IN THE MATTER OF AN ARBITRATION

BETWEEN: GREATER TORONTO AIRPORTS AUTHORITY

AND: PUBLIC SERVICE ALLIANCE CANADA LOCAL 0004

AND IN THE MATTER OF THE GRIEVANCE
NO. GV-008-04

SOLE ARBITRATOR O.B. SHIME, Q.C.

APPEARANCES:

MS. PAULA RUSAK	COUNSEL FOR THE EMPLOYER AND OTHERS
MR. DAN FISHER	COUNSEL FOR THE UNION AND OTHERS

Hearings were held in this matter at Toronto
On

August 3, 2004, February 8, 2006,
March 9, March 17, March 31, August 25, August 31, 2006,
September 20, 2006, April 2, May 17, May 27, June 26, August 24, 2007
June 8 and June 10, 2009

INDEX

THE BASIC FACTS	PAGE 6
EMPLOYER'S EVIDENCE .	PAGE 11
UNION'S EVIDENCE	PAGE 23
EMPLOYER'S REPLY EVIDENCE	PAGE 67
ANALYSIS	PAGE 70
CONCLUSIONS	PAGE 101
SUMMARY	PAGE 110
REMEDY – GENERAL	PAGE 111
REMEDIES – SPECIFIC	PAGE 119

AWARD

In this matter, the Grievor, [C.B.], claims that she was unjustly suspended and wrongfully dismissed and also makes various claims against the GTAA. The GTAA terminated the Grievor for being dishonest in reporting her absences, and for continuing her dishonesty by not being truthful when she was questioned about her absences, resulting in a loss of trust. The termination and the grievance letter are fully set out below.

The termination letter is as follows:

"Greater Toronto Airports Authority

GTAA

Strictly Private & Confidential

Ms. [C.B.]
60 Pavin Crescent
Bolton, Ontario
L7E 1X1

March 24, 2004

Dear Ms. [C.B.]:

On March 19, 2004, I met with you to discuss Management's concern about your absence from work for the period February 19 to March 16, 2004. The purpose of this meeting was to determine what exactly prevented you from returning to work earlier than March 17, 2004. Also present at this meeting was your union representative, Sue Newman, along with your Manager, Mike Hewlett and Human Resources Representatives Maria Maack and Brock Colter.

During this meeting you were asked a series of questions related to your absence. After you were given the opportunity to describe what you could do and not do following your surgery and convalescence, you were advised that Management had information inconsistent with that

description. Specifically, you were advised that you had been observed walking without difficulty and driving long distances.

When presented with this information, you could not satisfactorily answer our questions with respect to your activities and the inconsistencies between what you said you were capable of doing and the information we had.

At the conclusion of the meeting, you were advised that you would be relieved of your duties immediately and until such time as the GTAA could make a determination as to the appropriate level of discipline to be imposed.

A letter from Mr. D. V. Lotito, dated October 27, 1999, on the Code of Conduct, which you received attached to your pay stub dated the same date, clearly indicates that dishonesty will not be tolerated by the GTAA in any aspect of an employee's day at work. It continues to give examples of dishonesty, such as "falsifying attendance and leave reporting" and "making misleading and/or false statements". The letter also warns that any breach of this Code of Conduct could result in immediate termination as a first offence.

In reviewing all the facts that we have before us, we are of the opinion that you were dishonest in reporting your absences for part of the aforementioned period and that you continued this dishonesty by not being truthful when we questioned you on March 19th. This dishonesty has resulted in a loss of trust, which makes it impossible for the GTAA to continue any employment relationship with you. Consequently, the GTAA has no other alternative but to terminate your employment, effective immediately.

Your life insurance may, at your option, be converted from Group to Individual, within thirty-one (31) days after the date of severance. For further details, please contact Ms. Anna Silva, Benefits, Compensation and Pension Co-Ordinator, at (416) 776-3467.

Also, be advised that should you grieve your termination, the GTAA will not proceed with the processing of your pension entitlements, until the matter relating to the termination grievance is completed – unless you advise otherwise.

If you wish to proceed with the processing of your pension entitlements, please provide this request, in writing, to the undersigned, no later than the end of the business day April 5, 2004. Should we not receive any notification by this date, the GTAA will take no action regarding your pension at this time.

Effective immediately, you will not be allowed on GTAA property, without the permission of an Excluded Manager, unless you and/or family members are using GTAA facilities for the purpose of travel. Similarly, you are not to come to the Administration Building to deal with any administrative details related to your termination, unless you have the permission of an Excluded Manager. These restrictions are in accordance with the provisions of the Trespass to Property Act, and must be strictly adhered to. Be governed accordingly.

Please be advised that all company property and privileges that are still in your possession must be turned over, including all types of passes, keys and tolls, equipment and the Employee Handbook. Once this property is returned to the attention of the undersigned, a cheque will be sent to you covering your vacation leave, compensatory leave and lieu time leave balances, minus statutory deductions.

Yours very truly,

"Bryan Gordon"
General Manager
Airfield Maintenance

Copy: HR File
Union
Function"

The grievance is as follows:

I grieve suspension without pay pending investigation from March 19, 2004.

I further grieve that management was dishonest and [misled] me to believe that the purpose of the meeting was to discuss modified duties for my return to work.

I further grieve that the investigation meeting was held as an attempt at intimidation and further was an interrogation session not a meeting. Further that some of the questions ask[ed] at this interrogation session should have been asked of my Surgeon or through W.S.I.B and not me.

I further grieve that the employer failed to provide written notice of suspension.

I further grieve that the employer used intimidation tactics and harassment in calling me back to work without consultation with my Surgeon or W.S.I.B. while on certified medical leave (W.S.I.B.) for recovery following surgery for two work place injuries was solely intended for the purpose of suspension and termination of employment.

I further grieve the contents of the letter dated March 15th, 2004, that fails to acknowledge that the employer forced me to return to work earlier than the medical certificate indicated as per a telephone conversation from the week of March 8th. It fails to recognize that on March 15th I was sent home not because I was "never asked by the GTAA to come into work today" but rather because I returned to work with a letter from my Physiotherapist and not by my Surgeon. Further it is inaccurate in stating that I "would attend an appointment with your doctor early this week (week of March 15th and ..." and it fails to recognize that I requested the fax number for the Senior Manager, Airfield Services to have my doctor fax a new return date of in order to comply with the employer's request for a return of one week earlier.

I further grieve wrongful termination of employment as per the letter dated March 24th, 2004 and further grieve the inaccuracies and false accusations contained in this letter.

I further grieve that through this unfair dismissal action I have been denied career advancement opportunities including the opportunity to apply for positions posted as available only to GTAA employees.

I further grieve that the employer harassed me by having me stalked while on certified medical leave through W.S.I.B. and further that the employer knew or reasonably ought to have known would have caused considerable anguish, illness, pain, suffering and severe trauma.

I further grieve that the wrongful termination ignores the March 16th statements from my surgeon that clearly states as of March 16th I still had swelling and was recuperating and his advice to the employer that it takes 6 weeks to physiologically heal. They further ignored his recommendation that they call him if they have questions.

I further grieve that the employer failed to recognize that I have been a loyal trustworthy dedicated hardworking employee for 23 years without incident of any kind.

I further grieve the severe trauma and negative health impact to me that the employer knew or reasonably ought to have known would occur.

I further grieve the discriminatory practices due to both my disability and my personal relationship.

Identify Relevant Collective Agreement Article:

3, 9, 18, 23, All other relevant articles of my collective agreement, CHRA, Canadian Charter of Rights and Freedom, Privacy Act.

Redress Sought

That I be reinstated effective immediately to a position at the equivalent level in a safe work environment free from all harassment with full back pay and benefits to the date of suspension.

That I suffer no negative financial impact from this.

That I be given a sincere letter of apology for wrongful dismissal and false accusations made against me.

That all letters and information related to this, including but not limited to, all hand written notes, all documents obtained through stalking me, be removed from all GTAA files including the stalker's files and be handed over to my Local Union Representative.

That all stalking activities cease immediately and I be given written assurances that there will be no further stalking.

That all harassment cease immediately.

That the employer recognizes that my work place injuries were valid and recuperative time was valid as stated by my Surgeon.

That the employer pay for all counseling required by me to recover from this traumatic experience including the stalking.

That I be awarded up to the maximum amount allowed under the Canadian Human Rights Act for Pain and Suffering.

That I receive compensation for the slander, defamation of character and negative health impact in the sum of $300,000.00.

That punitive damages be awarded and the funds directed to Family Transition Place, Orangeville, Ontario.

That a contribution in the amount of $100,000.00 be made to PSAC fund for counseling and [assistance] to employees who have suffered [undue] harassment and/or wrongful dismissal.

That there be no delay in return to work and that compensation be paid immediately including retroactive salary and benefits.

Any discussions with my Union related to this matter be limited to my Local Representative, Sue Newman, my UCTE Regional Vice President, and my PSAC Grievance and Adjudication Officer assigned to this case and that all information be treated as Confidential and Protected when completed.

That I be made whole."

The Basic Facts

The Grievor, a fleet co-ordinator, was forty-seven years old at the time of her termination and had been employed by the GTAA for approximately twenty-three years. On October 31, 2003, the Grievor was exiting a sub utility vehicle while at work and injured her knee. On November 4th and 5th she was off work and returned to her regular duties on November 6th, 2003. On November 3, 2003, the Grievor was referred by the GTAA to a medical clinic at Terminal 2 where she saw Dr. Nagpal who referred her for physiotherapy treatment for six months.

Prior to her accident on October 31, 2003, the Grievor co-ordinated the maintenance of a fleet of approximately 200 GTAA leased and owned vehicles that included delivery to and pick up from dealerships or body shops for repairs and maintenance. The work involved a considerable amount of walking. After her accident, the Grievor was told by the General Manager of Fleet, Bryan

Gordon, to assist the Manager of Fleet, Mike Hewlett, with administration and accounting duties while sitting at a desk.

The Grievor received conservative treatment, but on February 19, 2004, Dr. R. Gordon, an orthopedic surgeon to whom she had been referred by Dr. Nagpal, performed arthroscopic surgery on her knee. On February 24, 2004, Dr. Gordon provided the Grievor with a medical note which indicated the Grievor would be off work for four weeks as a result of the surgery. The Grievor attended the Bolton Physiotherapy Clinic where she was treated by Ms. G. Farkas, the clinic manager, who is a Registered Physiotherapist in Ontario, with considerable experience in orthopedic rehabilitation.

The Grievor lived with Terry Townshend, a fellow employee. The GTAA was unaware of their relationship. Mr. Townshend had been terminated by the GTAA and was reinstated to his employment by a board of arbitration. He was off work and on sick leave. Unknown to both Mr. Townshend and the Grievor, the GTAA had Mr. Townshend under surveillance. Mr. Townshend was also terminated on March 17, 2004.

The Grievor was observed on the Townshend surveillance attending the Bolton Physiotherapy Clinic on February 27, 2004, where she was driven by Mr. Townshend. Because she was seen on the Townshend video, the GTAA decided

to surveill the Grievor on March 9 and 10, 2004. On March 9th, 2004, the Grievor was observed attending the Bolton Physiotherapy Clinic. King-Reed and Associates reported that after leaving the clinic, the Grievor drove to a Wal-Mart store where she was observed from 9:15 a.m. to 9:28 a.m., browsing for merchandise and reaching out to remove merchandise from the shelving. She was also observed standing on her toes and according to King Reed and Associates she demonstrated "no discomfort with either leg" at that time.

The Grievor then drove to a Rexall Bolton Drug Store which she entered at 9:45 a.m., and exited at 10:04 a.m. empty-handed. She then drove to a Canadian Tire gas station where she was observed between 10:09 a.m. and 10:10 a.m. walking away from the cashier's kiosk. The Grievor then stopped at a community mailbox between 10:13 a.m. and 10:15 a.m., and then drove to her residence. The Grievor was again observed at 12:54 a.m. driving 27 kilometers to the airport where she picked up a male who "entered the front passenger seat" and she then returned to her home where the male passenger met and hugged a brunette female.and then both departed. The Grievor appears to have entered her home at that time and did not reappear that day although surveillance was maintained.

On March 10, 2004, the Grievor was again observed between 8:01 a.m. and 9:10 a.m., entering and exiting the Bolton Physiotherapy Clinic. Between 9:15 a.m. and 9:37 a.m., she was observed entering a Zehr's grocery store and

exiting with three full grocery bags. She appeared to walk with an even gait with no indication of discomfort in either leg. The Grievor then returned home at 9:43 a.m., and although surveillance was maintained until 5:40 p.m., there was no further observation of the Grievor on that day.

As a result of the surveillance, the Grievor was contacted with a request for information from her physician as to why she required four weeks of recuperation and whether she could return earlier with or without restrictions.

The Grievor was unable to contact her doctor immediately and accordingly requested a note from her physiotherapist. Ms. Farkas wrote a note which stated that the Grievor had been asked to return to work one week prior to the four weeks recommended by her surgeon and with the original date of return to be March 22, 2004, and that the Grievor had been making excellent progress following the surgery. Ms. Farkas also stated that the Grievor "would significantly benefit from one more week off from work". The GTAA, while it received that note, was not prepared to consider it for reasons which will be discussed later. The Grievor, then obtained a note from her surgeon, Dr. Gordon, permitting her to return to work with restrictions. She returned on March 17, 2009 with Dr. Gordon's note and worked on that day.

Further surveillance was conducted of the Grievor on March 17, 2004. She was observed at 3:30 p.m. leaving her workplace and limping slightly on her

right leg and then continuing to walk with "quite a severe limp on her right leg". She drove to a community mailbox where she was again observed to "limp quite heavily". She returned home. She then walked around the vehicle and entered the passenger seat. Mr. Townshend left the residence and got into the driver's seat and the vehicle departed with both of them. The investigators lost contact with the vehicle and were unable to locate it although they searched for it. They returned to the residence.

On March 17, 2004 when she returned to work, the Grievor was told there would be a meeting on March 19, 2004, which she attended with her Union representative. At the conclusion of the meeting, the Grievor was suspended.

Although further surveillance was conducted on Saturday, March 20 and Sunday, March 21 at the Grievor's residence, she was not seen. Mr. Townshend was observed on the Saturday leaving and returning with a bag and a box and on the Sunday leaving and returning with groceries. The investigators reported the results of their investigation and concluded the Grievor "appeared to be surveillance conscious". They also concluded that when she left the workplace on March 17, 2004 "she displayed a pronounced irregular gait".

The Grievor was terminated by letter on March 24, 2004, which was referred to earlier in this award. I now turn to consider the evidence in greater detail.

Employer's Evidence

Ms. Maria Maack, the Senior Manager of Employee Relations for Health and Safety, testified that the Grievor was absent from work from February 19th, to March 16th, 2004, and was paid for sick leave. The GTAA has a costly absentee problem and has implemented an attendance monitoring program which examines the absentees, monitors the employee's average absence, speak to employees about GTAA concerns and follows up to see if their absences have improved. Some employees have been caught defrauding the sick leave plan as a result of the use of surveillance, resulting in their discharge. The GTAA also has a code of conduct which places a premium on honesty.

The Grievor was off work following surgery. During the last week of February, 2004, the GTAA had put Terry Townshend, another employee, under surveillance and the Grievor was seen on those surveillance tapes with Terry Townshend while she was attending the Bolton Medical Centre for physiotherapy. Accordingly, the GTAA placed her under surveillance on March 9th and 10th 2004. Mr. Townshend was suspended on March 10th, 2004 and then terminated for sick leave fraud.

Ms. Maack became aware of the Grievor's relationship with Terry Townshend because of his surveillance. Mr. Townshend had been terminated and then re-instated with an arbitration award of approximately $100,000.00. Initially, there had been no reason to place the Grievor under surveillance because she had surgery on February 24,

2004, and was prescribed four weeks off work by Dr. Gordon. The Grievor was within the four week period when she was seen on the Townshend videotape.

The Grievor was asked to return to return to work with a doctor's note and returned to work on March 15th, 2004 with a note from her physiotherapist, Ms. G. Farkas indicating she was being asked by the GTAA to return to work one week earlier than the surgeon had recommended. The note also stated that the Grievor would benefit from one more week off work and requested that if there were any further questions or concerns that the GTAA not hesitate in contacting her. That note was refused and the Grievor was sent home, but returned to work on March 17th, 2004 with a note from Dr. Robert Gordon, her surgeon. That note provided as follows:

Robert G. Gordon, MD, FRCS(C) Orthopaedic Surgeon 101 Humber College Blvd. Toronto, Ontario, M9V 1R8	Robert G. Gordon, MD FRCS(C) Orthopaedic Surgeon 101 Humber College Blvd. Toronto, Ontario, M9V 1R8
Date: March 16 RX Addendum With respect to Mr. Hewlett's letter it takes 6 weeks to physiologically heal. If you have questions please call. R. Gordon 416-545-1166	Date March 16 RX Ms. [B.] may return to work modified duties tomorrow. She still has swelling and is recuperating. She may have a sedentary job for some weeks. No lifting, no driving, no walking greater than 10 minutes. In 2 wks may return no restrictions. Thank you.

Ms. Maack testified that it was out of fear that the Grievor saw her surgeon seeking a note to return to work.

Ms. Maack testified that the Grievor was seen on the surveillance tapes driving for long distances and also walking and standing with no apparent discomfort. She did not appear to be favouring either leg and also was seen at Wal-Mart on her tiptoes reaching for items on a shelf for periods of 10 to 30 seconds. Ms. Maack did not see the Grievor limping or hobbling on the tapes. The Grievor was also observed getting in and out of her car and also was seen at the medical clinic first thing in the morning and then going to Wal-Mart, Zehrs, a drugstore and a Canadian Tire gas station as well as driving to the airport. The Grievor did not appear to be in any apparent discomfort.

Ms. Maack testified the Grievor's work consists of working in an office at a desk and going out to look at motor vehicles. Ms. Maack was not really certain or aware of all of her duties. Ms. Maack further testified that the GTAA accommodates people and that she could have accommodated the restrictions indicated on Dr. Gordon's note of March 16, 2004. Ms. Maack claimed the Doctor's note was inconsistent with the recommended "sedentary" job because the Grievor was seen on the surveillance tapes walking for more than 10 minutes and driving.

As a result of seeing her on the videotape, Ms. Maack met with the Grievor and her Union representative on March 19th. No one from the Union had seen the surveillance tapes prior to the meeting. Ms. Maack stated that the Grievor's manager had

informed her that the Grievor had come into work limping and hobbling which was inconsistent with the video. The Grievor told Ms. Maack that right after surgery she was limping and required a cane, but as time went on, she was bending her knee better and was able to walk without the cane, but was still limping. Also, the Grievor indicated she was better than she had been the previous week. She had been limping the whole time she was off, even on a good day, but she was able to bend her knee a little bit better. However, on the tape she appeared to be walking normally. The Grievor claimed that she hadn't really gone anywhere and was in pain after walking for a few minutes.

Ms. Maack felt that the Grievor was dishonest and had presented herself worse than she had been observed on the March 9th and 10th, 2004 tapes. She had been seen on February 27th, not limping, and walking and standing more than 10 minutes. Ms. Maack advised her that she was seen walking and standing for more than 10 minutes, but the Grievor didn't have an explanation, and could not remember; she claimed she really hadn't gone anywhere because of her pain.

When the Grievor was advised that she was seen driving, she stated initially that she had to have someone drive her to physiotherapy, but she indicated that later her knee was getting better and she was able to drive longer distances – but really not that long a distance. The Grievor indicated that one and one-half weeks prior to March 19th she could drive with no restrictions. She was advised that she was seen driving to the airport. The Grievor stated that she was doing a friend a favour by picking up a person at the airport, who had no-one to pick him up. However, Ms. Maack claimed someone was

waiting for that person in the Grievor's driveway. The Grievor responded that person did not know how to get to the airport. The Grievor stated it was challenge to drive to the airport and that she had to ice her knee when she got back, which Ms. Maack claimed was inconsistent because the Grievor also had advised her that one and one-half weeks previously she could drive without restrictions. Also, the Grievor volunteered that she had driven to see her daughter in Orangeville because of an emergency.

Ms. Maack concluded the Grievor was dishonest because she had driven to the airport notwithstanding that she indicated she could not drive for long distances and that there was a doctor's note that said she could not drive. The doctor's note had more restrictions than the Grievor appeared to have. The Grievor stated she was not able to return to work prior to March 17th, and had she returned she would have been running around and would have been unable to sit still. However, Ms. Maack claimed the video showed her walking, standing and driving and concluded she could have come back to work. The Grievor stated that she was bending her leg better, but she was still limping and that she had improved from the previous week when she was off. Notwithstanding that she was not limping on the video, the manager reported that when she came to work on March 17th she had a noticeable limp.

The Grievor stated that she was not aware there was modified work which surprised Ms. Maack because she was of the view that the Grievor had been on modified work in 2001. The Grievor was given an opportunity to "come clean"; Mr. Bryan Gordon, the General Manager of Facilities Maintenance, asked her to tell the truth. The

Grievor responded that she did not know what else to say. Ms. Maack claimed that if the Grievor had acknowledged wrongdoing and showed remorse or apologized she would have given her another chance, but the Grievor did not apologize. Although she said she was sorry, she did not ask for modified work. Ms. Maack and others made a unanimous decision that the Grievor was involved in sick leave fraud and continued dishonesty by lying during the investigation. The Grievor was suspended pending a final decision and put under further surveillance because her manager said she was limping although he had not seen her limping on the tapes. Ms. Maack wanted to see for herself if there was any difference between the way that the Grievor was currently walking and the prior videotape. On the surveillance that was conducted on March 17th, 2004, the Grievor was seen noticeably limping and according to Ms. Maack presented as being worse than she really was. Ms. Maack saw that video prior to the Grievor's termination. When further surveillance was conducted on March 20 and 21, 2004, the Grievor did not come out of her home.

