MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: *The Human Rights Code*, C.C.S.M. c. H175, as amended;

IN THE MATTER OF: A Complaint by C.R. against Canadian Mental Health Association, Westman Region Inc., alleging a breach of section 14 of *The Human Rights Code.*

BETWEEN:

C.R.,

Complainant,

- and -

CANADIAN MENTAL HEALTH ASSOCIATION,
WESTMAN REGION INC.,

Respondent.

Appearances: Isha Khan, Counsel for the Manitoba Human Rights Commission

C.R., the Complainant

G.K., Representative of the Respondent

Before: M. Lynne Harrison

REASONS FOR DECISION

Introduction

These proceedings arise out of a Complaint by C.R. against the Respondent Canadian Mental Health Association, Westman Region Inc. dated

January 26, 2009. In her Complaint, C.R. alleges that the Respondent discriminated against her in her employment on the basis of her disabilities (alcoholism and possible re-occurrence of cancer) and/or failed to reasonably accommodate her special needs which are based on her disabilities, and that such discrimination was not based upon *bona fide* and reasonable requirements or qualifications for the employment or occupation, contrary to section 14 of *The Human Rights Code* (the "*Code*").

On October 26, 2010, I was designated by the Minister of Justice under clauses 32(1) and (2) of the *Code*, as a Board of Adjudication, to hear and decide this Complaint.

The hearing took place in Brandon on May 3 and 4, 2011. Notice of the hearing was provided to the parties and the public in accordance with the *Code*. The Manitoba Human Rights Commission (the "Commission"), the Complainant and the Respondent all appeared at the hearing, the Commission being represented by counsel, and the Respondent being represented by a representative. At the outset of the hearing, the Complainant and the Respondent both confirmed that they were aware that they were entitled to be represented by counsel and were prepared to proceed.

In her opening statement, Commission counsel advised that the Commission and the Complainant would only be pursuing the allegations of discrimination based on an addiction to alcohol and binge drinking, and would not be pursuing allegations of discrimination based on the possible re-occurrence of cancer. The Commission asserts that the Respondent discriminated against the Complainant during her employment by its treatment of her in the time period surrounding a

conference she was to attend in late August 2008 in Halifax, by its failure to accommodate the Complainant's disability, and by its subsequent termination of the Complainant in September 2008.

The Respondent's position is that it works very hard to accommodate people with disabilities and that it bent over backwards to accommodate the Complainant. The Respondent says that the Complainant's allegations are unjust and absurd; the Complainant's employment was terminated for misappropriation of funds and nothing else.

The Evidence

An Agreed Statement of Facts and Agreed Book of Documents were filed at the hearing. The Commission called four witnesses, namely:

(i) J.E.B., a rehabilitation counsellor for the Addictions Foundation of Manitoba ("AFM") in Brandon;

(ii) C.R., the Complainant;

(iii) J.B., the Complainant's daughter and a former employee of the Respondent;

(iv) D.J., a provincial civil servant who was seconded to the Respondent at the relevant time.

Nine witnesses were called by the Respondent, namely:

(i) A.G., a member of the Respondent's Board of Directors at the relevant time;

(ii) P.B., an employee of the YWCA in Brandon, where the Complainant was previously employed;

(iii) N.M., an employee of the Respondent and Administrative Assistant to G.K.;

(iv) L.L., an employee of the Respondent;

(v) G.K., Regional Manager for the Respondent;

(vi) S.L., an employee of the Respondent;

(vii) B.P., a private contractor and member of the Respondent's Board of Directors;

(viii) J.N., the Respondent's bookkeeper; and

(ix) C.S., an employee of the Respondent.

I do not intend to set out all of the evidence in these Reasons for Decision, but would indicate that I have carefully reviewed and considered it in its entirety.

Background

The Complainant commenced employment with the Respondent on or about October 27, 2005, as a part-time Community Educator/Fundraising Coordinator. She had applied to work for the Respondent by letter dated May 25, 2005, addressed to G.K., Regional Manager for the Respondent. In that letter, she disclosed that she suffered from depression and was undergoing radiation treatment for cancer. When she began working for the Respondent, it was on a half-time basis, as she had just finished her radiation treatments.