When cross-examined, Ms. Maack testified that she made no inquiry about the Grievor's attending physiotherapy. She confirmed that based on what the GTAA had observed on the video and what the GTAA was told during the investigative meeting that the Grievor was defrauding the GTAA. Ms. Maack stated that even if she had been aware of the Grievor's aggressive physiotherapy, she would not have changed the termination decision because of what she saw on the video and what the Grievor had said in the meeting. Accordingly, the Grievor was terminated for sick leave fraud and continuing to lie during the investigation. She had been seen standing, driving and

walking for more than 10 minutes, but had indicated that she couldn't stand for more than 10 minutes and could not drive. Ms. Maack was of the view that the Grievor's responses at the meeting were inconsistent with what she had observed on the video.

Ms. Maack testified that the Grievor had 23 years of seniority with no discipline but she not speak to Mr. Hewlett, the Grievor's manager, about her work. Before the decision to terminate, the GTAA looked at the Grievor's years of service, her discipline record and any extenuating circumstances. The GTAA has made clear that it has a code of conduct and even when there is a first offence an employee may be terminated. Ms. Maack acknowledged the Grievor was a satisfactory employee.

Ms. Maack claimed the Grievor was not asked to return to work one week earlier, but was asked if she could return to work on modified duties and the Grievor said she would check with her doctor. The GTAA required something from the doctor indicating the Grievor could perform light duties. Also, Eric Tolton, a member of management, and another manager had had similar surgery and been off work for only a few days. Mr. Tolton was surprised to see the Grievor in the video walking normally.

Ms. Maack testified that Dr. R. Nagpal, who examined the Grievor at the time of her original injury in October, 2003, had been the GTAA's doctor and was still at the airport. Also, there was no need to send for an independent medical evaluation because the Grievor had been seen on video and was doing things she could have been doing at work. The GTAA did not expect the Grievor to be home all the time, but wanted to know

what had prevented her from coming to work; being on physiotherapy does not prevent employees from coming to work.

When cross-examined, as to why she did not call the Grievor's doctor, Ms. Maack stated that the GTAA sees those notes all the time and that doctor's write what the employees want. The doctor's note, dated March 16, 2004, said no driving, yet the Grievor stated she could drive with no restrictions. The note also said she should not walk for greater than 10 minutes and again the Grievor was seen walking for longer than 10 minutes. Also, according to Ms. Maack, the doctor's note says that in two weeks there will be no restrictions but "how would the doctor know – it is a suspect note". Ms. Maack also testified that the note was very specific and the doctor would repeat the same thing and "what's the point of talking to the doctor".

Ms. Maack acknowledged she was told by the Grievor that she was attending physiotherapy five days each week and she had also observed the Grievor on the video attending the Bolton Physiotherapy Clinic. Ms. Maack was of the view that the Grievor's activity on the video was inconsistent with the doctor's note and what she had said in the investigative meeting. The Grievor could have stated she was in the healing process and what she had done was consistent with both her physiotherapist's and surgeon's advice. The doctor's note did not change anything and the GTAA did not call him.

Prior to the March 19, 2004 meeting, the GTAA had not made up its mind as to what it might do and had prepared a series of questions as a guide to the interview. Ms.

Maack was aware that the Grievor was off for four weeks to recuperate and the GTAA wanted to know what work the Grievor could do and what work she could not do. It was not the practice of the GTAA to produce the investigative report or the video to employees who are being investigated. It was expected that the Grievor would advise the GTAA what she was able to do if she came back to work.

When the Grievor was observed on the video snippet of February 24, 2004, Ms. Maack was of the opinion that she was performing activities that she could do at work and testified that her responses at the meeting were inconsistent with the video. The GTAA was of the opinion that the Grievor committed sick leave fraud and lied during the investigative meetings. She re-iterated that she did not call the doctor because she felt the Grievor told the doctor what to write. Ms. Maack stated the Grievor had a desk job, but that Mr. Gordon, her manager, would be the best person to speak to about her work.

At the meeting, the Grievor indicated she might have been able to come back but she would be running around if she did. Ms. Maack claimed that the Grievor was doing the same activities she would be able to do at work, that is, walking, driving and running around anyway. Ms. Maack claimed that the Grievor lied by indicating she was progressing week by week, but in fact was better a week and a half prior to the meeting. While she came back on March 17, 2004 with a limp, she had not limped on the earlier video.

The Grievor had said that she could not drive, but then had driven a long distance to the airport and then came to work with a medical certificate saying that she could not

drive. The Grievor had also stated that while she was driving, she really hadn't gone anywhere, but when told that she was seen driving to the airport, she maintained she had to do it because a friend was coming to the airport with no one to meet him. Ms. Maack claimed that was untruthful because when the Grievor returned to her home there was another person waiting for the man who had been picked up at the airport. At that point, Ms. Maack stated the Grievor changed her story and said the person who was waiting did not know her way to the airport. However, Ms. Maack claimed the Grievor could have given that person directions.

The Grievor also said she was not aware that the GTAA accommodated people, but the Grievor had been accommodated in 2001. When asked to state how the Grievor had lied, Ms. Maack testified that the Grievor further stated that she was progressing with her walking and had used a cane, but there was no cane on the video and also the doctor's note indicated that there was to be no walking for more than 10 minutes. On the video, according to Ms. Maack, the Grievor did quite a bit of walking. Also the Grievor said that she could not do much and really did not go anywhere; Ms. Maack was not advised that the things the Grievor did were activities that she was told that she could do. Based on the videotapes, Ms. Maack was of the opinion that the Grievor was active and had done a lot.

On March 19th, 2004 Ms. Maack was told by the Grievor's manager that the Grievor was limping. However, she did not recall asking why she was limping in some instances and not limping in others. The Grievor told Ms. Maack that while she had

improved she still had a limp. Ms. Maack again stated the doctors rely on what patients tell them. The Grievor could drive and she had a note from her doctor that she could not drive. When informed that there is a difference between driving at work and driving while at home, Ms. Maack responded that the driving at work could be done by other employees.

Mr. Eric Tolton, Director of Facilities for GTAA, testified that there was a sick leave abuse problem at the GTAA which the GTAA was trying to reduce. Employees are put under surveillance if there is a reason to believe that there is an abuse of sick leave, such as persons who call in sick and then go golfing or have bad track records of sick leave abuse. When he saw the February 27th, 2004 Townshend video, the Grievor appeared to be walking normally and he felt that the GTAA could not turn a blind eye to what they saw and requested surveillance for her.

Mr. Tolton also saw the surveillance tapes of the Grievor for March the 9th and 10th and felt she was walking very well. She did not appear to be showing any ill effects from her surgery and did not appear to be in pain, and he concluded she was able to walk and drive and could have come to work. Mr. Tolton had had arthroscopic surgery and had discussed his surgery with the Grievor prior to her surgery. He told her each person is different, but he had had surgery on a Friday and was back to work on the Monday and had walked most of that day when he returned. He also told her another manager had had the same surgery a year previously and had been off work for one week only.

Mr. Tolton agreed with the termination because he felt there had been fraud and sick leave abuse. He was also of the view that during the investigative meeting, the Grievor continued to lie. He testified that employees are held to a high level of integrity and honesty and the Grievor had been in breach of it.

When cross-examined, Mr. Tolton testified the Grievor was a well liked and well respected employee. He had received a physiotherapist's note from the Grievor but requested a note from her doctor. She subsequently returned with a note from Dr. Gordon. Mr. Tolton was aware the Grievor would be absent for four weeks for surgery. When he saw the Grievor on the surveillance tapes with Mr. Townshend, he was surprised because he had not known the Grievor was living with Mr. Townshend.

Mr. Tolton was aware that there were provisions for an independent medical examination under the collective agreement but felt it could take weeks to arrange and by then it would be useless. He testified that his experience with doctors is that they frequently give out certificates respecting absences from work. Dr. Gordon's note said no driving, but the GTAA was aware she had done significant driving and chose not to call the doctor.

Union's Evidence

Gizella Farkas is a physiotherapist and case manager at the Bolton Physiotherapy Clinic and is responsible for assessing patients and determining their goals and the results of their treatment with due regard for their diagnosis. She has a combined B.S./M.S. in physiotherapy. She treated the Grievor, who had arthroscopic surgery, at the Bolton Physiotherapy Clinic. Ms. Farkas initially assessed the Grievor on February 20, 2004, and found that she had constant knee pain, edema or swelling at the knee and lower left leg. Her pain increased slightly with walking. The Grievor had the meniscus in her knee repaired. The meniscus acts as a shock absorber during walking or running or increased physical activity. A meniscus tear causes pain, swelling, difficulty with weight bearing, an altered gait and weakness. Miss Farkas had treated people previously who had had their meniscus repaired and she maintained that the recovery period on average was from six to eight weeks. She stated that it took a minimum of six weeks for the healing to occur.

The Grievor's range of movement was limited and she was physically limited in her ability to move her knee which was consistent with her surgery. Ms. Farkas was unable to complete the required special tests on the knee as the Grievor was unable to assume the required positions for testing. The Grievor's knee was bandaged and she had sutures and her movement was limited. The planned treatment was for the Grievor to exercise and to attend physiotherapy on a daily basis. Ms. Farkas anticipated that the Grievor would not be able to return to work for four weeks. In her experience, that is a

reasonable period to allow the area to heal and, to improve movement and strength to enable a person to return to normal activity. The Grievor saw Ms. Farkas and had physiotherapy with her and others on February 23, 24, 25, 26, 27 and March 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 18.

On February 23rd, she noted that the Grievor's incision was red and swollen, which may have indicated an infection which would influence the recovery; that was a setback because the more swelling that occurred, the less movement the Grievor would have. Ms. Farkas continued to see the Grievor. On February 27th, the Grievor reported that she had had no pain for three days. When asked Ms. Farkas said the consequences of stopping physiotherapy after reporting no pain would be limited movement, continued weakness and problems with walking. She stated that the Grievor was extremely diligent, receptive to treatment, and pushed through the exercises. Her attendance was excellent.

From March 1st to March 11th, the Grievor continued with her exercise program and by March 10th, her balance showed some improvement, but the healing process was not complete. Ms. Farkas stated it would take six to eight weeks for proper muscle strength and range of motion to return to normal or to become functional.

On March 12th, 2004, Ms. Farkas was informed that the Grievor had been told to return to work one week prior to her intended date and that a physician's note would be required. Ms. Farkas felt that the Grievor should be off work for one more week and

return to work on March 22nd, 2004, since that date was the fourth week following surgery. She stated that the Grievor was not able to return to work on March 12th. She was lacking full movement and full strength and she had not completed a full healing period. Ms. Farkas provided a letter for the Grievor requesting the Grievor complete the four week period. Ms. Farkas' letter is as follows:

> "March 12, 2004
>
> To Whom It May Concern:
>
> Ms. [B.] has recently brought to my attention that she has been asked to return to work 1 week prior to the 4 week recommendation by her surgeon. **At this time I feel that Ms. [B.] would significantly benefit from one more week off work.**
>
> Ms. [B] has shown excellent progress to date following her surgery. Upon return to work, I would like to recommend a graduated return to work schedule if possible. Please do not hesitate in contacting me with any further questions or concerns.
>
> Sincerely,
>
> "G. Farkas"
>
> Gizella Farkas RPT"
>
> *(emphasis added)*

Ms. Farkas was never contacted by the Employer. She stated that it is her experience that people do not generally go back to work earlier.

As of March 15th, the Grievor was feeling better but her leg was still aching. The Grievor had attempted to return to work, but after two hours was sent home for not having an appropriate note.

On April 2nd, 2004, Ms. Farkas wrote the following letter as questions had been raised about the Grievor's right knee injury. Ms. Farkas stands by the contents of her letter which is as follows:

> "April 2, 2004
>
> Ms. [B.] has recently brought to my attention that there has been disputes with regards to her claim of a right knee injury. I am forwarding a letter in order to clarify any misconceptions and to outline the healing and rehabilitative process.
>
> Initially, Ms. [B] presented with a right knee injury incurred at work on October 31, 2003. The mechanism of injury was a lateral stress movement with a popping sensation. The initial assessment revealed a right knee sprain. Ms. [B.] continued to work and did not seek physiotherapy treatment until December of 2003. Her treatment continued until February 2004, when surgery was recommended.
>
> Ms. [B] returned to Bolton Physiotherapy Clinic on February 20, 2004, one day post surgery. At that time her range of motion and strength were considerably limited. The sutures were still in place. There was marked edema at the knee and ankle (a common side effect following surgery). At that point, Ms. [B.] returned to the surgeon approximately 10 days post surgery at which point it was recommended that she remain off work for approximately 4 more weeks.
>
> Ms. [B] underwent an arthroscopic procedure in order to repair or remove any damaged structures. Upon observation, the surgeon removed portions of the meniscus that were damaged. The meniscus is a fibro cartilage structure in the joint allowing for shock absorption and proper joint movement. When damaged, the meniscus may impede movement and cause significant amounts of pain. Following the surgery, Ms. [B]

> reported significant improvements in pain levels. However, following surgery, activity is encouraged in order to allow for weight bearing and healing.
>
> Physiologically, the healing process following any injury is approximately 8 weeks. Following surgical intervention this time frame may be prolonged. Rehabilitation following arthroscopic surgery is prescribed for controlling inflammation, restoring range of motion, improving strength, and restoring proper gait pattern. Degenerative changes may slow the rehabilitation process and limit the level of activity. **Although a patient has been referred to treatment and recommended to stay off work, this does not in turn limit them from continuing with functional activities at home or in the community.**
>
> At this time, Ms. [B] has fallen within the time lines of the healing process and has done exceptionally well with her rehabilitation program. At this time I feel that the 6 week rehabilitation program was reasonable and that Ms. [B] is currently prepared to return to work. She was extremely diligent with her treatment program, was receptive to progressions of the exercises and was consistent with her attendance."
>
> *(emphasis added)*

On February 20, 2004, Ms. Farkas had provided a physiotherapy report to the Workplace Safety and Insurance Board which outlined the proposed treatment program for the Grievor and provided the following instructions: "No prolonged sitting or standing, no long distance walking, no ladder climbing, no squatting or crouching, no lifting or carrying and that complete recovery would be expected in 12 weeks." She testified that the body has the potential to return to normal activity in six to eight weeks, but she allowed for 12 weeks on the form in case there were complications.

Ms. Farkas testified that if the Grievor had returned to work before the recommended four weeks, it could have increased the inflammation process and slowed the recovery time if she was not at the full range of movement and strength.

Ms Farkas was asked to comment on the videotapes. With respect to the February 27th, 2004 tape, she stated it was difficult to assess her gait because of the position of her head, and the Grievor was walking behind another person. On March 9th, 2004 there appeared to be a slight deviation in her pattern of walking with a decreased step length and a slight limp. While at Wal-Mart, that there was a decreased heel strike and a pattern of moving her body so as to bring her leg forward which in turn presented a slight limp. Also, her weight appeared to be evenly balanced and she was walking at a casual pace. The shopping cart provided relief because the Grievor leaned against the cart in order to minimize weight bearing in the heel strike phase. The Grievor also avoided twisting her knee in order to change her direction and stayed in a linear pattern by backing up the cart and taking small steps in order to turn. She did not pivot with her foot, and took more time to complete the movement which is less stressful on the joints.

Ms. Farkas testified that when the Grievor stood on her tiptoes, it was evenly weight bearing on both legs and that the Grievor was utilizing her calf muscles and did not appear to stress the knee joint because her knees were in a straight or neutral position. Being on tiptoes does not hinder the movement of the knee joint and going up on her toes was consistent with her injury. The Grievor also exhibited a slight limp when she came closer to the screen. When she walked to the car she was still limping and there was a decreased heel strike. Ms. Farkas stated that limping can occur on either side – on the affected side due to pain and on the unaffected side which assumes more work and may become unbalanced or painful because of the necessary work it needs to do to

compensate for the affected leg. She stated that when the Grievor got into her car it was normal, but when entering the pharmacy her gait was slower and her limp was more prevalent; it was not the movement of an average person.

Ms. Farkas also stated that driving the car was determined by the physician. After the Grievor returned from driving to the airport her step length was decreased along with her heel strike. When she got out of the car there was a more evident limp on the right side as she walked away from the car.

On March 10th, the Grievor's gait at the beginning was more guarded, but became smoother as she progressed through the distance. Also, when the Grievor was carrying parcels out of the store, she was using her hip to lift and did not use her knee muscles which can occur when a person is carrying increased weight and occurred when she was carrying the increased weight of the grocery bags.

Ms. Farkas testified that the March 17th, tape showed the Grievor with an apparent limp on her right side and there was a deviation of her right foot when compared to her left. The Grievor had difficulty pushing the gate. She stated that on March 17th, the Grievor's limp was significant, her step pattern and step limp were consistent with the limp and there were no fluctuations with her limp as she was walking.

Ms. Farkas testified that the totality of the tapes was consistent with the Grievor's injury. She stated that there are many factors that can affect pain including inflammation,

gait patterns, swelling and overall physical ability. These may fluctuate from day to day and a person may appear to walk all right on one day, but not on another. Ms. Farkas anticipated that after four weeks there would be a graduated return to work, but before four weeks the Grievor could not return to work due to her decreased range of movement, weakness, pain, swelling and instability. She also stated that being in the workplace differs from being at home because a patient at home tries to pace herself and to complete activities as tolerated. Also, when at home, a person may take frequent breaks or stretch breaks whereas the workplace is repetitive and it is difficult to complete tasks at your own pace or not to complete them at all if they cannot be tolerated.

She acknowledged during cross-examination that activity helps to restore the range of movement and improves strength. She stated that the Grievor was improving and was diligent. The exercises were according to tolerance; if a person had a bad day, Ms. Farkas would limit the exercises and repetitions.

Ms. Farkas admitted that she was never told that the Grievor's employee would not accommodate her. When asked if the Grievor had been told she could go to work, could she have worked within certain restrictions, Ms. Farkas stated that based on her assessment, the Grievor could not have returned before four weeks. She stated that at four weeks the Grievor could do graduated work. While looking at the video, Ms. Farkas provided a gait analysis that described what she saw. She also admitted that if an employer is prepared to accommodate the patient, a patient may be able to work within the restrictions, provided that the patient continues to attend physiotherapy. Ms. Farkas

testified that when the patient is closer to the time of his/her return to work, she would attempt to assess the return to work activity according to the patient's job. She did not ask the Grievor about modified work. The return to work date is usually provided by the surgeon. Ms. Farkas confirmed that the Grievor could not have returned to modified work before the end of the four week period after her surgery. According to the Grievor's physical condition, she would not have been able to perform work, even within her physical restrictions. She could not change her position, walk long distances or walk for long periods. If her leg was down, it would be more prone to swelling because of the gravity pull that would also increase the inflammation and swelling and frequent position changing would increase stress to the knee as a result of getting up and sitting down. If the Grievor was at home, she would have the ability to lie down and elevate her leg. One week after surgery, the Grievor could not do any prolonged sitting or standing or any frequent position changes; she could not crouch or squat. She admitted that if the Grievor complied with restrictions and went to physiotherapy, she might have been able to return to work. Ms. Farkas was not aware of the Grievor's job duties.

When re-examined, Ms. Farkas stated that if the Grievor had returned to work, she would have obtained a job description and tried to simulate the job by putting the patient through these duties for a prolonged period of time while in a supportive setting. This testing usually takes place one week before returning to work. Patients are assessed on an on-going basis.

Dr. Robert Gordon, M.D., FRCS(C) is a medical doctor and orthopedic surgeon who is a specialist in knees and shoulders. He practices at the William Osler Hospital. Dr. Gordon is also a consultant in sports medicine to various professional teams. He saw the Grievor on January 20th, 2004 and found that there was swelling in her knee, that she had pain and difficulty in squatting and her knee would give way. He performed surgery on the Grievor on February 19, 2004, gave her a prescription for pain and advised her to take physiotherapy including going to a physiotherapist more or less every day. Dr. Gordon anticipated that the length of recovery for the Grievor would be between four and six weeks. He indicated that some people get better faster and some later. When he saw the Grievor five days later, he examined her and reviewed a report of her operation and after assessing her wrote a note stating that she should be off for four weeks. He was of the opinion that four weeks was a reasonable time for her to recover and to return to work and that physiotherapy was critical to her recovery.

Dr. Gordon assesses each patient individually and prescribes according to their specific needs. Each case is different and he prescribes what is reasonable for each patient. It takes from four to six weeks to recover on average and a person may or may not be able to go back to work. He testified that a person who gets in and out of cars and walks for longer than 10 minutes could not go back to work. As of April 21, 2004, after her termination, Dr. Gordon reported to the WSIB that the Grievor still had pain under her right kneecap and would benefit from more physiotherapy and strengthening for another couple of weeks.

Dr. Gordon observed the videotape of the Grievor and stated that on March 9th, 2004, she exhibited a limp on her right side and when walking she was attempting to protect her right leg. He maintained she was limping while pushing the cart at Wal-Mart and was side stepping in order to prevent pivoting on her knee. He confirmed that the Grievor getting up on her toes would not affect the kneecap or cartilage, but that walking upstairs or squatting would bother her. He stated when she left Wal-Mart she limped on her right side in order to protect her knee. He also claimed that her quick step meant she did not want to put weight on her knee.

On March 10th, the Grievor was limping and according to Dr. Gordon, she exhibited some difficulty in walking and carrying a bag on the correct side protected her. On March 17th, she was limping and walking gingerly and the limping appeared to be worse than it had a week earlier. Also, she had greater difficulty getting in and out of the car and appeared in more pain.

When cross-examined, he stated that the Grievor advised him about her work and told him she drove vehicles. He also stated there are many reasons why a patient would not go back to work; it depends on how they get to work, on the number of times the patient is required to get up and down and also on an objective assessment of a patient's swelling and pain. He further stated that if patients could not control their environment he would suggest that they stay at home. He was of the view that every patient is involved in different situations, but felt the Grievor could not control her environment

and it would be better for her to stay home and recover. He was of the opinion that the Grievor had a high level of pain and could not go to work.

When he examined her on March the 16th, he found that her knee was still swollen and she continued to have pain. He confirmed that everyone is different, but he also relies on what the patient tells him. He testified if patients asked about modified duties, he would discuss it with them, but still might advise them to stay at home. Dr. Gordon felt it was better for a patient to be at home as opposed to being at work and in 10 years he has never had anyone say that they could do modified work, " but was of the opinion that after surgery it was better to be in a home environment than a work environment". He stated the Grievor's knee was swollen on that day and he did not want her to walk for more than 10 minutes.

When re-examined, Dr. Gordon agreed that every person is different, and different considerations apply including the age and condition of the patient, the type of surgery, the health of the patient, the nature of the operation and how the patient is recovering, as well as the patient's job demands and whether there are any post-operative considerations.. He weighs those considerations for each patient.

Dr. Robert Ferrie, M.D., FRCSC., is a trained surgeon and former Chief of the Department of Urological Surgery at Joseph Brant Memorial Hospital. He received additional training as a psychotherapist and currently practices full time as a psychotherapist. He is a member of the G. P. Psychotherapy Association of Canada, the

Ontario Medical Association Section of G. P. Psychotherapy, the International Society for Traumatic Stress Studies (ISTTSS), the Canadian Society for the study of trauma and dissociation. He is also certified by the EMDR (International Association of Trauma Focused Psychotherapy) and is a member of the EMDR Canada (EMDRC). He is one of three certified E.M.D.R.s in Canada. His practice is mostly trauma focused and currently consists of dealing with and assisting people who have psychological problems.

The Grievor was referred to Dr. Ferrie in January, 2005. She informed him she had been recently fired and had been stalked by her employer which brought back memories of being stalked by her ex-husband. She claimed that she had recovered from her past trauma and then had knee surgery. When she was called to a meeting with her employer and interrogated, she felt betrayed after 23 years of being a faithful employee. Dr. Ferrie took her history and did a mental status examination. He observed that she reported disturbing memories of the actual incident of firing and being in a room while being interrogated.

Dr. Ferrie concluded that the Grievor was suffering from post-traumatic stress disorder (P.T.S.D.) as set out in the D.S.M. 4, a diagnostic tool which assists in making medical diagnoses. P.T.S.D. may arise where a person feels threatened and alters his/her behaviour. The Grievor appeared to be neat, tense, agitated and not good at eye contact. Her cognitive functions were normal. She had superior intelligence and was pre-occupied with upcoming hearings. Dr. Ferrie first addressed the previous abuse and stalking by her ex-husband and she responded fairly quickly to that treatment. Dr. Ferrie

also felt that the Grievor suffered from being followed at her workplace, but what bothered her the most was the betrayal of 23 years of being a loyal employee and she questioned why the GTAA had done this to her. Previously, people at the GTAA had helped her in dealing with her husband by throwing him off the property and she felt betrayed by the people that had previously assisted her.

Dr. Ferrie testified that the Grievor had a betrayal trauma. In Dr. Ferrie's opinion the way in which the Grievor had been treated by GTAA was to her a tremendous betrayal which brought about all the symptoms of her past and it was damaging to her. She displayed signs of P.T.S.D. which had been brought to the forefront by what had occurred with GTAA. She displayed symptoms of avoidance by staying at home and being afraid to go out. She stayed in her basement, had flashbacks of being interrogated, and also had a great deal of fear. Dr. Ferrie treated the Grievor for being terminated and particularly the manner in which she was terminated.

Dr. Ferrie was of the view that the Grievor had handled the trauma from her previous relationship. He prescribed her Prazosin. He stated that tests showed she had a specific trauma as a result of being fired. Her P.T.S.D. symptoms were all related to being fired as demonstrated by various objective tests he performed. She was unable to get the scenario of being interrogated by members of management out of her head and she discussed the details of her termination, such as her badge being taken away from her. She was concerned that after being a loyal employee for 23 years, how far they had gone in betraying her. She had trusted the GTAA and felt that she had been unjustly

dealt with. The trauma she suffered from being betrayed resulted in a cascade of symptoms specifically related to the way in which she was fired.

She also had paranoia-like symptoms. She felt that she was under surveillance and because she felt that she was unfairly treated it triggered her memory of being stalked. Most significantly from the Grievor's point of view, she had knee surgery and had done everything her doctor told her to do and went back to work as quickly as she could and for all of this she was being fired. Having been traumatized as a result of being stalked by her husband and then being stalked, according to her, by the GTAA, it was causing her a great deal of psychological pain, distress and terror. Dr. Ferrie continued to deal with the events surrounding her termination.

In March of 2005, just past the anniversary of her termination, she had panic attacks and diarrhea about being fired. She continued to feel violated and betrayed. She felt that she was stupid to trust and to work so hard. Dr. Ferrie was of the opinion she continued to have P.T.S.D. that was fairly severe and it was triggered by the events of being fired. The Grievor continued to be angry and upset about the manner of interrogation and she did not sleep and experienced nausea. In Dr. Ferrie's opinion, her termination caused her a lot of stress and continued for a year or more. She continued to think about the termination and the events kept coming into her mind. As of March 3rd, 2007, the Grievor was still suffering and her symptoms had been triggered and exacerbated by the arbitration hearings.

Dr. Ferrie testified that her P.T.S.D. was linked to her termination and brought out what had been previously been quiescent. He stated that there was some improvement, but she still had symptoms. He was still concerned about her symptoms on April 26th, 2005. By May, 2005, the Grievor had progressed. However, the process of the hearing was also triggering symptoms and the Grievor reported that anytime she hears a reference to the airport or drives by it, she gets a sick feeling in her stomach. She continued to have trouble following asleep. Dr. Ferrie stressed that her trauma was not from being fired, but her trauma was from being betrayed. He couldn't say for certain that it was likely she could be cured. He did not have the impression the Grievor was looking for compensation, but that she was looking for "justice". He also confirmed the Grievor was not malingering.

In March of 2006 the Grievor continued to have disturbing images of being fired. She also had symptoms related to the stress at the hearing. She was affected by the way in which she was interrogated and she continued to feel betrayed by the managers. Dr. Ferrie stated that the initial cause of her P.T.S.D. was what had occurred with her husband. However, being subjected to the events around her termination, which she considered to be an unfair firing and betrayal of trust by her employer, who had previously been supportive, brought back all the previous symptoms as to what had occurred. She continued to experience fear and some agrophobia related to previous physical and sexual abuse including death threats and all of these symptoms were triggered by her being unjustly terminated.

The Grievor also felt that there was a connection between her husband following her and the GTAA's surveillance of her and it was a similar assault on her privacy and on her person; it triggered a lot of disturbances on her part. She was disturbed after 23 years of loyalty and by the interrogation. Dr. Ferrie stated that being followed could be perceived as a threat and the Grievor feared that someone was going to hurt her. She was angry and felt that the GTAA was using her knee injury as an excuse to harass her. She also felt nauseated, violated, betrayed, and had negative thoughts.

When cross-examined, Dr. Ferrie denied that he was an advocate, but maintained that he came to the hearing as an independent assessor. He stated that he was acting professionally and was trying to be objective. He denied any knowledge that he was playing a role in her litigation, but stated that he was simply trying to help. He has never been to an arbitration and he had never testified in a legal proceeding before and it had not occurred to him that he would be called as a witness, notwithstanding the Grievor had mentioned she was at arbitration. However, he did realize in March of 2007 that he might be a witness. Dr. Ferrie indicated he had no faith in physicians doing independent assessments for litigation purposes and that it was not the job of the doctor to determine whether a person was improperly terminated.

Dr. Ferrie stated that P.T.S.D. does not generally occur because there is litigation. It is very common in the population at large and most people are not involved with litigation. He maintained the Grievor did not have an adjustment disorder, but it was the termination that exacerbated her P.T.S.D. and her symptoms arose as a result of being

fired. He confirmed that most people don't recover from P.T.S.D. and the Grievor's P.T.S.D. was reactivated and exacerbated by her firing.

When cross-examined about the effect on the losses she had experienced, he stated that in his opinion, the loss of her grandmother and cousin in 2004 were not very stressful. He relied on both objective testing and subjective evidence to determine the connection between the exacerbation of her P.T.S.D. and her termination. The objective evidence was obtained by testing over the period that he treated her. He also asserted that she was not malingering.

Dr. Ferrie stated the Grievor had been physically and sexually abused and had received therapy, however her symptoms were triggered by being unjustly fired. He asserted her termination was the cause of her current symptoms and it made them worse, but that the termination was not the initial cause of the P.T.S.D. Dr. Ferrie assumed that prior to her termination there were also unresolved issues. However, her P.T.S.D. was related to being fired and not related to the previous abuse. He testified that objective testing showed the focus of her difficulties was the GTAA. The Grievor continued to have disturbing images as a result of being fired and her meetings with management members of the GTAA. Dr. Ferrie also felt that her trouble in falling asleep was a significant factor.

Dr. Ferrie testified that the Grievor's issues with her mother were resolved and were improving. He agreed her daughter blames her for the break up of her marriage.

The Grievor also felt betrayed by a fellow employee whom she felt did not support her. Dr. Ferrie claimed that since the Grievor began seeing him that she was getting better. He also stated the Grievor told him that she was pressured to return to work before she was ready.

When re-examined, Dr. Ferrie testified that he dealt with her traumas in chronological order and dealt with her earlier trauma prior to dealing with the termination problem. He also stated that the objective testing indicated that her P.T.S.D. was made worse by the stress she was under but that she did not malinger.

Ms. Suzanne Newman is employed as an administrative assistant at the GTAA. She has been a Union representative since October 2, 1995. At the time of the grievance she was the second vice-president of the Union local. Miss Newman received a phone call from the Grievor stating that she had a meeting on March 19th, 2004 to discuss modified duties and was asked to bring a Union representative. Ms. Newman was present at the meeting and took notes which she filed. Ms. Newman stated that she was told to act as a witness and to remain quiet, but that she could speak at the end. According to Ms. Newman, the Grievor stated that she was able to walk with a cane after surgery and then use painkillers. Dr. Gordon had indicated that she could drive approximately one and a half weeks after surgery. The Grievor did not feel well enough to return to work. She stated when she walked for more than 10 minutes that her knee became aggravated. In the second week she walked with a cane. The Grievor admitted

to picking up a family friend because there was no one else available to pick up the friend.

When the Grievor was told her job was on the line, Ms. Newman requested a break and the Grievor came back and apologized. Ms. Newman stated that the Union took the position that the GTAA was retaliating against the Grievor because of her relationship. She also stated the tone of the meeting was stressful and it was like an interrogation session and it was the first of its kind that she had ever been to.

At the March 19th meeting, the Union took the position that the suspension was unwarranted and Ms. Newman wrote the following letter to the GTAA.

> "To: Maria Maack
>
> Date: March 22, 2004
>
> **Re: Investigation Meeting on March 19, 2004 of Ms. [C.B.]**
>
> Following the investigative meeting on Friday, March 19th, 2004, I sought advice from our Union Representative. We would also like to state that this suspension pending the investigation of Ms. [B] previous experiences of being stalked.
>
> It is the Union's Position that if the Employer felt that Ms. [B] could have returned to work earlier than her surgeon stated, they should have asked for a 3rd party assessment through W.S.I.B. for information regarding her recovery during which time you had Ms. [B.] stalked.
>
> As Ms. [B] is not a medical practitioner and does not have a medical degree it is not a decision she could or should have made as it could have been detrimental to her recovery.
>
> It is also our understanding that because this was a work place injury, the Employer has the right to discuss her recovery with W.S.I.B.

"Suzanne Newman"
2nd Vice President, Local 00004

c. Bryan Gordon,. [C.B.], Dr. R. Gordon, W.S.I.B. for Ms. [B]'s file, Canadian Human Rights Commission for Accommodation, C. Collins – RVP – UCTE, S. Pylyshyn – PSAC G & A

PSAC	Public Service Alliance of Canada Union of Canadian Transportation Employees Local 00004 Terminal 2 Lester B. Pearson International Airport Toronto AMF, Ontario L5P 1B2"

When cross-examined, Ms. Newman stated that Mr. Townshend had been terminated on March 16th, and the Grievor returned to work on March 17th, and the meeting with the GTAA was on March 19th. She stated that the Grievor was not guarded and she was not aware of what was going to be asked. She conceded that Ms. Maack explained that her role at the meeting was not to respond on behalf of the Grievor. Ms. Newman's notes reflect that the Grievor was taking physiotherapy and had been housebound from February 23rd to February 29th, and was walking with a cane. Also, the Grievor stated that after she drove to the airport she had to ice her knee. The Grievor was given a last chance, presumably to tell the truth and was then suspended pending an investigation.

The Grievor, testified that she commenced work in April 1951, for the prior Employer to the GTAA and in 1996 the GTAA took over the operation (both

referred to as the GTAA). Her mother and father had both been employed by the GTAA and her father had been the controller for a period of years. The Grievor performed a myriad of jobs including stints in accounts payable as an accounting clerk, as the acting supervisor in accounting, in the maintenance garage administrative support and latterly as fleet co-ordinator. The GTAA has approximately 200 vehicles requiring maintenance, with a high level of interaction with other persons for maintenance, cleaning, accident repairs, and for replacement vehicles. The Grievor's job involved a lot of walking to and from the office to the maintenance department and to the delivery gate. She inspected new vehicles and arranged for their maintenance. She picked up vehicles in the parking lot and drove them as required.

On October 31st, 2003, the Grievor twisted her knee while getting out of a vehicle. Her knee became swollen and she reported it to Kevin Lacey, her supervisor. She had previously fallen in the parking lot and hurt that same knee in April, 2003. The Grievor saw Dr. Nagpal at the Terminal 2 medical clinic. She testified that Dr. Nagpal is employed by the GTAA. Dr. Nagpal told her to get x-rays and to start physiotherapy and eventually referred her to Dr. Robert Gordon, an orthopaedic surgeon, whom she saw on January 20, 2004. Dr. Gordon told her that she required surgery. She was concerned because she enjoyed her job and did not like being off work. The Grievor had surgery on February 19th, 2004, and was prescribed physiotherapy following the surgery. Dr. Gordon told her that he would give her a note to be off work for six weeks, but the Grievor did not like being off and wanted to get back to work and requested a note for only a four week period. She had told Dr. Gordon what her job involved. After the

surgery, her knee was "pretty sore" and her routine was altered. Her knee became infected and she had a fever. She phoned a help line and was told that the fever was fighting off the infection and to keep an eye on it. She attended physiotherapy on a regular basis.

The Grievor had been personally involved with a fellow employee Terry Townshend for approximately four years (subsequent to ending her relationship with her husband). Mr. Townshend had been terminated by the GTAA, but was subsequently re-instated. The Grievor, because of her involvement with Mr. Townshend, was concerned about losing her job. Mr. Townshend was again suspended on March 10, 2004, and terminated for a second time on March 16, 2004. According to the Grievor, Mr. Townshend had pancreatitis, but she had asked him to drive her to physiotherapy and both were observed by investigators for the GTAA, who had Mr. Townshend under surveillance. The Grievor felt it was her fault that Mr. Townshend was terminated.

The Grievor was concerned about surveillance because she had been previously stalked by her husband in 2001. At that time, the GTAA had assisted her by permitting her to bring her vehicle inside the plant gate and when she went outside her manager accompanied her. As a result of being abused and stalked, the Grievor had been absent for work with a breakdown for approximately two months. The Grievor testified that she has never been disciplined or received any caution about her attendance.

On March the 11th, 2004, while she was off work, the Grievor received a phone call that she was to contact Kevin Lacey immediately and when she did Mr. Lacey demanded her phone number and address and told her that she would be reprimanded if she did not give him the information. She gave him her phone number and address, but felt she was going to be suspended. Mr. Lacey told her to come back to work and she would be accommodated with modified duties and to speak to her surgeon. She told Mr. Lacey that her surgeon was away and that she would speak to him as soon as he returned to get the appropriate note.

The Grievor attended physiotherapy on March 15th, and told her physiotherapist that she was told to get back to work. The Grievor banged her knee on March 11th or 12th, and it had aggravated her knee and it became more sore. When she saw Ms. Farkas she felt all right but was taking pain killers. She was attending physiotherapy every morning. The Grievor asked Ms. Farkas for a note because Dr. Gordon was away and she felt that a note from a physiotherapist might suffice. The Grievor returned to work on March 15th, with a note from Ms. Farkas(which has been referred to earlier) because she was frightened that she would be terminated.

The Grievor testified that after her physiotherapy sessions in the morning she would feel less pain and that is when she went to Wal-Mart. In the afternoon she attempted to exercise her knee and would rest. When she was given the original doctor's note, there was no suggestion of modified duties and it did not occur to her she might be able to perform modified duties; she adhered to Dr. Gordon's advice. However, she did

not think she could go back to work because she still had a lot of pain and was taking pain pills. On some days her knee felt better, but on other days it would get sore and flare up. During the first week after surgery her knee was infected and she was told not to drive. In the second week, approximately March 2nd or 3rd, Dr. Gordon told her that she could drive.

On March 15th, she gave the physiotherapist's note to Mike Hewlett, her supervisor, but he sent her home because he would not accept a physiotherapist's note. Mr. Hewlett told her to fax a doctor's note. She advised Mr. Hewlett she would try and contact her surgeon. The Grievor saw Dr. Gordon on March 16th, and informed him that she was told to go back to work with modified duties. Dr. Gordon called Mike Hewlett and left him a voice message because he wanted to know why his diagnosis was being questioned. She told Dr. Gordon that she was fearful of losing her job and needed a note from him to return to work. Dr. Gordon was upset because his judgment was being questioned and did not like the GTAA bullying employees. He had signed the Grievor off from four to six weeks and he told her it was up to her how she felt physically. The Grievor was feeling very fearful; her knee was swollen and was sore and she had also fallen the previous week and again hurt her knee and she informed Dr. Gordon that she had to go back to work. Accordingly, Dr. Gordon gave the Grievor a medical certificate to return to work. On March 17th the Grievor returned to work with the note from Dr. Gordon and a letter in response to a letter Mr. Hewlett had sent her. She worked for the whole day and physically her knee was in pain. When she left work her knee was swollen, more so than before. She hadn't taken any pain pills that day because she was

working. She had been told that she would be accommodated and she was afraid that if she didn't go to work she would lose her job. When she returned on March 17th, no effort was made to give her modified duties.

On March 17th, she was told by Kevin Lacey that there would be a meeting on March 19th, to go over her modified duties and to contact her union representative. When she went to the meeting on March 19th, she was asked questions about her surgery, about walking with a cane, whether she drove, whether she could stand on her tiptoes, what did she do and where did she go. When asked about her physical abilities, she stated some days were good, but on other days her knee was sore; she went for physiotherapy every morning. If she felt up to it she would go to Wal-Mart or the drugstore for her medication. She stated that after physiotherapy she felt less pain but later on if she didn't rest her knee it would be sore. She admitted to driving to the airport to pick up a friend whose wife would not drive on the highway and found the airport confusing. However, the questioning made her realize that she had been followed and stalked and she felt violated and afraid. She stated modified duties were not discussed. At the end of the meeting the Grievor was suspended.

The Grievor recalls March 19th, 2004, because it was her birthday. She was supposed to go out for her birthday but didn't go; she was upset, felt violated and was sick and fearful. She felt she was again being stalked and harassed because of her relationship with Terry Townsend. She was fearful of the GTAA hurting her and although she knew that they couldn't physically hurt her, she was afraid to go out and she

wouldn't open the blinds, open the door or answer the phone. These were feelings that she had before because of living in a fearful relationship with her former husband for 20 years where she had been abused.

The Grievor saw Mr. Peter Munisteri, a psychotherapist, and she told him what had happened and that she was fearful. She was also pretty sick. She also saw her family Doctor, Dr. Chen on March 22nd, and told her that she was suspended and was fearful of losing her job, that she couldn't sleep or eat and was afraid to go out. Dr. Chen prescribed her anti-depressants.

The Grievor paid for counseling and felt that she needed counseling more than physiotherapy. After her termination, she saw Mr. Munisteri on a weekly basis and admitted that she had seen a counselor prior to these events because of spousal abuse. She suffered from low self-esteem and was frightened. She also saw Lynette Pole-Langdon, a therapist, but stopped seeing both her and Mr. Munisteri at the end of 2004. In January, 2005, she was referred to Dr. R. Ferrie, who specializes in trauma, and saw him between January and June of 2005. She registered with Workopolis at the end of March and continued to see Dr. Chen because she did not feel she was able to cope with working or finding a new job. Dr. Chen continued to prescribe anti-depressants. The Grievor continued to suffer from nausea and was unable to sleep. In addition, her family life has been affected, she does not see her grandchildren as frequently as she would like. She suffers from anxiety attacks, does not sleep and her relationship with Terry Townshend has been strained.

The Grievor maintains that she was not fraudulent, that she was not able to do anything and that she didn't drive until it was approved by her doctor. She claims she was in touch with Mr. Hewlett while she was absent and gave him updates about the situation and doesn't feel she did anything wrong. When she was asked at the meeting to "come clean", she did not know what they wanted. She admitted that she had gone to Wal-Mart and the drugstore, but she could not remember everything that she had done on a day to day basis. She felt the tone of the meeting was aggressive and violent and, as a result of what occurred, she suffered post-traumatic stress disorder.

The meeting of March 19th, 2004, brought back fears of abuse by her husband. She felt because of the nature of the questioning she had been stalked and everything she had worked to regain, including her self-confidence and self-esteem, was crushed. All her fears came back and she did not have the strength to do anything any more and continued to have anxiety attacks. She stopped playing golf and engaging in other activities. She stopped physiotherapy because she did not have any money after being terminated and her knee has never been the same. She feels that the GTAA is responsible for her knee not being right because she could not complete her physiotherapy. She suffered from a breakdown at a point in her life when she had become quite confident and happy after having been mentally, sexually and physically abused and she does not know if she will "ever get to that place again".

The Grievor kept notes, which was a process that she had learned from her past therapy. Notes were kept as a means of protecting herself if she felt threatened; it was a

way of writing significant things down on paper in order to get it out of her head. The Grievor had felt threatened by the GTAA because she felt that if they found out she was with Terry Townshend she would be targeted. Terry had been terminated once before and was then subsequently terminated again on March 16, 2004. The Grievor felt that the GTAA didn't like Terry and she would become a threat if the GTAA found out that they were together. Her notes consisted of her application for jobs and doctor's appointments and she also took notes for her therapy in order to get things out of her head. She expected that some of her notations would become evidence at her hearing. She wrote how upset she was and was aware if she claimed mental distress she would testify and her notes would indicate how she felt and would help her. She also admitted that she knew that medical doctors or counselors would be required to support her claim, however, she went to see doctors and counselors because she was upset. She was also aware that her claim would not be as strong if she did not receive medical attention and counseling.

She was aware the GTAA places a high premium on honesty and is aware of the code of conduct and that employees have been terminated for abuse of sick leave. She could not drive and accordingly, had asked Mr. Townshend to drive her to physiotherapy and felt because of that she was to blame for Mr. Townhend's termination. She was also distressed because of his suspension and termination. The Grievor stated that when she was off in February and the early part of March she was being paid out of her sick leave bank. She also claimed that when she was injured on October 31st, 2003, Mr. Hewlett told her not to put in a WSIB claim.

The Grievor admitted to thinking that she was being followed on March 16th. She maintains that she was in touch with Mr. Lacey and Mr. Hewlett regularly. She also stated that before her termination she was happy and confident, but was afraid she might lose her job in 2003 when she had her accident, right up until she was terminated in 2004. When Dr. Gordon wanted her to be off for six weeks, she told him that she wanted to be off for four weeks because of fear of losing her job.

When the Grievor was terminated, she was devastated. She had been employed for 23 years and as a result of being terminated, she couldn't eat or sleep and cried non-stop. She stayed in the house. On March 29th she went to her website to look for a job and she applied for a number of jobs online. She stated that she couldn't find a job. She was again feeling sick, couldn't sleep and wasn't eating. On April 5th, when she contacted Dr. Gordon, he gave her a reference to the physiotherapy department at Etobicoke Hospital because it was free. Also the Grievor was financially affected and wasn't certain of another job; she saved everything and curtailed her spending. Her note on April 7, 2004, states that the GTAA took away her independence and her dignity and she became angry. She had worked hard and supported the family and suddenly she had nothing. She felt worthless and that she was a bad person and became afraid to do anything. She referred to herself as a coward. Her notes also reveal that her state of mind was such that she couldn't go to see her grandson's hockey or her granddaughter's gymnastics and was afraid to go out and did not see her family at Easter.

The Grievor continued to send out her resumés and make job applications and she notes that on April 21st, her knee was still swollen and sore and that is when Dr. Gordon gave her a prescription for physiotherapy to Etobicoke Hospital. She continued to search for jobs and also developed arthritis in her knee. She remained inside her home. The Grievor continued to have anxiety attacks and at times she couldn't breathe and on one occasion she went to the emergency at the Orangeville Hospital because of an anxiety attack.

On May 18th, the Grievor went to therapy and broke down. She felt she had lost control over everything. She couldn't understand how her workplace had done what they did to her. She thought they were friends; they were like family and the airport was a safe place for her.

She was further upset when her grievance was denied and after she was terminated from her employment she stated she couldn't handle what was going on and she was losing control. She wasn't eating or sleeping. She couldn't be sociable and she became reclusive, although she had not been a recluse before. Before her termination, the Grievor claims she was outgoing. She went out with friends. She went golfing and dancing and was involved in sports. The Grievor also continued to be frightened that she was being followed. She continued to be upset because the GTAA said they didn't know about her injury and called her a liar, notwithstanding that she had reported the injury to the GTAA. She saw Peter Munisteri in June of 2004, and continued to see him for crisis counseling and also continued to see Lynette Pole-Langdon for counseling. Some days

she felt better than others, but she claimed that counseling hasn't helped her to date. Her anxiety attacks continued. She was also not sleeping or eating and continued to cry all the time; her mother spent a week with her in June of 2004 and that was comforting for her.

In July of 2004, she could not attend her cousin's funeral. Also in July of 2004, the physiotherapist at Etobicoke Hospital explained that the muscle beside her kneecap had lost its strength and would have to be built up. The physiotherapist taped her kneecap in place. The muscle had lost its strength because she hadn't finished the physiotherapy prescribed by Dr. Gordon; she continued with the physiotherapy three times a week and then commenced working in September of 2004. At that point she was given exercises to perform, but was told not to use the stairs and she could not drive or walk for lengthy periods. Between July and September, 2004, she continued to see Peter Munisteri weekly and also Lynette Pole-Langdon for counseling as well as her family doctor. She continued to have anxiety attacks but started to feel better. She began to see Dr. Ferrie in January, 2005 and stopped seeing him in May, 2005.

When cross-examined, the Grievor claimed that she hated the GTAA at the time of her termination and currently had a strong dislike for the GTAA, although she did not blame them for the injury to her knee. However, she did blame the GTAA for continuing health problems and felt betrayed by Mr. Hewlett and Mr. Lacey and others. She admitted she had a good relationship with them. She also felt violated by them and

became sick because of them. She maintained that the GTAA added to her problems although she doesn't blame them for all her psychological problems.

She further testified on cross-examination that the GTAA took away her independence and dignity and that she has no respect for management of the GTAA. She admitted that she could not go back to a place where she had been happy and confident because of what had been done to her. Given her feelings, she does not want to return to the horrible place at the GTAA. She admitted that she is seeking damages for the pain that the GTAA caused her, but does not blame all of her emotional difficulties on the GTAA. She stated that she had been happy and confident at the time that she was terminated.

The Grievor admitted that she has been estranged from her mother and has had difficulties with her older daughter and mother but that she had been close to her grandmother who died in June of 2004. As well, she was close to a cousin who died in July of 2004. She was also upset as a result of Terry Townshend being terminated for a second time. All of these situations had taken a toll on her. She admitted that she is continuing to have issues with her first husband and is still fighting for divorce. She continues to feel someone is following her. The Grievor claimed that she had suffered from stress, anxiety and depression before her surgery and before the surveillance in 2004. However, she claimed there had been no impact on her work or her absenteeism.

After her termination she was in pain and worried about covering her physiotherapy and being unemployed.

The Grievor acknowledged that an employer has a legitimate interest insuring employees do not abuse the sick leave plan, however if the employer received a note from a doctor, it was a legitimate reason for a person to be off work. When asked if employees should report to work if they are capable, she responded that it depends on whether they are following the doctor's orders.

The Grievor stated that prior to her surgery she was able to make some modifications to her own work by getting up from her desk and moving around when her leg became inflamed from sitting. She took the elevator instead of the stairs and the driving was infrequent. During the period before her surgery and after her accident, her knee was in pain. When asked if her job required her to sit down, she maintained it was a very busy job and it was not really a sit down job. Others were able to do some of the physical aspects of the job and while driving was infrequent it was painful for her to get in or out of a car during that period. Prior to her surgery, her job did not require significant modifications. She also acknowledged that employees should return to work as soon as possible if given an okay by their physician.

The Grievor stated that Dr. Gordon had given her permission to drive after the second follow-up appointment. Her restrictions as of a March 16, 2004 for modified duties included no lifting, no walking for more than 10 minutes and no driving. She

claimed that after her physiotherapy, there was no pain, which lasted for about two hours, and then she would rest in the afternoon and put her knee up. She also took pain pills to alleviate the pain, but maintained that she couldn't function at work if she took pain killers because that would prevent her from driving. The Grievor admitted to driving to physiotherapy and to Wal-Mart, Zehr's and the gas station and picked up her mail on the way home from physiotherapy. When she drove to the airport she used her left foot to brake. She also had banged her knee on March 11th or 12th, which caused swelling and more pain.

The Grievor was told to get a doctor's note and she would be accommodated with modified duties and, fearful that she would lose her job, she prevailed on Dr. Gordon to give her a note. When she saw the physiotherapist on March 15th, she was feeling all right because she had taken painkillers. On the day she worked, she went home and took Tylenol 3. The Grievor also admitted that not all of her notes were made contemporaneously with the events in her life, but after March 16th, 2004, the notes were made contemporaneously with events and she anticipated her notes would assist her when she testified. Terry told her to keep notes in case she was terminated. She wrote down what was relevant to her. However, she stated that she went to doctors and counselors because she was upset. She was also aware that if she did not see doctors and counselors, her claim would not be as strong. The Grievor also admitted that she had received counseling in 2001 and 2002 and the odd time in 2003 to deal with her abuse, but had stopped going. She received counseling more regularly after her termination.

The Grievor agreed that Mr. Lacey told her the GTAA could accommodate her with modified duties if she obtained a doctor's note. She agreed there was nothing wrong with that request. The Grievor obtained a note from her physiotherapist because she was concerned about her job, but when she produced it she was sent home to get a doctor's note. Mr. Townshend was terminated on March 16, 2004 and the Grievor felt someone was following them. The Grievor also stated that she was in touch with Mr. Lacey and Mr. Hewlett regularly. She admitted that when she was off work in February and March she was paid out of the sick bank. The Grievor testified that Mr. Tolton helped her when issues had arisen with her husband. She had collapsed at work and Mr. Tolton urged her to take time off and, as well, her doctor told her to take time off. She remained at home for two months as a result of a breakdown.

Peter Munisteri is a psychotherapist and counselor at the Vaughn Counseling Centre in Woodbridge, Ontario. He graduated in psychology from York University in 1997, took graduate courses in psychotherapy and counseling and has a Master's degree in counseling. He also served an internship in psychotherapy and counseling at the Toronto Healing Arts Centre. The Grievor was referred to Mr. Munisteri by Dr. Chen in January, 2004, because she felt she was being treated differently by management and her supervisors at work and she felt isolated and alienated by people with whom she had previously enjoyed working. She was treated by Mr. Munisteri for approximately six months. He noted that she loved and enjoyed her work and continued to do it diligently; her workplace was like family and she had always taken pride in her work, and put in a

lot of effort. Mr. Munisteri attempted "to facilitate her stress system as a result of the dynamics at the GTAA".

On March 19th, 2004, the Grievor called Mr. Munisteri stating that she "had never been so hurt". She was crying and distraught. She had been dismissed verbally and it confirmed what she had been thinking, that is, she was alienated and was mistreated at the GTAA. She felt violated, victimized and hurt and was extremely tired. She was mentally drained, had trouble focusing and concentrating and was overwhelmed. Mr. Munisteri saw the Grievor again on March 25th, 2004 after she was terminated. Most of the session was spent providing emotional support for her. He attempted to assist her by directing her anger, and trying to help her regain a sense of herself and her self esteem.

Mr. Munisteri testified that subsequently the Grievor was in a survival mode; she was cocooned and she wanted to shelter herself from fear of being hurt again. He felt she was experiencing the onset of traumatic stress. By July of 2004, her anxiety level increased, she was focused on her dismissal and the stress surrounding the events of March 19, 2004. She was nervous, extremely anxious and was afraid that she would be hurt again emotionally. She was also tired, easily startled, and had trouble sleeping. She experienced rapid heartbeat, shortness of breath, sweating and a dry mouth.

Mr. Munisteri testified that when he first saw her in January, 2004, she was stable and emotionally hardy and optimistic. After she was dismissed her world had turned, she was in emotional turmoil and had stress symptoms that she had not had to cope with

before her termination. By October, 2004, Mr. Munisteri was of the view that the Grievor was receptive and open to therapy and she attended sessions every week. She had been through an extremely trying time which wore her down emotionally and he tried to provide her with introspective care in order to tend to herself and her needs. She had made some improvement at the time. Her commitment to therapy was impeccable, and she felt that the therapy office was a safe zone for her. However, her emotions were like a roller coaster and she had bouts of anger. His notes of March 22nd, 2004, indicate that most of the time the Grievor was sad or depressed, was withdrawn, felt worthless and at times had suicidal thoughts. She was tired, had difficulty sleeping, had a decrease in appetite and a significant weight loss.

When cross-examined, he testified that the Grievor did not exhibit any concern about the pending litigation [arbitration], and did not indicate she was seeking damages. He stated that his job was to provide support, motivational counseling and to assist the Grievor in expressing her concerns. Initially, she had presented as a person who loved life and wanted a happy relationship. Mr. Munisteri felt that she was a good person. Prior to her termination she appeared to be a potentially happy person and was confident. Mr. Munisteri testified that the Grievor was cocooned, and was emotionally upset and distraught; she was attempting to shelter herself emotionally and could not concentrate. He stated that there was mental instability and it was evident she had been through a lot emotionally. There was no improvement between July and September, 2004. Subsequently, she did show some slight improvement.

On July 29, 2005, Mr. Munisteri reported on the Grievor's condition as follows:

Reason for Referral

[C.B] was referred to my office by Dr. C. Chen in January 2004 for reasons pertaining to stress, anxiety and depression. During this particular period, [C.B.] was employed by the Greater Toronto Airports Authority (GTAA) and it was during this time when [C.] began to experience Psychological and Emotional Stress. [C.] expressed concerns of emotional/psychological abuse in the workplace and ill treatment by her superiors in management positions. [C.B.]'s concerns came to fruition on March 19, 2004 when she was dismissed from work. March 22, 2004, [C.] arrived at my office for a scheduled appointment, very distraught and depressed.

Background Information

[C.B.] was in direct need of emotional and psychotherapeutic attention. Her self confidence/esteem was at an extreme low, her levels of anxiety had escalated and [C.] became fearful and withdrawn from friends and society in general. The sudden dismissal from the GTAA left [C.] with feelings and thoughts of unknowing and self critical doubt, deriving from the psychological abuse she experienced in the workplace. [C.] found it extremely difficult to open up and express herself after the dismissal from work; thus readily resorted to methods of coping such as silence and solitude, all relating to personal self protection and avoidance. During the first month of her dismissal, [C.] would rarely answer telephone calls or leave her home, after telling me that she would leave home only to attend therapy and counseling. [C.] mentioned many times throughout therapy that she was always well respected in the workplace and performed all tasks with pride and high quality standards; this was feedback that she received often from management. [C.] received mixed messages within a relatively short period of time and thus it makes it easier to understand how the events of March 19, 2004 affected [C.B.] in such a negative way.

Therapy Information

Despite feelings of depression and anxiety, [C.] did realize the importance and benefits of Psychotherapy, thus committed to a weekly program where much of work resolved around Stress Management, Intensive Psycho-emotional therapy and Post-traumatic stress counseling. [C.] focus was to re-stabilize and re-strength herself throughout traumatic experiences and stress brought on by her dismissal from the Greater Toronto Airport

Authority. Although [C.] was scheduled to come in for therapy on a weekly basis, I would in addition facilitate telephone sessions when [C.] experienced feelings on being in a crisis situation. During these specific sessions, [C.] would mainly work through coping and resolution strategies. In my professional opinion, [C.] stressor and related symptoms were clearly brought on by the decisions made and actions taken by those events and individuals responsible for her dismissal.

As indicated in Worksheets 10.1 (Mind over mood depression inventory) which were utilized often throughout the therapy program, [C.] experienced many negative psychological and emotional inhibitors and symptoms as a result of the work related stress she was incurring. [C.] would rationally and cognitively make direct associations between her symptomatic experiences and recent events. [C.]'s level of anxiety has been consistent throughout most of the eighteen month therapy program, almost always exhibiting symptoms listed in Worksheet 11.1. [C.]'s tendencies and behaviour during the first half of her time spent in therapy were leaning to that of a depressed individual which was also observed by [C.]'s Physician Dr. C. Chen. Specific concern and attention was given to related issue #10 on Worksheet 10.1 (Mind over mood depression inventory). [C.] became very frustrated by the series of events, especially because she was content, confident and in good standing with peers at work prior to her dismissal from the GTAA. Although [C.B.] remains a pro-active and committed individual to therapy, the long and lingering proceedings of the past eighteen months are continually proving to be disruptive to [C.B.]'s life and in actuality hinders her ability to progress beyond this in a complete and productive manner.

Observations

[C.B.] is an extremely grounded, rational and co-operative individual. [C.]'s intentions in therapy have always been genuine. In my opinion, she has been victimized by others and left to bare full responsibility. The level of emotional and psychological abuse she's endured has certainly been damaging enough to have the effect it has had on her. Still [C.]'s mandate and priority caters to self care, stress management/inoculation and conflict resolution. Through adversity [C.] remains motivated and optimistic, while working through unresolved issues pertaining to her case.

"Peter Munisteri"
Peter Munisteri, C.P., R.I.H.R.
Psychotherapist?

Mr. Munisteri testified that the triggering event for her condition was the dismissal from the GTAA. When she spoke about her past, she indicated that she was

well adjusted and had been well adjusted when she initially came to see him. She informed Mr. Munisteri that prior counseling had affected her life in a positive way. She had concluded her previous therapy prior to seeing Mr. Munisteri and she saw Mr. Munisteri solely because of her experiences at the GTAA. Mr. Munisteri continued to see her between January, 2005, and July, 2005. He stated that her confidence and resiliency had been stripped from her, but that was based on what she told him. He felt she was victimized, but that was also based on what she told him.

Ms. Lynette Pole-Langdon is employed at the Family Transition Place in Orangeville and is a community counselor. She does individual and group counseling. She has an Honours Bachelor of Arts in psychology and her Master of Education (Counselling Psychology) and has experience in counseling. She saw the Grievor on four occasions between June 7, 2004 and August 23, 2004. The Grievor had suffered physical, emotional and sexual abuse and Ms. Pole-Langdon had seen the Grievor earlier in 2001. Ms. Pole-Langdon, because of the long waiting list, referred her to Dr. Ferrie. In June, 2004 when interviewed, the Grievor did not maintain eye contact, had a quiet manner was timid, visibly upset and cried at times. She stated the Grievor was impacted by her wrongful dismissal by the GTAA and was emotionally upset. The Grievor talked to her about ways of feeling safe again and she also wanted to gain her independence. The Grievor was also concerned about being followed.

When cross-examined, Ms. Pole-Langdon said that she did not talk to the Grievor about testifying and was unaware that the Grievor was seeking damages. She also stated

that the Grievor's feelings were not unusual for a person who was wrongfully terminated. The Grievor also identified with feeling angry and Ms. Pole-Langdon helped her with her coping skills and feelings about being wrongfully terminated, as well as with her embarrassment dealing with her co-workers. The Grievor was told to keep a log at counseling and she recorded her daily events and commenced working for the Region of Peel in September, 2004. In addition, her family life has been affected and she suffers from anxiety attacks, does not sleep and her relationship with Terry Townshend has been strained.

Dr. Connie Chen, a family physician, has been the Grievor's family doctor since 1999. She testified that she saw the Grievor in 1998 in connection with problems in her marriage. The Grievor left her marriage in April, 2001 and underwent a great deal of stress. As a result, she was off work for a period of time in 2001 and Dr. Chen prescribed tranquillizers and anti-depressants for her. The Grievor was also seeing a counselor. In June, 2001, Dr. Chen suggested the Grievor take more time off but the Grievor wanted to return to work. In June of 2003, the Grievor injured her shoulder at work but did not take any time off.

Dr. Chen saw the Grievor on March 16, 2004 and was informed the Grievor was off work because of surgery to her knee. The Grievor had provided a note from her surgeon to be off work for four weeks but she felt the GTAA was giving her a hard time about why she needed to be off work. The Grievor had a note from Dr. Gordon to return to work and told Dr. Chen she would try to do desk work only. The Grievor was also

upset because Mr. Townshend had been terminated. The Grievor's nerves were bad and she wasn't sleeping; she was worried about returning to work in the light of what had happened to her partner. Dr. Chen prescribed Atavan for her.

On March 22, 2004, Dr. Chen saw the Grievor who reported she had lost her job. She also reported that she had been videotaped. The Grievor was shocked and upset about being fired. She had been with the GTAA for a long time and felt there were no problems in the past with her. While there were issues with others, she never felt targeted. However, she felt she was now being targeted because of her relationship with her partner. The Grievor was anxious and fearful of being followed and felt she could not leave the house. The Grievor also stated she had been following the restrictions given to her by Dr. Gordon.

The Grievor felt the same anxiety and fear that she had in the past when she was being followed by her husband. Dr. Chen prescribed an anti-depressant. The Grievor's affect was flat, she was tearful, she had insomnia, her emotions fluctuated up and down, she had a decreased appetite, paranoia, an inability to concentrate, anxiety depression. On March 22, 2004, Dr. Chen felt she had a situational depression which was not major.

Dr. Chen saw the Grievor again in April and stated the Grievor was not coping very well. She continued to be tearful and afraid to leave the house. On May 14, 2004, Dr. Chen spoke to the Grievor about counseling; she felt therapy was in order. Dr. Chen testified that her depression was situational which is caused by a precipitating incident.

When cross-examined, Dr. Chen admitted that in 1987 the Grievor had been stressed at work, that in 1990 she had issues with her husband and suffered from insomnia. In 1992 and 1994, the Grievor had stress in dealing with her mother. In 1998 the Grievor reported she was stressed at home and work and was also stressed at work in 1999. In 2000, Dr. Chen indicated the Grievor was having family problems. Dr. Chen then admitted the Grievor had chronic anxiety but did not suffer from anxiety attacks. After her termination, the Grievor had acute anxiety attacks, chest pain, feelings of absolute dread and feeling that she was having a heart attack. She also had agrophobia along with her panic attacks.

On March 16, 2004, the Grievor was under stress, her nerves were bad, she was not sleeping. On March 22, 2004, the Grievor was depressed and Dr. Chen added to her medication. There was no further mention of depression after May of 2004. In May of 2004, the Grievor was having trouble sleeping and Dr. Chen discussed counseling services. In September, 2004, the Grievor was working short term and suffered from insomnia but there was no increase in her anxiety.

Dr. Chen reviewed the Grievor's past medical history while being cross-examined. The Grievor had been off work in 2001 as a result of stress at home with her husband. At that time, the Grievor was depressed and had seen a counselor. In May of 2001, Dr. Chen advised her not to return to work but in June of 2001 Dr. Chen stated the Grievor wanted to return to work. Dr. Chen acknowledged treating the Grievor for

different medical issues prior to the year 2000, which I find to be part of a normal medical history and which I do not propose to outline because, in my view, they are not relevant to the issues at hand.

Dr. Chen acknowledged the Grievor had chronic anxiety but could not recall anxiety attacks. Post termination the Grievor had anxiety attacks which comprised an overall feeling of absolute dread, chest pains which are quite dramatic and feelings of having a heard attack. Also, the Grievor had agoraphobia. In September, 2004, the Grievor continued to have insomnia.

Employer's Reply Evidence

Kevin Lacey, senior manager of field services, testified that he was not called by the Grievor during her absences. Mr. Lacey claimed that when he called the Grievor he asked her if she could return to work earlier and that modified duties were available. When the Grievor asked if she was under surveillance he responded that she was not. After hanging up the Grievor called back and asked if she was next "on the chopping block". On March 11, 2004, Mr. Lacey provided a memo to Bryan Gordon outlining his conversation with the Grievor which was filed. The subject heading of that memo is "F. W. TOWNSHEND MEETING".

When the Grievor returned to work, he told her she had to attend a meeting about her surgery, her absence and modified duties and to bring a Union representative. He testified he had no further involvement with the Grievor.

When cross-examined, he again stated that he had asked the Grievor if she could return to work on modified duties. He recalls being asked to contact the Grievor at the same time as an investigative meeting was being held with Terry Townshend. He also stated that he had no knowledge she was put under surveillance. He responded no when asked by her if she was under surveillance. He was aware that Terry Townshend was under surveillance and had seen the tape of Terry Townshend where the Grievor was initially identified.

Mr. Lacey testified that this was the first occasion an employee off for surgery had been called back for modified duties. He also acknowledged that he and the Grievor were friends and he has been spoken to by her supervisor about spending extended time socializing with the Grievor. He confirmed that the Grievor had not called him while she was off, although he may have received updates from another employee who was a friend and co-worker of the Grievor as well as the Union representative. Mr. Lacey admitted that discipline had not entered his mind.

Mike Hewlett, the fleet manager for the GTAA, testified that the Grievor had reported to him and that they had a very good friendship and working relationship. He claimed he never told the Grievor not to make a WSIB claim. He also stated that after

her termination, he gave her a positive job reference. When the Grievor reported for work with the note from a physiotherapist, Mr. Hewlett sent her home after communicating with Ms. Maack. He claimed that the human resources department required medical information to diagnose her fitness for duty. Mr. Hewlett was aware that the collective agreement provides for an independent medical examination.

Dr. James Rathbun, a medical doctor and specialist in orthopaedic surgery, who specializes in hip and knee problems, was called by the GTAA in reply. Dr. Rathbun practices at Scarborough General Hospital. He reviewed the videotapes and read the medical reports. He agreed with Dr. Gordon that some patients get better sooner and some later – some return to work in a week and others may take six months. The single most important factor is the patient's motivation. Also a person's job may determine how long that person is off work.

When he looked at the videotapes, Dr. Rathbun did not have any information. After observing the tape of March 9, 2004, Dr. Rathbun stated the Grievor was walking normally when she entered the automobile and that her gait was normal. While pushing the shopping cart her weight was on both feet. When getting up on her toes and then down there did not seem to be a problem. When she continued walking there was no limp or lurch and the Grievor had a normal gait. Her entry into the car was also normal. On March 10, 2004, the Grievor's gait was normal and her getting into the car was normal. Dr. Rathbun acknowledged that on the March 17, videotape, the Grievor

favoured her right leg, limped, and her gait was not normal. While at the mailbox, the Grievor favoured her right leg. Her entry into the car was normal.

When cross-examined, Dr. Rathbun acknowledged that on March 17, 2004, the Grievor was definitely limping and there was nothing to suggest the Grievor was faking. She was favouring her right leg. He admitted that the shopping cart would assist the Grievor if she needed it, but when she walked into the store she did not appear to need a walking aide. He stated that part of recovery is getting active and carrying out minor activities. He admitted that when the Grievor got into the car, she put her right leg, which had been operated on, into the car first and that her weight would be on her left thigh.

When re-examined, he suggested that since the Grievor had surgery on her right knee, she would not have wanted to flex her knee to get into the car because it would be too painful; it would be more appropriate to pivot and then put her bottom on the seat, lift up her right leg and rotate it into the car, and then bring the left leg in. She did not appear to have much trouble. He found it difficult to understand why limping occurred on the third day when the Grievor appeared to be normal on the first two days. He also stated there was to be no prohibition from doing sedentary work.

Analysis

The relevant provisions of the collective agreement are:

Article 4 – Management Rights

> 4.01 The Union recognizes that it is the exclusive right and responsibility of the Employer to operate and manage its business and to

determine, inter alia, the location(s), schedule(s) of work, employee complement, method(s) and means of its operation(s) from time to time in accordance with its mandate.

4.02 Except as specifically provided herein, the provisions of this Agreement do not restrict or limit the rights typically recognized as vesting in management.

4.03 The Employer has the authority and responsibility to implement and promulgate reasonable and lawful rules and regulations to be followed by all employees for the purpose of, inter alia, maintaining efficient operations and fiscal responsibilities, including rules and regulations designed for the protection, health and safety of its employees in the workplace and the protection and safety of the public and users of the airport facilities and the security of the airport facilities.

4.04 The Employer shall exercise its rights in a reasonable manner and subject to and consistent with the provisions of the collective agreement.

Article 19 – Discipline

19.01 An employee may be disciplined for just cause.

19.02 When an employee is required to attend a meeting, to discuss his/her conduct for which the Employer is considering discipline or termination, the employee is entitled to have, at his or her request, a union representative present if more than the employee's manager is involved.

Because this is a termination case, it is incumbent upon the GTAA to establish on the balance of probabilities that the Grievor was dishonest in reporting her absences and for not being truthful when she was questioned about her absences resulting in a loss of trust which made it impossible to the GTAA to continue any employment relationship with her. For the reasons that follow, I have concluded that the GTAA has failed to satisfy its onus.

The Grievor was employed for twenty three years and was described by Mr. Tolton, a GTAA Manager, as a "well liked and respected employee". Mike Hewlett, her fleet manager, stated that he had both a good working relationship and an enjoyable working relationship with her. Mr. Hewlett went so far as to give her a positive reference after her termination when she was seeking other employment. The Grievor had worked for all of that period without any record of discipline and without any record of absenteeism.

The Grievor injured her knee at work on October 31, 2003 and was referred by the GTAA to a medical clinic at the airport where she saw Dr. Nagpal, whom the GTAA admitted was a former employee of the GTAA, and who, evidently, continued to work at the airport. Dr. Nagpal prescribed physiotherapy and the Grievor continued to work at the GTAA while undergoing physiotherapy. During that time the GTAA adjusted her workload. I infer from the evidence that notwithstanding the Grievor's injury and notwithstanding she was receiving physiotherapy, she continued to work from the beginning of November until February of 2004 when she was operated on by Dr. Gordon to whom she had been referred by Dr. Nagpal.

The Grievor was operated on, and attended physiotherapy on a daily basis. Dr. Gordon gave her a note to be off work for four weeks. Ms. Farkas' notes indicated she came for physiotherapy on February 24, 25, 26, 27 and March 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 18. She was initially seen on a videotape because her partner and fellow employee, Terry Townshend, was under surveillance by the GTAA.

There was an objection to the introduction of the videotape evidence and I determined that the videotape evidence was relevant and admissible. I note that there is some controversy among arbitrators as to whether surveillance evidence is admissible and also whether there must be, as a preliminary matter, reasonable grounds for an employer to conduct surveillance of an employee. More recently in Landolfi et al v. Fargione, (2006), 79 O.R. 767, (C.A.), an issue arose concerning video surveillance evidence. Cronk, J., writing for the Court, referred to an earlier case which had admitted video evidence and stated as follows:

> As well, the video evidence at issue in *Ball* was tendered by the defence both as substantive evidence and for impeachment purposes. Copies of the videos had been provided before trial to the medical experts for both parties, and the defence intended to introduce at trial medical evidence from physicians retained by the defence who relied on the videos in forming their opinions regarding the plaintiff's injuries. That is not this case.
>
> [51] In addition, the trial judge in *Ball* was alive to the fact that the admissibility of the videos in that case depended upon a threshold determination of relevancy and an assessment that their probative value exceeded their prejudicial effect. **He found that the videos were relevant to the evidence adduced before him concerning the plaintiff's capacity to "make certain movements" and ruled that the videos had sufficient probative value to their admission.** In contrast, in this trial, the trial judge made no ruling regarding the relevance of the video evidence from the perspective of the defence or, more generally, in relation to the matters in issue between the parties. Nor did he consider whether the probative value of the videos exceeded their prejudicial effect.
>
> [52] **Moreover, and perhaps more importantly, there is no principled basis for video evidence to attract a different, and more stringent, test for admissibility at trial than that which applies to any other form of evidence.** Admittedly, the impact of video evidence can be powerful. But this is true of many forms of demonstrative evidence or any evidence that establishes that a witness is being less than truthful. The test for the admission of the evidence remains the same. *(emphasis added).*

In my view, the decision of the Court in *Landolfi* resolves the arbitration controversy and I confirm my ruling at the hearing that the videos in this matter were relevant and had sufficient probative value to support their admission.

The video tapes should be considered against the background medical evidence which distinguished between a work environment and a home environment for the care of recovering patients. Dr. Gordon asserted that if patients could not control their environment, he would suggest they stay home and outlined the reasons why a patient would not return to work. He was of the view that the Grievor had a high level of pain and could not return to work.

Ms. Farkas also confirmed that being in the workplace differs from being at home and that patients at home will pace themselves and complete activities as tolerated. At home, a patient is able to take frequent breaks, whereas the workplace is repetitive and it is difficult to complete tasks at one's own pace or not complete them if they cannot be tolerated. Ms. Farkas, who saw the Grievor almost daily, confirmed the Grievor could not have returned to modified work before the end of her four week period after her surgery. At home she would have the ability to lie down and elevate her leg. Ms. Farkas also provided specific details as to why the Grievor could not return to work.

The Grievor was also of the view that she could not return to work. On March 17, 2004, the Grievor, in response to a letter from Mr. Hewlett, wrote to him stating that "I

am unable to provide you with confirmation that I am fit because I am recovering from surgery and am not yet fit".

There is not a shred of evidence that Dr. Gordon and Ms. Farkas conspired with the Grievor or each other in any way, to suggest that the Grievor was not able to return to work at the relevant time. Dr. Gordon testified that in his opinion the Grievor should have remained away from work for six weeks but that she was fearful of losing her job and requested a note from him validating her absence for only four weeks. The totality of the Union's medical evidence supports the Grievor and it is apparent that before terminating the Grievor the Managers at the GTAA did not rely on any medical evidence, but simply relied on their own observations of the video surveillance and their meeting with the Grievor. I now turn to consider more specifically the surveillance and the meeting.

The Grievor was initially observed on the Townshend surveillance leaving the physiotherapy clinic. Also on March 9th and 10th, when she was observed she was also at the physiotherapy clinic. Her continual attendance at a physiotherapy clinic ought to have at least prompted some further medical inquiry by the GTAA as to the status of her recovery, but did not. According to the Grievor, after physiotherapy she felt less pain and that is when she went to the various stores to obtain medication and groceries. Also, she was taking pain killers. The Union's medical evidence stated that when she reached up on tip toes in the store, which appeared to concern the GTAA, she used her calf muscles and not her knee which was not a problem.

The Grievor stated that in the afternoons she would exercise her knee and would rest. She also stated that on some days her knee would feel better, but on other days it would get sore. Recovery from surgery is usually subject to an ebb and flow of pain or discomfort. It is not precise, and pain and discomfort may vary from day to day which was confirmed by both the Grievor and also Ms. Farkas who testified that "pain, including inflammation, gait patterns, swelling and overall physical activity may fluctuate from day to day and a person may appear to walk all right on one day, but not on another". The video surveillance ought to have been assessed in that context.

Both Dr. Gordon and Ms. Farkas interpreted the videotape surveillance. Both confirmed that the Grievor's gait was not normal and also that she compensated in different ways for the pain in her knee. The GTAA called Dr. Rathbun in reply. He is a trained orthopaedic surgeon and testified that on March 9th and 10th, that the Grievor appeared to be walking normally.

There is no indication that Dr. Rathbun had been consulted prior to the Grievor's termination. And although the GTAA asserted that the Grievor was medically fit to return to work to perform modified duties, no medical evidence was called in support of its position until Dr. Rathbun was called in reply to the Union's evidence. I determined that the GTAA could not split its case by calling reply evidence to support the GTAA's medical conclusions which were made at the time of termination. Clearly, there would have been no opportunity for the Union to respond to Dr. Rathbun's reply evidence. However, I permitted Dr. Rathbun to respond to the Union's specific evidence

concerning the video surveillance. For the most part, Dr. Rathbun's evidence suggested that on March 9th and 10th, the Grievor appeared to be walking normally and that when she got in and out of the car on those days and on March 17th, she appeared to get in and out of the car normally.

However, Dr. Rathbun agreed that on March 17th, the Grievor was limping although he could not explain why she was limping on that day and not on the earlier days. However, the Grievor provided an explanation for limping on March 17th. Quite simply it was the day she returned to work and had not been given modified duties. Also, because she was at work she did not take pain killers since they might negatively affect her in the work place. I note that Dr. Rathbun also stated that there was nothing on the tape to indicate that on March 17th, the Grievor was faking, although the GTAA relying only on the video took the position that on March 17th, the Grievor was aware of the video surveillance which implied that she was faking a limp.

The other surveillance issue concerns the Grievor's driving to the airport. The Grievor had been cleared to drive by Dr. Gordon prior to that day. She claims she was asked to drive to the airport by a friend to pick someone up. The friend would not drive to the airport. After that drive she iced her knee. However, the Grievor had been medically permitted to drive and again, the one occasion where she was seen driving must be viewed in the context of the medical evidence which makes a distinction between the home environment and the work environment. Clearly based on the medical evidence of both Dr. Gordon and Ms. Farkas, the Grievor was not fit to drive in a work

environment where she had no control over her work and where she might be called upon to drive on demand or on a more regular basis, which is clearly distinguishable from the one "home" drive where she was seen on the video surveillance. Moreover, while at home, the Grievor was taking pain killers which according to her testimony she did not take at work and which would have prevented her from regular driving at work.

But the video surveillance is also significant in that both on March 9th and 10th, apart from the one excursion to the airport, the Grievor remained in her home for most of the day. She did not fit into the profile of people abusing sick leave symbolized by Mr. Tolton's description of a person playing golf or a person who is frequently absent. The Grievor does not appear to have been engaged in any other kind of frivolous non work activity symbolized by the golfer. But it is also of significance that prior to the Grievor being terminated surveillance was conducted on March 20th and 21st, and on both of those days the Grievor did not leave her house.

That the Grievor remained at home for lengthy periods and did not engage in outside activities while under surveillance did not concern the GTAA nor was it factored into the GTAA's decision. Moreover, the surveillance demonstrated she was limping on March 17th, prior to her termination and Ms. Maack was made aware of that fact but the GTAA interpreted her limping as faking, without any basis whatsoever. Also the lengthy periods that the Grievor remained at home ought to have prompted further medical inquiries, but, at the very least, the readily apparent limping and abnormal gait on March 17th, after the Grievor had been at work and when she did not take pain killers certainly required some further medical inquiry.

After considering both the Union's medical evidence and the GTAA's medical evidence, I find that the video surveillance does not establish on the balance of probabilities that the Grievor was medically fit to return to work to perform modified duties. I prefer the Union's view of the video surveillance. Since both Dr. Gordon and Ms. Farkas dealt directly with and examined the Grievor, they were in a position to assess her movements and her gait on the surveillance tapes. Ms. Farkas had very direct and constant contact and with the Grievor during the period of her rehabilitation and was able to more fully understand and explain the Grievor's limitations. There is no evidence whatsoever, as I have indicated earlier, that either Dr. Gordon or Ms. Farkas in any way conspired together or with the Grievor to provide less than an independent and truthful explanation of her as to how they viewed her on the videotape. I prefer their evidence to that of Dr. Rathbun who at no time examined the Grievor and was not familiar with her.

The videos merely show the Grievor walking for short periods when picking up some groceries and medication after receiving physiotherapy. She also drove on one occasion. The videos did not show her doing any form of heavy or difficult activities such as heavy lifting or the like. She was progressing in her healing which permitted limited physical activity, but that she had attained a level of healing enabling her to return to the demands of any form of work at the GTAA are clearly not ascertainable on the videos. The videos are clearly consistent with her explanation that she felt better after physiotherapy and was on pain killers. Her testimony that she had not sufficiently healed to return to work is completely corroborated by Dr. Gordon and Ms. Farkas. Moreover,

the videos demonstrate that there were lengthy periods, including two whole days, when the Grievor remained at home and are consistent with her testimony that she remained at home and rested her knee.

I am also of the view that the extent to which a person may modify their gait or their posture to compensate for an injury is outside the expertise of an ordinary lay person. Shifts in posture and gait to accommodate an injury may or may not be readily apparent. Such shifts may also be subtle and not apparent to the untrained eye. I am not prepared to adopt any conclusions from the opinions derived from the videotapes, of the investigators or management members of the GTAA, concerning the Grievor's ability to return to modified duties. They were not doctors and they ought not to have arrogated to themselves the medical knowledge which was necessary to assess the medical condition of the Grievor based on an examination of the tapes. They ought, at least, to have consulted a person with the relevant expertise such as a medical doctor and to have had that person assess the videotapes. On balance, I prefer the evidence of Dr. Gordon and Ms. Farkas that the videotapes when properly and medically assessed do not establish that the Grievor was fit to return to work to perform modified duties as the GTAA inferred.

Also, the Grievor testified that she was in touch with Mr. Lacey and Mr. Hewlett regularly while she was absent, particularly to report her progress. Mr. Hewlett did not deny that the Grievor kept in touch but Mr. Lacey, while denying that the Grievor called him, indicated he received updates from another employee, who was a friend of the

Grievor and may have received updates from the union representative. Mr. Lacey's response was tentative and, on balance, I prefer the evidence of the Grievor that she updated the GTAA on her progress. But, at the very least, Mr. Lacey's testimony indicated that he was receiving updates about the Grievor's condition which demonstrates both that the GTAA was aware of her post surgical progress, and that the Grievor, as a responsible employee, was ensuring that the GTAA was kept aware of her progress and would have been aware that she was regularly attending the physiotherapy clinic.

After seeing the videotapes, the Grievor was contacted and asked if she could provide a doctor's note as to her medical condition. Initially, unable to obtain a note from Dr. Gordon, the Grievor obtained a note from Ms. Farkas, her physiotherapist. The Grievor was seen on the videotape attending a physiotherapy clinic so that members of management would have been aware that the physiotherapy note was from a legitimate source, who was treating the Grievor and who was familiar with the Grievor's medical condition. That note stated that the Grievor "would significantly benefit from one more week off work".

The GTAA insisted that the Grievor obtain a doctor's note and rejected the physiotherapist's note. I find that rejection in favour of a doctor's note disingenuous given the GTAA's evidence about doctor's notes. When cross-examined, Ms. Maack stated that "the GTAA sees doctors' notes all the time and that "doctors write what the employees want". Mr. Tolton, when cross-examined, stated that in his "experience

there are a number of doctors who freely give out medical certificates for absences from work". Both GTAA witnesses had a cynically stereotypical view of doctors, which according to them was based on their experience, yet the GTAA rejected a physiotherapist's note, while insisting on a doctor's note. I find that the GTAA's reason for rejecting the physiotherapist's note was not credible. The GTAA had before them a note from a credible physiotherapist which members of management chose to ignore. That note put them on notice of the possibility that the Grievor's medical condition was not what appeared to them on the videotapes and at the very least ought to have prompted further medical inquiries as to the Grievor's condition. In my view, the GTAA's rejection of the contents of the physiotherapy note is a further indication of a selective approach concerning the Grievor's actual medical rehabilitation and displayed an ostrich approach particularly to her physiotherapy and the physiotherapist's note. Given the Grievor's exemplary attendance record and her known surgery, the GTAA's rejection of the physiotherapist's note was not warranted nor was it credible.

The Grievor next returned with a note from Dr. Gordon. According to the Grievor when she informed Dr. Gordon he became angry that she was being compelled to return to work and called Mr. Hewlett. Counsel for the GTAA asked that I reject the Grievor's account of what had transpired in Dr. Gordon's office concerning that phone call. However, Mr. Hewlett was called in reply and he was not asked to deny, nor did he deny receiving a phone call from Dr. Gordon. Accordingly, after considering all the evidence in that regard, I find that Dr. Gordon did call Mr. Hewlett and received no response.

The Grievor explained her concern to Dr. Gordon that she might be fired for not returning to work and as a result of that explanation he provided her with the return to work note that is referenced earlier. Ms. Maack was of the view that Dr. Gordon's note was inconsistent with the Grievor's activity on the video and did not contact him although that the note stated that "with respect to Mr. Hewlett's letter, it takes 6 weeks to physiologically heal. If you have questions, please call". Notwithstanding my ruling restricting Dr. Rathbun to reviewing the videotape, he advised counsel to the GTAA, without objection from the Union, that he had reviewed the medical reports and videotapes and he agreed "with Dr. Gordon that some patients get better sooner and some later – some return to work in a week and others may take six months"

In the face of all the medical evidence, Ms. Maack and Mr. Tolton made their own lay assessments of the videotapes and declined to contact Dr. Gordon, despite an invitation to do so. No doubt their refusal to contact him arose because of their view of doctors which I have described earlier. Again, they made what I have found to be an erroneous assessment of the Grievor's medical condition and particularly the videotape evidence. The note stated she still has swelling and is recuperating but it also said "no driving, no walking greater than 10 minutes". Since the videotapes, according to Ms. Maack, had shown the Grievor walking for longer than 10 minutes after her physiotherapy and had also shown her driving, Ms. Maack and others determined that Dr. Gordon's note contradicted the videotapes. None of the involved management members made the distinction between being in a work environment where an employee is subject to the demands of the employer and the job, and rehabilitation in a home environment

where an employee is free to take pain killers and to rest and exercise as may be necessary.

Nor did they consider that while a person is in rehabilitation and progressing that person is capable of certain limited activity, including walking, which does not mean that he/she has sufficiently healed so as to be able to come back to work. Recuperation is not the equivalent of recovery and limited post surgical activity while recuperating is not indicative of a capacity to perform work related duties – even modified duties. Certainly, the totality of the videotapes suggested that the Grievor remained at home for lengthy periods of time where she could rest her knee.

Again, the Managers of the GTAA ventured into a medical area for which they had no training and arrogated to themselves a medical assessment which lacked the type of knowledge which is reflected in Dr. Gordon's and Ms. Farkas' testimony. Their conclusions were overly simplistic and I reject their view of both Dr. Gordon's note and the videotapes. Again, I find that Dr. Gordon's reference to a patient taking six weeks to physiologically heal and his reference that the Grievor still had swelling and was recuperating ought to have put them on notice that they should obtain further medical advice – if not from Dr. Gordon, then from another independent doctor. On that note, I now turn to the collective agreement.

Article 24.07 provides as follows:

24.07 Sick Leave with Pay

(a) When an employee is unable to perform his or her duties because of illness or injury, excluding absences contemplated by Article 24.04, the employee will be granted sick leave with pay, subject to the provisions of Clause 24.07(e), and provided the employee satisfied the Employer of such condition in such manner and at such time as may be determined by the Employer. Subject to the provisions of Clause 24.07(b), unless otherwise informed by the Employer, a statement signed by the employee stating that s/he was unable to attend to perform his or her duties because of illness or injury shall be considered as meeting the requirements of this Clause.

(b) Where there is a legal duty on the Employer to accommodate an employee due to illness, injury or disability, in order that the Employer may objectively assess the accommodation, if any, the Employer may request a statement from the employee's attending physician (or Specialist if required by the Employer) verifying the medical diagnosis, including the need for the current period of absence and a prognosis stating the anticipated duration of the absence. The costs associated with obtaining such a statement shall be borne by the Employer.

(c) Notwithstanding the provisions of Clause 24.07(a), a statement signed by the employee may not be acceptable under the following circumstances:

(i) where the Employer has reasonable cause to suspect an abuse of sick leave; or

(ii) where the employee is absent for five (5) or more working days or has used more than ten (10) days of sick leave in a fiscal year.

In the circumstances described in (c)(i) and (ii), the Employer may request a statement from a qualified medical practitioner (including a chiropractor, where applicable) to verify the reasons for the employee's absence. The costs associated with obtaining such a statement shall be borne by the employee.

Article 24.07 (a) provides that an employee is entitled to sick leave pay upon the mere signing of a statement that he/she was unable to perform his or her duties because of illness or injury. The mere signing of a statement stating that he/she was unable to perform his or her duties because of illness or injury is sufficient to meet the requirements of Article 27.04(a). It is apparent that the GTAA accepted Dr. Gordon's note on behalf of the Grievor as entitling the Grievor to be paid sick leave. I also note the use of the word "shall" in Article 27.04(a) compared to the use of the word "may" in Article 27.07(c) indicates that the entitlement is mandatory once the statement is signed.

However, Article 24.07 (c)(i) contains a procedure permitting the GTAA where it has "reasonable cause to suspect an abuse of sick leave" to challenge the employee's claimed entitlement by obtaining an opinion or statement from a qualified medical practitioner verifying the employee's absence. Clearly the parties put their mind to the use and possible abuse of sick leave and also to a process for verifying the reasons for the employee's absence. Notwithstanding that the process is discretionary, I find that the failure to proceed to verify the suspected sick leave abuse in accordance with Article 24.07, in these circumstances, constituted a failure by the GTAA to properly exercise its discretion and was therefore a violation of the collective agreement such that the Grievor's mandatory entitlement under Article 24.07(a) continued to be operative.

Further, I find failure to obtain further medical evidence on the grounds that it took too long is not credible. There was sufficient medical evidence on hand to indicate that the Grievor's claim for sick leave was not abusive; there was the undisputed work

place injury, the undisputed reference by Dr. Nagpal, to whom the GTAA had referred the Grievor, and Dr. Nagpal's reference, in turn, to Dr. Gordon. There was the undisputed surgery and attendance at physiotherapy, there was the physiotherapist's note which was both overlooked and undisputed, and there was the Grievor's letter in writing to Mr. Hewlett that she could not return to work, as well as evidence of her limping. All of this should have put the GTAA on sufficient notice, even apart from Article 27.07(c), to obtain a further medical opinion.

In addition, Ms. Newman, a Union vice-president, who had attended the March 19th, meeting with the Grievor, wrote to Ms. Maack on March 22, 2004, before the Grievor was terminated, stating that the GTAA "should have asked for a third party assessment through the WSIB for information regarding her recovery", and while the collective agreement did not limit the GTAA to a WSIB assessment, Ms. Newman's letter put the GTAA on notice that it ought to obtain third party medical advice before terminating the Grievor.

Moreover, I infer from the evidence that the GTAA had access to Dr. Nagpal, a former employee who practices at the airport, and if he had been unavailable to consult or had a conflict, surely he could have referred the parties to an independent medical practitioner for a proper and early opinion. The evidence clearly indicates that the GTAA made no effort whatsoever to discuss the situation with Ms. Farkas, or Dr. Gordon, or to obtain an independent medical opinion. Given the medical circumstances of a loyal, twenty-three year employee, some minimal effort should have been made to obtain an

independent medical opinion. The Grievor has given the GTAA twenty three years of service; certainly the GTAA, in return, could have found a few minutes for a phone call. I am unable to accept the GTAA's evidence that it took too long. There was not a modicum of effort to obtain another opinion. Also, if the GTAA really believed, as its evidence indicated, that obtaining a medical opinion takes too long, why have Article 24.07(c)(i) in the agreement if it is only going to be ignored.

The GTAA relied upon the videotapes and also the investigative meeting and I now turn to consider that meeting. The Grievor attended the investigative meeting where she was confronted by Ms. Maack and other members of the GTAA. The Grievor was under the impression that she was attending to discuss modified duties, whereas the GTAA managers attended having seen the videotapes, which neither the Grievor or the Union were aware of, for the purpose of investigating the Grievor for sick leave abuse. Ms. Newman described the tone of the meeting as being "stressful", "like an interrogation session" and the "first of its kind that she had ever been to."

Mrs. Maack indicated that in addition to the videos there were a number of instances in the meeting of March 19, 2004 where the Grievor was not truthful. First, Mrs. Maack claimed that the Grievor lied in the meeting when she indicated that she was progressing week by week but had been seen limping on March 17, 2004, when she returned to work, notwithstanding she had not been limping when she was seen on the earlier videos. Dr. Rathbun, who testified for the GTAA, testified that there was no evidence on the March 17th tapes that the Grievor, who was seen limping, was

malingering. At the meeting, the Grievor told Ms. Maack, according to her assistant's notes, that she might walk normally with a pain killer. In her testimony, the Grievor also stated that she felt better after physiotherapy and accordingly, could walk more normally and also she could walk better when on pain killers. When she attended work on March 17th , she did not take pain killers because it might prove to be unsafe. Also, Dr. Gordon confirmed that on March 16th, 2004, when he examined the Grievor her knee was swollen.

When all of the evidence is reviewed, I find that the Grievor did not lie. Mrs. Maack, who was aware the Grievor worked on March 17th, 2004, did not consider that on the earlier videos the Grievor had just left physiotherapy, but that on the March 17th, 2004 video she had just left work where she had not been given modified work which may have affected her. Also, other observations made that day occurred while she was working. Ms. Maack made no inquiry as to why the Grievor appeared to walk normally on the earlier videos but limped on March 17th . She also did not consider that people heal at varying rates; that is, they might feel better one day but regress the next day - healing is a fluctuating process. I find Ms. Maack arrogated to herself a medical assessment of the Grievor's condition which was both superficial and lacking in any basic medical understanding of the healing process. She jumped to conclusions which were unwarranted and unreasonable. She condemned the Grievor for appearing to walk normally and then condemned her again for limping.

Second, Mrs. Maack condemned the Grievor for stating that she had used a cane since Ms. Maack had not observed the Grievor walking with a cane. In her assistant's notes, Ms. Maack is recorded as asking the Grievor if it was "worse in the beginning". The Grievor responded that she "had a cane". Later in those same notes, the Grievor is noted as responding to a question from Ms. Maack as to whether she could walk as follows:

> "CB First wk w cane
> Wed. of 2nd week w/o a cane (tried)"

Ms. Newman's notes of the meeting state:

> "lst few days of surgery had a cane"
> Improved

And later those notes indicate the Grievor's response to questions about walking as follows:

> "MM After lst week?
> Yes with a cane
> 2nd a bit without a cane".

Also, on April 2, 2004, long before the issue of a cane arose, which it did in these proceedings, Ms. Farkas wrote a note on the Grievor's behalf, referring to her attendance at the physiotherapy clinic on February 20, 2004, and described the Grievor as "ambulating with a straight cane".

Based on the evidence, I determine that the Grievor did not lie, nor was she inconsistent when she testified that she walked with a cane. The videos were taken at the end of the two week period when she used the cane "a bit" and where she had just left physiotherapy when she felt better. Her operation was on February 24th, 2004 and her

statements about using a cane in the first week and a bit on the second week are entirely consistent with not using the cane on March 9th and March 10th, when she went to physiotherapy which made her feel better. It ought to have been perfectly apparent to Ms. Maack that the Grievor was not lying. I do not find Ms. Maack's evidence on this point to be credible.

Third, Ms. Maack also testified that the GTAA did not expect the Grievor to be home all the time, yet condemned her for going to the drug store and to Wal-Mart. As the GTAA did not expect her to be home all the time, then surely the GTAA anticipated she would engage in some activity outside the home which likely included some walking. I note that the Grievor at the meeting, while expressing that she did not feel completely healed so as to perform her regular duties, admitted that she had gone for physiotherapy and to the drug store for medication. Also, the Grievor was condemned for reaching up while shopping, however, the medical evidence supports the Grievor's ability to reach up notwithstanding her surgery. Certainly shopping for necessities for a limited period was not beyond the range of activities that could be anticipated. Also, when the Grievor went shopping, it was after her physiotherapy, when she felt better. She also took pain killers. Notwithstanding the GTAA's expectation that she not be home all the time, she was condemned for walking. I note also that all of the walking on the videotapes was for a limited period in the mornings after her physiotherapy. The Grievor testified that she remained at home resting for the balance of the day after physiotherapy, other than the driving incident which I shall refer to later. On the videotapes, the Grievor did remain at home in the afternoons and remained completely at home on March 20th and 21st when

she was also under surveillance. Also, the videotapes were taken at the end of the second week after her surgery and it would normally and reasonably be expected that she would be making some post surgery progress to enable her to do some walking.

Fourth, Mrs. Maack maintained that Dr. Gordon's note indicated the Grievor could not work for more than 10 minutes, but the Grievor had walked for more than 10 minutes on the video (actually the longest period on the videos that the Grievor is shown walking is for nine minutes, although inference may be drawn that she walked inside the store when she was not videotaped). Ms. Maack rejected any notion of responding to Dr. Gordon's invitation to discuss the matter and immediately concluded that both the Grievor and Dr. Gordon were not being truthful. Again there was a failure to understand the distinction made by Ms. Farkas and Dr. Gordon between walking and driving in a work environment while under a supervisor's direction and control where repetitive activity might be harmful to the healing process, and being in a home environment where a person healing could exercise self control according to the state of his/her pain or discomfort and rest as required. Also as the Grievor indicated, she rested and took pain killers at home which was an unsafe thing to do at work.

Ms. Maack compared the Grievor's activities on tape with the instructions in Dr. Gordon's note of March 16, 2004, and found the activities and note to be inconsistent. The note's restrictions as to what the Grievor could do in a work environment, in my view, are consistent with her observed activities in a non-work environment when she was able to rest and where she was on pain killers. Again, the GTAA did not expect the

Grievor to be at home all the time. What then did the GTAA expect the Grievor could do? Surely the GTAA must have anticipated some activity and some post surgical progress. At the very least, the totality of evidence should have caused the GTAA to make further enquiries either from Dr. Gordon or from an independent medical source. To act in the precipitous way that it did was contrary to the Grievor's past work history and attendance, and to her explanation at the meeting.

The fifth issue concerns the Grievor's driving to the airport. The Grievor stated at the meeting that the driving restrictions had been lifted by Dr. Gordon. Moreover, she was also candid to admit that she had also driven to see her daughter because of a family emergency, which the GTAA had not observed on the tapes. Again, the one incident of driving for a brief period at the request of a friend differs from the possibility of repetitive driving and the repetitive getting in and out of a motor vehicle that might occur in a work environment. The Grievor claimed that on that on that occasion she returned home and iced her knee. Further, the condemnation of the Grievor for the act of driving was superficial and might readily have been cleared up by the GTAA speaking to either Dr. Gordon or an independent medical source. Also, the GTAA had in hand Ms. Farkas' note suggesting she should be off work for one more week and yet no reasonable attempt was made at the meeting or after to obtain an explanation from Ms. Farkas for the driving. The GTAA simply jumped to an unwarranted conclusion about the Grievor's ability to drive at work. The single act of driving did not mean she could drive at work where she might be required to drive on a repetitive basis.

Sixth, Ms. Maack stated that the Grievor could have said she was in the healing process and what she had done was consistent with both her physiotherapy and surgeon's advice. At the time, the GTAA had the physiotherapist's note that the Grievor should be off for one more week. Also, the notes of Ms. Maack's assistant stated as follows:

> "MM. Did they say you could go back to work?"
> "CB No"

Given the totality of the circumstances known to the GTAA about her surgery as well as her consistent physiotherapy, and Dr. Gordon's earlier note that she could return after four weeks, I am unable to conclude that the GTAA was unaware that the Grievor was acting in a manner that was consistent with the medical advice she had received and I do not accept Ms. Maack's evidence on that issue. Certainly her response at the meeting was consistent with receiving advice that she could not return to work.

Ms. Maack testified that at the meeting on March 19, 2004, if the Grievor had acknowledged wrongdoing and showed remorse or apologized, she would have given her another chance. Ms. Maack then stated that the Grievor said she was sorry but did not ask for modified work. I infer from Ms. Maack's evidence that she was attempting to demonstrate that the GTAA either exercised some discretion or was compassionate in dealing with the Grievor. Ms. Newman, the Union representative, testified that the Grievor was told her job was on the line. As a result, Ms. Newman requested a break and had a discussion with the Grievor. After the break, according to Ms. Newman, the Grievor apologized. The notes of the meeting made by Ms. Maack's assistant which were filed indicate there was a break. When the Grievor and Ms. Newman returned, Ms.

Maack is recorded as asking if there was anything she wanted to say. The assistant's notes refer to the Grievor's response as follows:

> "CB Not really, didn't know I could be placed on mod. Duties, won't question doctor, work related injury, should've asked sorry.

Based on all of the evidence, I determine that the Grievor did apologize. Also, in context, the Grievor had returned to work on March 17, two days before with a note that she had extracted from Dr. Gordon under the perceived threat of losing her job. That note was in response to Mr. Lacey's telephone conversation with the Grievor about performing modified duties and Ms. Maack was aware of the note and that the Grievor had returned to work to perform modified duties. Accordingly, there was no reason for the Grievor to ask to perform modified duties which Ms. Maack claimed was a requirement in addition to the apology. I find from all of the evidence that the GTAA was not prepared to exercise its discretion and give her another chance, nor was the GTAA compassionate.

I also interpret the Grievor's evidence about modified work, unlike Mrs. Maack who interpreted the Grievor's comments as not being aware of modified work, not as a denial of knowledge about modified work in general, but as being of the opinion, based on her conversations with Dr. Gordon, whom she did not question and who instructed her to be off work for at least four weeks, that she, personally, was unable to perform modified work. I note also that in the period after her injury and before seeing Dr. Nagpal that the Grievor performed modified work, so that it is highly unlikely she was not aware of modified work. Her statement at the meeting was based on her doctor's explicit advice that she could not return to any work for four weeks.

After reviewing all of the evidence surrounding the meeting, I determine that the Grievor was of the view that the meeting was to discuss modified duties. She had not anticipated that she was to account for her daily activities and accordingly was unprepared for the specific questioning. I conclude that she responded to the GTAA's questions in an honest and straightforward way, bearing in mind her surgery, the medical advice that she had been given and the way she felt. She did not malinger, nor was she dishonest.

I find that the GTAA came to the meeting with a preconceived notion that the Grievor was dishonest. The GTAA gave the Grievor no quarter – the GTAA did not delve into her responses with any depth and jumped to unwarranted assumptions, e.g. that her limping on March 17th, after working, was inconsistent with what appeared to the GTAA to be normal walking on the earlier videos. Answers that were favourable to the Grievor were not interpreted to her benefit.

All in all, I conclude that the investigative meeting was superficial, that unwarranted conclusions were drawn, that the GTAA entered into the meeting with preconceived notions, and that the meeting, as Ms. Newman stated, was an interrogation and not a genuine or reasonable attempt to discover the truth about the Grievor's condition. I find that the GTAA's inferences or conclusions about the meeting were not reasonable or credible.

There are two additional issues with respect to the termination that require some further discussion. The first concerns the Grievor's seniority and the second concerns the modified work that the Grievor could have performed. Ms. Maack testified that before terminating the Grievor, she looked at the Grievor's years of service, her discipline record and any extenuating circumstances. She acknowledged the Grievor was a satisfactory employee. She stated that the GTAA has a code of conduct and an employee may be terminated even where there is a first offence. Mrs. Maack acknowledged that she did not speak to Mr. Hewlett, the Grievor's manager, about the Grievor's work. Mr. Lacey, who was also one of her managers, testified that after he telephoned the Grievor about returning to work he had nothing further to do with the matter. Ms. Maack and the GTAA were required to act reasonably under the collective agreement. Seniority and a good work record are matters that an employer is required to weigh in the balance before disciplining or discharging an employee. And while there are obvious instances where an employer may terminate an employee for a first offence such as assault, the alleged sick leave abuse, in these circumstances, is not one of those instances given the Grievor's work history.

In this case, the Grievor, being a very senior employee was entitled to have her seniority and work record weighed in the balance, even assuming she did not return to work from her surgery as the GTAA suggested. There was a positive duty on the GTAA to consider her seniority and work record including her work performance. There was also a positive duty on the GTAA to consider why corrective discipline such as a warning or a lengthy suspension might not be salutary in these circumstances.

Ms. Maack and the GTAA, in my view, did not consider the Grievor's seniority, her exemplary record or her work performance. They did not consult with either Mr. Lacey or Mr. Hewlett, who worked more closely with the Grievor, about her work performance and the type of work she did. Any consideration of the Grievor's seniority and work performance in my view was so superficial as to be non-existent. I do not find Ms. Maack's efforts to make an assessment of the Grievor's work history to be reasonable or appropriate in the circumstances. I find her assessment of the Grievor to be completely lacking in credibility and I categorically reject her evidence that she made any assessment of the Grievor's circumstances whatsoever. This is a case where there was a complete rush to terminate without any credible, proper or appropriate consideration of the employee involved. There was a complete failure by the GTAA of its duty to consider the Grievor's individual work background and to explain why it did not consider a lesser penalty.

Second, Ms. Maack acknowledged the Grievor was a "satisfactory" employee while Mr. Hewlett, her manager, testified that he had a good working relationship with the Grievor and she was a well liked and "respected" employee. She also stated that the Grievor's work consisted of working in an office at a desk and going out to look at motor vehicles, but she was not really certain or aware of all her duties. When cross-examined, she indicated that she also was aware the Grievor had a desk job but that Mr. Gordon, her manager, would be the best person to speak to about her work. Mr. Gordon was not called to testify.

Ms. Maack also claimed she could have found work for the Grievor, but nowhere did she articulate what work was available. When she was cross-examined and told there was a difference between driving at home and driving at work, Ms. Maack claimed that driving at work could be done by other employees.

Ms. Farkas testified that the Grievor could not have returned to modified work before the end of the four week period after surgery. In her note of March 12, 2004, Ms. Farkas recommended a graduated return to work schedule. Graduated return to work schedules comprise working shorter hours to begin with and then gradually increasing those hours. Ms. Farkas stated the Grievor could not change her position, walk long distances or walk for long periods. If her leg was down, it would be more prone to swelling because of the gravity pull which would increase the inflammation and swelling, and frequently changing positions would cause stress to the knee as a result of getting up and sitting down. When Dr. Gordon examined the Grievor on March 16, 2004, after the alleged incriminating videotapes, he found that her knee was still swollen and that she continued to have pain.

Returning an injured or disabled employee or an employee who has had surgery is not an easy task. There is always the risk of further injury if an employee is returned to work too early or if the employee returns to an inappropriate job. It requires some delicacy and sensitivity when matching a returning disabled, injured or post surgical employee to a job because of the inherent risks. Ms. Farkas testified that when a patient

is closer to his/her return to work, she would attempt to assess the return to work activity according to the patient's job.

After assessing all the evidence, I am at a loss to understand what modified jobs the GTAA intended for the Grievor. Ms. Maack did not know in any reasonable detail what work the Grievor had performed prior to her surgery. She was also completely unaware of her capability to perform other work nor did she indicate in any detail what kind of work she would have had the Grievor perform. Further, she lacked any sense or sensitivity as to what work the Grievor could perform given her specific medical condition. What was the modified work that the Grievor could have reasonably performed at the time, given her post surgical condition? The managers at the GTAA who testified lacked the knowledge and experience to match the Grievor to a modified job and it is simply too simplistic to state that a post surgical employee, who walked for a short period or who drove on one occasion, could have performed modified work on a regular basis without exposing him/herself to further injury. The GTAA had a responsibility to provide evidence as to what work the Grievor could have performed. Ms. Maack did not have sufficient knowledge of the work the Grievor had performed or the nature and extent of her post surgical medical assessment or a proper assessment of the work the Grievor could have performed. I am unable to determine what modified work there was that the Grievor could have performed. I note further that when the Grievor returned to work on March 17th, 2004, she was not given modified duties.

Further, the GTAA's generalized evidence that there was work to be performed lacks the sensitivity and delicacy required by an employer to match a returning injured post surgical employee to the work place. I accept Ms. Farkas' evidence that a person returning to work post surgery requires an assessment of the return to work activity. That assessment did not occur in this case. Again, Ms. Maack was unaware of the work that the Grievor had performed and was also unaware of any work the Grievor could have done given her surgery and post-operative condition. I find that the GTAA has not established on the balance of probabilities that there was a modified job or modified work activity that the Grievor could have performed given the state of her post operative condition. In the result, I determine that the GTAA did not act reasonably and further there was not cause to terminate the Grievor for not performing modified work.

Conclusions

This matter seems to me to be beyond dispute. It comes to this. The Grievor injured her knee and tried to work with that injured knee. When it became too difficult she sought medical assistance and was ultimately operated on by Dr. Gordon. Dr. Gordon advised her to stay home and gave her a note indicating she would be off work for four weeks. She began physiotherapy and diligently attended physiotherapy on a continual basis. Initially she used a cane and as she improved she gradually gave up using a cane. For the most part she remained at home stopping on two of several occasions to pick up some basic necessities while on the way home from physiotherapy. While at home she took pain killers and after physiotherapy she was able to walk more

comfortably. She drove on one occasion to the airport to assist a friend and on another occasion because of a family emergency. At all relevant times, she was acting under Dr. Gordon's instructions.

She was aware that Mr. Townshend was suspended on March 10, 2004, and when she was contacted by Mr. Lacey, she became fearful of losing her job and requested a note from Dr. Gordon, who initially balked, but when told she might lose her job gave her a note permitting her to return to work with certain limitations. She returned to work but was not given modified duties and did not take painkillers on her return because it was unsafe, which resulted in her limping.

Both Dr. Gordon and Ms. Farkas were independent and respected witnesses. There is no evidence that they in any way conspired with the Grievor in order to assist her in remaining off work. They assessed the videotape evidence and testified it was consistent with the Grievor's post surgical recuperation. They testified that the home and work environment differ and Ms. Farkas quite independently wrote to the GTAA indicating the Grievor should be off work for one week longer. There is also no evidence that the Grievor in any way manipulated either Dr. Gordon or Ms. Farkas to assist her in remaining off work. Also, given the Grievor's past record of attendance including working in the months prior to her operation with an injured knee, coupled with her testimony, I find she was not the kind of person to malinger or to manipulate the health care providers.

At the meeting with the GTAA, the Grievor had not anticipated the exact nature of the meeting, but on close examination I find that she answered the questions asked in a straightforward and honest matter, notwithstanding the "harsh" nature of the investigation referred to by Ms. Newman. I determine that the Grievor was an honest and diligent employee, that she followed her doctor's instructions and that she at no time malingered or attempted to wrongfully obtain sick benefits.

It is typical of collective bargaining regimes, when it comes to matters of discharge and discipline that where an employee has a poor disciplinary record, it will weigh in the balance when employers decide what penalty shall be meted out. Where an employee has a good disciplinary and absenteeism record, an employee is entitled to draw on that well of responsible behavior when discipline or discharge is considered. In this case twenty-three years of exemplary behaviour went unnoticed by the managers of the GTAA. So too did the period between November, 2003, and February, 2004 go unnoticed when the Grievor had a work related injury as an excuse to be absent or malinger; she did not use her injured knee as an excuse not to come to work at that time.

There was also a failure to consider that the Grievor over a twenty-three period did not fit into Mr. Tolton's profile of a person who calls in sick and then goes golfing or a person who abuses sick leave. Quite to the contrary, the Grievor's attendance and disciplinary record were exemplary for twenty-three years, including the period she worked with an injured knee while taking physiotherapy. The Grievor's work record and behaviour were the very antithesis of employees who abuse sick leave. Again, that

record and behavior were matters that she was entitled to draw on for consideration by the GTAA and were matters that an employer acting reasonably as the GTAA was required to act should have considered before terminating her. I find that the GTAA did not consider the Grievor's exemplary work record when its managers decided to terminate her. At the very least, given her outstanding work record, no explanation was offered as to why the GTAA did not obtain an independent medical examination and did not consider that corrective action by way of discipline was not the better course of action rather than outright discharge.

The GTAA has failed to demonstrate on the balance of probabilities that the Grievor wrongfully claimed sick leave benefits and without the slightest hesitation, I determine that the GTAA did not act reasonably and that there was not cause to terminate the Grievor.

The Union further argued based on all the evidence that the GTAA acted in bad faith while the GTAA submitted that its conduct was justified in the circumstances. In addition to Article 4 of the collective agreement which requires the GTAA to "execute its rights in a reasonable manner", the *Canada Labour Code*, R.S. c. L-1, s. 50, requires the parties to bargain collectively and in good faith. Good faith, in my view, does not cease once the bargaining ends and a collective agreement is signed. It would be completely antithetical to the Code to bargain the provisions of a collective agreement in good faith and not administer them in the same manner. Accordingly, I find that there is an implied obligation in the GTAA to administer the collective agreement in good faith.

Turning to the conduct of the GTAA, I find that its conduct throughout was both unreasonable and in bad faith. I determine that it acted in bad faith based upon two separate grounds. The first is that it associated the Grievor with Mr. Townshend and failed to independently assess her conduct and the second is that its conduct was so egregious that standing alone and without any consideration of Mr. Townshend the GTAA acted in bad faith.

It is clear from Ms. Maack's testimony that the GTAA bore some animus towards Mr. Townshend who had been terminated and reinstated with an arbitration award of approximately $100,000.00, and who was being investigated again and was under surveillance. Very often in labour matters, it is difficult to determine motive and accordingly it is necessary to draw inferences from the evidence. It is not for this Board of Arbitration to deal with the merits of the Townshend matter; suffice it to say, from Ms. Maack's evidence and/or the circumstances surrounding Mr. Townshend, the GTAA was not partial to Mr. Townshend.

The GTAA became aware of the relationship between the Grievor and Mr. Townshend as a result of the surveillance of Mr. Townshend. It quickly acted against Mr. Townshend as a result of seeing him on the videotapes and suspended him on March 10, 2004, and terminated him on March 16, 2004. The GTAA then immediately turned to the Grievor requesting information about her situation on March 11th, 2004, meeting with her on March 19th, 2004, and terminating her on March 24, 2004, notwithstanding that she had returned to work with a doctor's note and a physiotherapist's note and

notwithstanding that on March 20 and March 21, 2004, while under surveillance, she was not seen leaving her home. Nor did the GTAA bother to get a medical examination, to which it was entitled pursuant to Article 24.07(c) of the collective agreement. Faced with an employee, who had surgery and who also had 23 years of exemplary service, the GTAA did not even take the time to inquire whether its view of the Grievor's condition was medically sound. The GTAA acted with considerable haste and terminated the Grievor only days after it terminated Mr. Townshend.

However, the Grievor's termination following so close on Mr. Townshend's termination is also linked to Mr. Townshend by Mr. Lacey's e-mail of March 11, 2004, one day after Mr. Townshend's suspension on March 10, 2004. Since Mr. Townshend had been suspended on March 10, 2004, why was there any need by Mr. Lacey to refer to the "TOWNSHEND MEETING.DOC" as the subject matter of an e-mail that was explicitly about the Grievor. Moreover, Mr. Lacey indicated that his e-mail, and it appears to be the case, was in response to another e-mail which he said he would produce but did not. Further, the explanation given by Mr. Lacey that he was asked to contact the Grievor at the same time as an investigative meeting was being held with Terry Townshend, in context, does not appear to be credible given that Mr. Townshend had been suspended and essentially disposed of the day before Mr. Lacey's e-mail. The reference to Mr. Townshend is also contained in the notes of Ms. Maack's assistant which refer to "Townshend" just prior to the transcription of the GTAA's meeting with the Grievor.

I determine that the e-mail and the assistant's note link the Grievor to Mr. Townshend. Mr. Lacey's e-mail, in its body, also confirmed that the Grievor was living with Mr. Townshend. Accordingly, given that linkage and coupled with the timing of the Grievor's suspension and termination which proceeded so hastily and so closely on the heels of Mr. Townshend's suspension and termination, without any individual consideration of the Grievor's lengthy work record and diligent service and seniority, I determine that the GTAA associated the Grievor with Mr. Townshend, against whom the GTAA bore some animus, and terminated her based on that association. The GTAA willfully did not independently assess the Grievor's situation on its own merits and, in effect, condemned her by association. In so doing, I find the GTAA was both unreasonable and acted in bad faith by not individually and independently assessing the Grievor's circumstances to which she was surely entitled after so many years of faithful and diligent service.

Second, and even without the linkage to Mr. Townshend, I find the GTAA's conduct to be so egregious that I determine it acted in bad faith. The GTAA ignored the Grievor's lengthy and exemplary service and seniority; the GTAA ignored that the Grievor had injured herself at work and did not malinger and continued to work with a bad knee as long as she could, even to the point where the GTAA modified her work. The GTAA ignored that the Grievor did not fit the profile of an employee with frequent absences and did not have any record of absenteeism or malingering; the GTAA ignored that it had sent the Grievor to Dr. Nagpal, a former GTAA employee, who worked at the airport, and who in turn referred the Grievor to Dr. Gordon and that the Grievor had a

legitimate injury that required surgery. The GTAA ignored the physiotherapist's report that the Grievor be given one more week off work, ignored Article 24.07 of the collective agreement by not requesting "...a statement from a qualified medical practitioner .... to verify the reasons for the employee's absence", and notwithstanding the GTAA's stated skepticism about doctors, ignored the physiotherapist's report while requesting a doctor's report. The GTAA also ignored Dr. Gordon's invitation to discuss the matter.

The GTAA also ignored the lengthy periods of time on the videotapes where the Grievor stayed home, focused on the short periods when she shopped for household and personal items, and ignored the videotape evidence that she was attending a physiotherapy clinic which ought to have at least signaled to the GTAA that she was undergoing rehabilitation. The GTAA ignored her explanation for her activities and her honest admission that she both shopped and also drove once in a family emergency beyond what was observed on the videotapes. The GTAA managers arrogated to themselves a medical knowledge as to her condition, despite lacking any medical training whatsoever. The GTAA ignored and disbelieved her limping on March 17, 2004, after working, but refused to consider her explanation that when she appeared to walk normally that she had just received physiotherapy treatment which may have provided her some relief. The GTAA ignored her apology although claiming that if she apologized she would not have been terminated. The GTAA did not consider a traditional and lesser form of corrective discipline notwithstanding that the Grievor had been an exemplary employee for twenty-three years without a disciplinary record.

At the meeting with the Grievor, the GTAA drew negative and unwarranted inferences from any explanation the Grievor offered. For example, the GTAA claimed that her reported limping by both the investigators and managers on March 17th, was fraudulent notwithstanding the videotapes, which her doctor and which Dr. Rathbun, the GTAA's witness confirmed as not showing the Grievor to be malingering. The GTAA also claimed the Grievor lied about a cane when she clearly stated that she had used it earlier and then sporadically. The interrogation was harsh and after considering the evidence of the meeting, I determine that the questioning during the meeting was superficial and the GTAA gave the Grievor no quarter. Almost everything she said was given a negative or wrong interpretation.

I determine based on all the evidence that the GTAA came to the meeting with a closed mind, that it refused to consider any reasonable explanation and failed to properly consider all the evidence. The GTAA failed to review all of the facts in a reasonable manner and failed to verify its view of the Grievor by obtaining medical corroboration which was available to it. The GTAA was motivated by an arrogant presumption about the Grievor's medical condition notwithstanding that none of the managers had any medical training.

And finally, the GTAA, in writing, labeled the Grievor as being "dishonest" and "not being truthful" which resulted in a "loss of trust which makes it impossible for the GTAA to continue any employment relationships with you". Thus was an exemplary employee with twenty-three years service capriciously cast out of the GTAA, without any

reference to an exemplary record, with the result that her future employment opportunities were limited. I do note that Mr. Hewitt who was not consulted about her termination did give her a letter of reference, at the request of a mutual friend, but that was not a GTAA sanctioned reference and appears to have been the act of a friend, for personal reasons. Certainly, Mrs. Maack did not mention the letter. In any event, that reference throws into relief the GTAA's decision to label the Grievor untruthful and dishonest and to ignore her twenty-three years of exemplary service and is at least an admission by her supervisor of her very positive employment record.

Summary

In summary, I conclude, based on all the evidence, that the GTAA's conduct and the way in which it dealt with the Grievor, was unreasonable and in bad faith. The GTAA submitted that I should reject the Grievor's evidence and asserted that she could have returned to perform modified work earlier and that her claim for damages was exaggerated and not credible. However, not only do I find that the Grievor's evidence was credible and consistent, but also I conclude that her evidence in all respects was corroborated by the various medical practitioners who treated her. Dr. Gordon and Ms. Farkas corroborated her physical injury and Dr. Ferrie, Dr. Chan, Mr. Munisteri and Ms. Pole-Langdon corroborated the Grievor's post termination mental distress and her mental state. Dr. Ferrie particularly confirmed her mental distress as deriving from her betrayal and termination by the GTAA. To find as the GTAA argued that the Grievor was not credible suggests that all of the medical practitioners, who corroborated her evidence, either conspired with each other or were manipulated by the Grievor. I do not so find,

and further, I conclude their evidence was consistent, credible and independent and was consistent with and corroborated the Grievor's evidence. By comparison, and for the reasons given, I do not find the GTAA's evidence to be credible or reliable. Apart from Dr. Rathbun, whose evidence I have referred to earlier, there was no evidence adduced by the GTAA to contradict the Union's medical evidence. In the result, I prefer the Union's evidence, particularly that of the Grievor, to the evidence of the GTAA both with respect to the Grievor's post surgical condition and the effect of the GTAA's conduct on her mental state.

Employees are not like tissues to be used up and then thrown out at a whim into the bin of low level employment or unemployment. Employees, particularly those such as the Grievor, who have been long term local employees, are entitled to both a reasonable consideration of their seniority and work record and to a reasonable investigation of their conduct before being discharged and accused of dishonesty. There was not cause to discharge the Grievor, and since the GTAA's conduct in both its investigation and also in its ultimate determination was not only unreasonable but also in bad faith, the Grievor is entitled to an appropriate remedy including damages. *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595. I now turn to consider the remedy.

Remedy - General

The relevant provision of the collective agreement is as follows:

Article 13.14

The arbitrator shall have all the powers vested in it by the *Canada Labour Code* and the collective agreement, including in the case of discharge or

> discipline, the power to substitute for the discharge or discipline such other penalties that the arbitrator deems just and reasonable in the circumstances, including compensation for lost income and benefits. The arbitrator shall render his or her award within a reasonable period.

The *Canada Labour Code* provides:

> Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.
> R.S. c. L-1, s. 157; 1972, c.18, s. 1; 1977-78, c. 27. s. 55

Because of the unusual circumstances of this case, the issue of remedy is a difficult one and involves consideration of the modern labour law regime which differs from the employer/employee relationship at common-law, where either party could terminate the contract of employment by due notice and where the only damage that could arise results from a failure to give proper notice. In *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R 1085 at p. 1103, McIntyre, J. distinguished the employer/employee relationship from collective agreements ".... which involve consideration of the modern labour law regime". That regime is a statutory regime which attempts to balance the power relationship between employers, and employees who are considered vulnerable. To that end, various statutory regimes require the parties to bargain in good faith and to maintain industrial peace during the term of the

collective agreement, and, in so doing provide for the peaceful resolution of disputes through arbitration. In that context, a whole body of jurisprudence has developed which provides for the employer's right to manage the workplace, but also provides for due process in cases of discharge and discipline including the right to a hearing and consideration of such factors as seniority, work performance and corrective discipline and a requirement that an employer consider all of the relevant facts. The statutory regime entrusts boards of arbitration with a remedial authority to enforce the rights and obligations under a collective agreement and to place an innocent party, so far as can reasonably be done, in the position in which he/she would be, if that party's particular rights had not been violated. Redress if any must be appropriate to the violation. Thus, boards of arbitration have awarded remedies such as compensation in cases of unjust dismissal and damages in the cases of illegal strikes. Moreover, The Supreme Court of Canada in *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929, 125 D.L.R. 4th, 583 has sanctioned arbitrators determining "whether conduct in the administration of the collective agreement violates the Charter and likewise grant remedies". That Court, in passing, also noted that courts have been found to lack jurisdiction in the following claims "wrongful dismissal; bad faith on the part of the Union, conspiracy and constructive dismissal; and damage to reputation", implying that arbitrators have jurisdiction where such disputes "expressly or inferentially arise out of the collective agreement". McLachlin, C. J., at p. 603, also stated that arbitrators may refer to both the common law and statutes and approved of the statement by Denning, L. J, in *David Taylor and Son, Ltd. v. Bainette* [1953], 1 All E. R. 843 (C.A.) at page 847 where he stated "there is not one law for arbitrators and another for the court, but one law for all".

I also note that in the companion case to Weber, the same Court in the *Queen in right of New Brunswick v. O'Leary [1995]* 125 D.L.R (4th) 609, decided that a claim by the employer against the employee for negligence in the course of that employee's work was subject to the exclusive jurisdiction of the arbitrator. I hasten to add that the Courts have also approved such imaginative arbitration remedies as a quia timet order restraining future violations of the collective agreement. *Samuel Cooper & Co. v. International Ladies Garment Workers' Union* (1973), 35 D.L.R. (3d) 501, [1973] 2 O. R. 841 (Div. Ct.).

Further, the statutory and collective agreement remedy contains no provision limiting the remedial power of an arbitrator. Where the statute intended to limit an arbitrator's remedial authority, it did so specifically. For example, the *Canada Labour Code*, s. 60 limits the remedial authority of an arbitrator only where the collective agreement contains "a specific penalty", which suggests a broad remedial authority where there is no specific penalty. In the result, I conclude that a board of arbitration has sufficient remedial powers to redress express or implied violations of the collective agreement and that its remedial powers may be fashioned to appropriately redress those violations of the collective agreement in the context of a modern labour law regime. I now turn to the appropriate remedy in this matter.

While it is usual to bifurcate arbitration hearings into a first hearing respecting liability and if so found, into a second hearing to deal with the remedy, including damages and compensation, the parties have agreed I deal with the remedy based on the

existing record. The Grievor seeks damages for mental distress, compensation for past wages and benefits, damages for future losses, as well as punitive damages. The GTAA submits that the Grievor has contrived her condition and feigned illness so as to attract damages. Again, I do not agree with the GTAA's submissions. There is a consistency and credibility to all the medical health experts, who treated the Grievor, that when coupled with the Grievor's testimony and the lack of medical evidence by the GTAA overwhelms the submissions by the GTAA that the Grievor has contrived her circumstances, and feigned her illness. I determine that the conduct of the GTAA resulting in a violation of the collective agreement is deserving of a substantial remedy.

It is usual in matters of this sort, unlike wrongful dismissal cases, that an employee who is wrongfully discharged is reinstated. Reinstatement also serves the purpose of avoiding future losses of wages and benefits that a wrongfully discharged employee might suffer. Also, the ordering of an employee to be reinstated has a mitigating effect on future losses. But there are also a number of cases where employees, having been found to be wrongfully or unjustly discharged, are not reinstated and an order has been made that in lieu of reinstatement compensation be paid to the employee. Also, there are numerous cases where employees have been found to be in breach of trust such that the employment relationship cannot be repaired, and reinstatement has been found to be inappropriate. In those cases, it is the conduct of the employee resulting in the breach of trust that brings about the severance of the employment relationship.

An implied term of trust in the employment relationship is not confined to the employee. There are reciprocal duties on both the employer and employee. An employer's obligation is well articulated by the House of Lords in *Malik v. Bank of Credit and Commerce International S.A.* [1997], 3 All E. R. 1, where the House of Lords stated that there is an obligation on the employer not to conduct itself, without reasonable and proper cause, in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Lord Nicholls, in affirming that there is a relationship of trust and confidence between an employer and employee, stated at p. 8:

> "Employment and job prospects, are matters of vital concern to most people. Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable. Although the underlying purpose of the trust and confidence term is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable. Employers must take care not to damage their employee's future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term."

Lord Steyn at p. 15 stated the following with respect to the development of the employer's obligation:

> "The reason for this development is part of the history of the development of employment law in this century. The notion of a "master and servant" relationship became obsolete. Lord Slynn of Hadley recently noted in *Spring v. Guardian Assurance plc* [1994] 3 All E.R. 129 at 161 [1995] 2 AC 296 at 335
>
>> "the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer

> than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee
>
> ……it was the change in legal culture which made possible the evolution of the implied term of trust and confidence".

That Court went on to find that where there is a breach of the implied term of trust and confidence by the employer, the employee may claim for financial loss including loss of benefits, which the employee should have received had the contract run its course including salary, and pension rights as well as other promised benefits. Lord Nicholls concluded as did The Supreme Court of Canada in *Whiten v. Pilot Insurance Co.,* supra, that damages should be assessed in accordance with ordinary contractual principles. The decision in *Malik* was approved by the Ontario Court. of Appeal in *Haldane v. Shelbar Industries Ltd.* (2000) 46 O.R. (3rd) 206.

In this case, I find that conduct of the GTAA was so high handed, arbitrary, and capricious that it had such a destructive impact on the Grievor that I would not be prepared to reinstate her to her employment. While I will expand further on the Grievor's mental state in dealing with the remedy, I find that the sense of betrayal felt by the Grievor, in being dealt with in such an arbitrary high handed and capricious manner, after giving her all for twenty three years, has resulted in a legitimate lack of trust and confidence by the Grievor such that, if she were to be reinstated, she would not be treated respectfully and with the dignity to which she is entitled as a result of her honest and diligent service.

Further, the Grievor, as a result of previous physical and sexual abuse, suffered from post traumatic stress disorder (PTSD). The events leading up to her termination and the termination labeling her dishonest and untrustworthy precipitated her PTSD so that even going near the airport causes her distress. Counseling hasn't sufficiently helped her to date and she still shows signs of PTSD. She testified that she is unable to go back to the GTAA because of what was done to her. In all these circumstances, I would not have reinstated the Grievor. Her fragile mental state, which was known to the GTAA, overrides any consideration of reinstatement with the concomitant effect of mitigation. As such, I prefer to follow those cases where boards of arbitration have not reinstated, usually at the behest of the employer, and have awarded damages or compensation in lieu of reinstatement.

I note parenthetically, that the GTAA's letter of March 24th, 2004, terminating the Grievor, the GTAA stated, that the Grievor's ".....dishonesty has resulted in a loss of trust, which makes it impossible for the GTAA to continue any employment relationship with you". By the same token, the GTAA's conduct has so impacted the Grievor that she is unable and incapable of continuing her relationship with the GTAA. Breach of trust is not a one way street. It applies equally to both employers and employees.

I determine that the GTAA did not have cause to terminate the Grievor, that it did not act reasonably and has acted in bad faith and/or so seriously breached the implied terms of mutual trust and confidence that its conduct when viewed objectively has so damaged the relationship between the Grievor and the GTAA that she is entitled to a

remedy in damages for loss caused to her future employment prospects rather than the usual remedy of reinstatement.

Remedies – Specific

For the reasons stated I determine that the Grievor is entitled to the following remedies.

Administrative Remedies

First, I determine that the GTAA shall expunge all references, both leading up to the Grievor's suspension and her termination from their records, and the GTAA, its managers and its employees are prohibited from mentioning or discussing any of the circumstances surrounding her termination to others.

Second, the GTAA shall provide the Grievor with a letter of reference referring to her exemplary service in form and substance satisfactory to the Grievor and to the Union.

Mental Distress

The next issue concerns the Grievor's claim for mental distress and I determine the Grievor is entitled to such damages for breach of the collective agreement. In *Fidler v. Sun Life Assurance Co. of Canada* [2006] 2 S.C.R. 3, the Supreme Court of Canada

considered the issue as to whether damages for mental distress are recoverable as the result of a breach of contract. The Court stated as follows at p. 19, 20:

> 44. We conclude that damages for mental distress for breach of contract may, in appropriate cases, be awarded as an application of the principle in *Hadley v. Baxendale*: see Vorvis. The court should ask "what did the contract promise?" and provide compensation for those promises. The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken. As the Privy Council stated in *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, at p. 307: "the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed". The measure of these damages is, of course, subject to [page 20] remoteness principles. **There is no reason why this should not include damages for mental distress, where such damages were in the reasonable contemplation of the parties at the time the contract was made.** This conclusion follows from the basic principle of compensatory contractual damages that the parties are to be restored to the position they contracted for, whether tangible or intangible. The law's task is simply to provide the benefits contracted for, whatever their nature, if they were in the reasonable contemplation of the parties.
>
> **45.** It does not follow, however, that all mental distress associated with a breach of contract is compensable. In normal commercial contracts, the likelihood of a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. **The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security.**
>
> *(emphasis added)*

In my view, one of the main purposes of a collective agreement is to provide employees with the "psychological benefit" and "mental security" in being gainfully employed. Not only does employment provide such benefit and security with respect to the financial support employees receive which enables them to provide for their homes and families but it also provides such benefits as health and insurance coverage. Also of importance are seniority rights which permit employees to better themselves through promotions and which also provide security in the event of lay-off which is a departure from the common law of master and servant. Most jurisdictions provide additional job security to employees by raising the bar for discharge or termination to just or proper cause. Under the *Canada Labour Code* and this collective agreement, the GTAA is able to discharge or terminate an employee for cause but in so doing must act reasonably. Further protection is given to employees by the collective agreement which entitles an arbitrator to substitute for the discharge or discipline such other penalties that the arbitrator deems just and reasonable in the circumstances.

In the result, I determine that the object of the collective agreement to both secure a psychological benefit and also mental security was within the reasonable contemplation of the parties and that mental distress damages arising from the breach are recoverable. I further determine that the degree of mental suffering caused by the GTAA's breach was both reasonably foreseeable and also of a degree sufficient to warrant compensation and damages. In *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701, Iacobucci, J. stated as follows at p. 742:

> "I note that the loss of one's job is always a traumatic event. However when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating".

I further determine that mental distress is a reasonably foreseeable incident of discharge and particularly so when the discharge is both unjust, unreasonable and also in bad faith.

The Grievor had been in previous years physically and sexually abused and had suffered considerable mental distress including post traumatic stress syndrome as a result. The GTAA was fully aware of her specific vulnerability because at the time the GTAA had assisted her and also she had taken a leave of absence. When she collapsed at work, Mr. Tolton told her to go home and she had a breakdown and was away from work for two months. It was therefore reasonably foreseeable that terminating the Grievor without cause, without proper investigation and without regard to her record of service would be especially devastating in a way that was beyond what is usual in the event of a termination. In *School Division of Assiniboine South No. 3.v. Hoffer*, (1972), 21 D.L.R. (3d) 608 (Man. Ct. App.); 40 D.L.R. (3d) 48 (S.C.C.) 480 n., the Court stated at 21 D.L.R. (3rd) at p. 613:

> "The test of foreseeability of damage becomes a question of what is possible rather than what is probable".

And at p. 614:

> "it is enough to fix liability if one could foresee in a general way the sort of thing that happened ..."

Clearly, given her past history, the Grievor's traumatic reaction to the termination was reasonably foreseeable.

As a result of this termination by the GTAA, the Grievor suffered from anxiety and depression. She could not sleep, had difficulty visiting her children and grandchildren, lost her sense of self worth and felt betrayed by the GTAA and its managers. Because of the harsh interrogation and being labeled as untrustworthy and dishonest, after twenty-three years of honest and diligent employment, the Grievor felt a deep sense of betrayal and her post traumatic stress disorder was revived. She was referred for psychotherapy and received treatment. It was apparent from her testimony and her demeanor as a witness that her mental state had not returned to normal. Whereas before her termination she had been happy, confident and social, she became reclusive and introverted. In a sense, after so many years of loyal and diligent service in the employ of the GTAA, its harsh and unfair treatment traumatized and "broke" her.

In addition to her mental distress, the Grievor was left impecunious upon her discharge and was forced to choose between physiotherapy and psychotherapy. She chose psychotherapy with the result that her knee injury was aggravated. Subsequently, as the result of Dr. Gordon's intervention, she was able to obtain treatment at a hospital. However, her knee has not completely healed. I find that had she continued with physiotherapy, her knee injury would have resolved itself at a much earlier date.

While the Union called as witnesses a number of people to attest to the Grievor's mental state and condition post discharge, the GTAA did not call any medical witnesses to rebut the Union's evidence. The GTAA argued that the Grievor's alleged mental distress was calculated to extract damages from the GTAA. I do not so find. The

witnesses called by the Union were all independent and experienced health providers and were unanimous in their view that the Grievor's negative mental state was the result of being discharged by the GTAA. I am unable to conclude, despite comprehensive cross examination by counsel for the GTAA of the Union's witnesses, that the various health professionals who testified, either collaborated with each other or with the Grievor in any way, nor is there any evidence to suggest they were manipulated by the Grievor.

I further determine that the Grievor was candid and honest about her mental state and the resulting mental impact of what she perceived to be the unjust and unfair treatment by the GTAA. The primary source of her mental distress as confirmed by Dr. Ferrie was her sense of betrayal after so many years of honest service as well as the harsh interrogation and manner of her dismissal. The Grievor was quick to acknowledge that there were other issues in her life that were distracting, but in the main she went from a happy, confident person who had engaged in social and athletic activities and who enjoyed her family, to a virtual recluse who was left with a negative personal image and a loss of self worth. She sought assistance from psychotherapy because in earlier years she had been helped by psychotherapy as the result of being abused by her husband.

In the result, I determine that the Grievor is entitled to damages for mental distress and for the extended pain and suffering in her knee. I further determine that although there were other issues that contributed to her mental distress and also that she perceived and was affected by the surveillance and videotaping of her activities by the GTAA which she considered to be stalking, none of this would have impacted her to the

extent it did were it not for the GTAA's misconduct. I have earlier in these reasons determined that the GTAA was entitled to conduct surveillance of employees and that such evidence is relevant. Accordingly, after eliminating those other issues to which she admitted, coupled with eliminating the negative impact on her mental state of the surveillance, which was both lawful and relevant, and which contributed to her mental distress, I determine the damages for mental distress and for the extended pain and suffering to her knee caused by the GTAA should be assessed at $50,000.00.

Past Economic Loss

Further, the GTAA shall compensate the Grievor for loss of compensation and benefits from the date of her termination to the date of issuance of this award, subject to the following. This matter took an unusual amount of time. There is no infrastructure to control the scheduling of arbitration dates, so that arbitration hearings depend on consensual and self scheduling in accordance with the available dates of counsel, the arbitrator and the witnesses. The scheduling in this case was made more difficult because of the attempt to accommodate the various health care professionals that were called as witnesses by the parties, or that were required in attendance to assist counsel. However, Counsel for the Union took a six month leave of absence which delayed the scheduling of hearings and I am of the view that the GTAA should not bear the cost of delay caused by his absence for that period. Accordingly, the GTAA shall be entitled to deduct an amount equivalent to six months of compensation from the above amount. However, any mitigation during that six month period should not be used to reduce the award.

I am also satisfied that the Grievor made extensive efforts to mitigate any damages or compensation that might arise and I further determine that the GTAA shall deduct from the above compensation payable, such compensation that the Grievor has received from the date of her termination to the date of the issuance of this award other than for the six month period referred to. The Grievor is entitled to interest on the amount in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 127.

Further, because the compensation is to be received in a single taxation year, the parties shall structure the amount received to deal with the increased tax implications that have resulted from the Grievor not receiving the compensation over a more lengthy period.

Future Economic Loss

The Union claims that because of the GTAA's conduct, the Grievor has suffered future damages and points out that her wages have been reduced to approximately $20,000.00 per year from her GTAA wages which were approximately $50,000.00. The union also claimed damages for additional losses which the Grievor shall suffer, including her loss of seniority, loss of pension, and loss of a unionized job. The GTAA again maintained that the Grievor by virtue of her conduct was disentitled to any economic loss and that her situation was contrived. I again confirm that the Grievor's conduct was not dishonest and that her testimony was not, in any way, contrived.

The GTAA, as stated, was aware that the Grievor was highly vulnerable because of her past abusive experience with her husband. The GTAA had assisted her and was aware that the events surrounding her relationship with her husband caused her to take time off. The Grievor quite properly, in my view, does not request reinstatement because of what the GTAA has done to her. The impact of the GTAA's conduct was traumatic and abusive and given her mental state and PTSD there is no more basis for reinstating her to her employment relationship as there is to reinstating her to a traumatic and abusive marital relationship.

In my view, the diminished financial situation in which the Grievor finds herself as a relatively unskilled person, without the benefits of service and seniority, is both patently obvious to employers, employees and unions as arising naturally from a breach of a collective agreement resulting in termination and is reasonably within the contemplation of those parties. Moreover, as indicated, there are cases where employees have not been reinstated and awarded a financial sum so that reinstatement is not always the result of a wrongful dismissal. And further, the Grievor's particular vulnerability was known and it was reasonably foreseeable that the impact on her of such an unreasonable and unjustified termination, after such honest and diligent service, would have a severe impact on her mental state beyond what may be considered normal in termination cases, and could result in her not being able to return to the GTAA. The condemnation of an innocent employee without any proper investigation and the labeling of an innocent employee who has been both diligent and honest as dishonest and untrustworthy was

bound to have an extremely serious impact on that person's mental state, such that it disables that person from maintaining a trustful or confident employment relationship with those who wrongfully condemned and maligned her.

Where there is a claim for damages for future loss of employee benefits, the Grievor need not prove her loss of future income and/or benefits precisely to the exact dollar figure. The Grievor need only establish that there is a reasonable and substantial risk of loss of income in the future in order to be entitled to damages for future loss of benefits. That is the case here. However, effect must be given to contingencies both positive and negative which may reasonably be foreseen. *Gerula v. Flores* (1995), 126 D. L. R. (4th) 506 (C.A.) at pp. 517-518.

The Grievor had enjoyed a long and happy relationship with the GTAA. Her parents had worked there and Mr. Hewlett testified that he and the Grievor had a very good friendship and working relationship. The Grievor also testified that she considered the people at the GTAA to be her friends. By remaining with the GTAA for all those years, the Grievor's length of service and seniority had enhanced her prospects within the GTAA with respect to future promotions, increases in wages and benefits and also with respect to job security where seniority is an important factor in the event of lay-off.

For many employees, in similar circumstances to the Grievor, their sole significant asset is service and seniority. It is important to note that after being terminated, the Grievor did not have sufficient funds to continue with both physiotherapy

and psychotherapy and had to choose. The Grievor's seniority was much like a capital asset or investment, since it served to enhance her financial future by way of promotions, wage and benefit increases including increased vacation and pension. As well, seniority secured her future by being a significant factor when it came to lay-offs. As an example of the increased benefits, it is apparent that the Grievor's vacation escalated in tandem with her years of service. In her twenty-fourth year, she would have had an entitlement to six weeks' vacation. Given her age, it is unlikely she will ever receive that amount of vacation again. Similarly, her pension is the result of years of service and again her pension will be reduced.

Because service and seniority are such important considerations for employees, they will not voluntarily change jobs and will often reject an opportunity for a higher paying job, choosing instead to remain in a job or position because of the greater benefits of seniority and service, pension and job security. In this case, because of the Grievor's personal attachment to her work at the GTAA, her friendships at work, and the benefits of her service and seniority, I determine that it is most probable that she would have remained at the GTAA for the balance of her working life. The potential because of her seniority for future collective bargaining increases, promotions, an enhanced pension and job protection in the event of layoff make it extremely improbable that she would have changed jobs.

The impact of the GTAA's conduct was to consign the Grievor, who is unskilled, to a lower level of income without the benefits of the service and seniority that she had

earned. Whereas, by remaining with the GTAA, the Grievor had an income of approximately $50,000.00, she now has an income of approximately $20,000.00, with decreased job protection, a diminished pension and the loss of future benefits including wages that she likely would have received through collective bargaining at the GTAA. I determine that her damage claim falls within the damages contemplated by the leading decision of the Courts in *Hadley v. Baxendale*, (1854), 9 Ex. 341, 156 E.R. 145, approved, *Fidler v. Sun Life Assurance Co. of Canada*, supra. In *Fidler*, the Supreme Court of Canada stated that:

> "Damages, for breach of contract as far as money can do it, place the plaintiff in the same position as if the contract has been performed…"

It has been the law that these damages must be:

> "such as may be fairly and reasonably be considered either arising naturally …. from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties".

In the result, I determine that the extent of the Grievor's damages for future loss including her loss of seniority, escalating holidays, and pension benefits resulting from her being unable to continue with the GTAA must be assessed. The Grievor's reasonable expectation in the circumstances of this case would have been to continue in her employment with the GTAA, and the GTAA having rendered her unable to continue under the aegis of the collective agreement is responsible for damages for the resulting loss, including the loss of her protective seniority. Because the Grievor will suffer substantial economic losses in the future, she is entitled to damages for such economic loss. I determine that her damages shall be determined and calculated by referring to the current collective agreement. While I considered extending the period of loss, until the

Grievor reached age 65, there is a strong likelihood that she will retire once she becomes eligible for her full pension. The pension plan permits employees to retire with a full pension if they have attained age 55 and have at least 30 years of membership service.

Accordingly, I determine that the Grievor is entitled to damages for loss of her seniority and benefits including pension benefits, based on what she would have earned, from the date of the issuance of this award until she reaches the retirement age of 55 referred to in the pension plan, when she will have accumulated at least 30 years of service. The GTAA shall deduct from that amount such amounts as the Grievor may earn for the above period, based on her current earnings which can be precisely determined. Since the Grievor has been awarded past compensation for the period between her termination and the issuance of this award, that period shall be calculated as time worked for pension purposes.

Should any period remain between the expiry of the current collective agreement, and the date the Grievor reaches her retirement age the damages for that remaining period shall be based on the final year of the current collective agreement and, as well, deductions shall be made during that period based on the Grievor's current earnings. If a further collective agreement is negotiated prior to the date the Grievor would have retired, I am satisfied that there would be further increases to which she would have been entitled. However, it is also possible that the Grievor will increase her earnings over that period, and, in that, she may be assisted by a proper letter of reference which I have awarded. Accordingly, I have offset the contingency of agreement increases with the

contingency of increases in the Grievor's future potential earnings. The matter is referred back to the parties to deal with the precise calculations.

Punitive Damages

The decision of the Supreme Court of Canada in *Weber*, supra, as I have indicated, suggests a broad remedial power for arbitrators and particularly its approval of and reference to Denning, L., J.'s, comment that there is one law for both arbitrators and the Courts, which, in my view, entitles arbitrators to award punitive damages, as does the lack of any restriction on the arbitrator's remedial power which is contained in the collective agreement and the *Canada Labour Code*.

The conduct of the GTAA has an added dimension that goes beyond the mistreatment of the Grievor; the GTAA's failure to deal with the Grievor in a reasonable manner stripped the collective agreement of any meaning. The collective agreement provisions which are a product of the *Canada Labour Code* are to be administered in good faith. The GTAA's high handed, malicious and arbitrary conduct ignored its negotiated obligations under the collective agreement. The GTAA superimposed its policies on its duty to act reasonably in terminating the Grievor for cause. It assumed dishonesty and summarily terminated the Grievor in accordance with those policies. However, the GTAA's policies must square with its collective agreement responsibilities to act reasonably in determining whether there is cause by reviewing all relevant circumstances and factors surrounding an employee's conduct. Thus, the GTAA did not

consult with the Grievor's supervisors to consider her work performance and did not consider her lengthy seniority and service, which are hallmarks of a collective agreement and which are, inter alia, negotiated to provide an employee with job security. While an employer may discharge an employee for a first offence, even assuming the Grievor had abused sick leave, in all these circumstances termination was highly inappropriate given her lengthy service. The GTAA also did not consider corrective discipline pursuant to Article 19 which provides that an employee may be disciplined for just cause which is considered a vital component en route to determining whether an employee should be discharged. And the GTAA did not consider and made no attempt to secure an independent medical opinion to verify the Grievor's medical condition which it was entitled to do pursuant to Article 24.07.

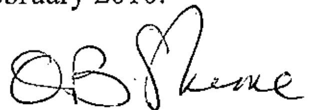
In my view, the GTAA arbitrarily treated the Grievor as if the law of master and servant was still in effect and completely ignored the provisions of the collective agreement and exercised its rights in an unreasonable manner in violation of Article 4.04. The stripping of these collective agreement provisions goes beyond the insensitive mistreatment of the Grievor and punitive damages should serve as a deterrent to any future misconduct by the GTAA in administering the collective agreement and dealing with other employees. A significant award is needed to deter the .GTAA from exploiting the vulnerability of employees who are dependent on their employment with the GTAA.

In addition to the manner in which it treated the Grievor, who was a particularly vulnerable employee entitled to the protection of the collective agreement, it is important

within the labour relations community to condemn the GTAA for the manner in which it has acted. Compensatory damages to the Grievor are, in my view, insufficient to accomplish the objectives of retribution, deterrence and denunciation as to what has occurred. *Whiten v. Pilot Insurance*, supra. Further, to treat an honest, diligent and sincere employee, who has given exemplary service, as the GTAA did and then to label her as dishonest and untrustworthy and consign her to the possibility of unemployment or low level employment is a marked departure from the ordinary standards of decent behaviour. In all these circumstances I determine that the GTAA shall pay to the Grievor the sum of $50,000.00 by way of punitive damages. When determining that amount, I have considered the likely totality of the amounts awarded to the Grievor under the other heads of compensation and damages and have sought to avoid duplication. In the absence of all or part of the damages and compensation under those other heads, I would have considered a greater sum for punitive damages than I have awarded.

In the result, the grievance is allowed. I shall remain seised in the event the parties are unable to agree on any or all of the remedial aspects of this award.

Dated at Toronto this 27th day of February 2010.



Owen B. Shime, Q.C.