In or about July or August 2006, the Complainant began renting an apartment from the Respondent in its building located at 1202 Rosser Avenue, in Brandon, Manitoba.

At about the same time, while continuing in her half-time position as Community Educator/Fundraising Coordinator, she was offered and took on the duties of Community Support/Housing Coordinator, also on a half-time basis.

Eventually, the Complainant also took on the duties of part-time Caretaker for the Respondent’s building at 1202 Rosser Avenue. In that capacity, her duties included making sure that the building was clean and the rents were paid, and taking care of tenants’ complaints and of repair work that had to be done.

The Complainant performed various other duties for the Respondent from time to time, including acting as recording secretary at Board meetings. The Complainant’s evidence was that she was frequently commended for her work. She never had a performance review, and never received any negative comments with respect to her performance or any formal warning. She felt that she did a good job, as evidenced by the fact that she was being paid $10 per hour when she started in 2005, and $16 per hour when her employment ended less than three years later. In the course of the hearing, G.K. acknowledged that the Complainant did some very good work while she was with the Respondent.

Problems with Alcohol

It is stated in the Agreed Statement of Facts that the Respondent became aware that the Complainant was engaging in bouts of excessive or binge drinking.

Several witnesses testified on this point. J.B. said that the Complainant had been an alcoholic for as long as she could remember. On cross-examination, the Complainant herself stated, in response to the question as to when she became a binge drinker, that she had probably been one all of her adult life. She also indicated that when she is extremely stressed, it leads to her drinking.

According to J.B., the Respondent's staff was definitely aware of the Complainant's addiction. J.B. said that she had had many conversations with L.L., who was a friend and her supervisor, and that L.L. was aware that J.B. did not cope well with the Complainant's addiction. J.B. said that G.K. would occasionally ask her questions as to whether the Complainant was drinking, and would ask her to look at the cameras in the apartment building to see, for example, if the Complainant was carrying in a case of beer.

J.B. also testified that she had never seen the Complainant intoxicated at work, and had never seen her addiction interfere with work. When asked if she was aware of the Complainant having taken sick days because of her addiction, J.B. replied that she may have, but that the Complainant took less sick time than the rest of them.

L.L. testified that she became aware that the Complainant had an addiction to alcohol within the first year. She encouraged the Complainant to go to AFM and AA, and to seek counselling through Foster's (Counselling Services), but did not know whether the Complainant followed up on this. On cross-examination, she agreed that she socialized with the Complainant, and that they were friends. She also agreed that she offered counselling to the Complainant because she wanted to help her, not

because G.K. told her to do so. She said that she did, however, tell G.K. about this, and that he encouraged her and backed her up in this. She recalled discussing the Complainant's drinking with J.B., and that J.B. had very great concerns with respect to her mother.

G.K. similarly testified that he determined that the Complainant had an alcohol problem early on, within the first year. He said that he repeatedly offered her supports, but the Complainant always declined them. The Complainant told him at one point that she had gone for an assessment previously, and had been told that she was not a binge drinker. Given that the Complainant was denying offers of support, he said, they did the best that they could. On cross-examination, he said that he had offered counselling to the Complainant after every binge at least, and at an absolute minimum, six times. He agreed that there was no documentation with respect to any such offers.

Others also testified in this regard. N.M. said that she knew that the Complainant had a drinking problem. S.L. testified that a couple of months after the Complainant started, she believed that the Complainant might have an addiction to alcohol. J.N. acknowledged that he had heard that the Complainant had an addiction to alcohol.

J.B. testified that in 2007, two of her sisters (the Complainant's daughters) passed away, one in February and the other in June. The Complainant struggled with their loss, and became extremely stressed. She was drinking more, and when drinking, she would be quite depressed.

A number of the witnesses spoke about a particular incident involving the Complainant's drinking. One day, while on holiday, L.L. had received a phone call from staff advising that the Complainant was very drunk. She and J.B. went to the Complainant's apartment, and found the Complainant heavily intoxicated and hallucinating. They called G.K. to come and help. At the time, J.B. thought that they should call an ambulance, but the Complainant did not want to see a doctor. G.K. said that he did not think it necessary to call an ambulance, and was reluctant to have the Complainant taken against her will. He asked the Complainant what would help, and she said going down to the water and skipping stones. As a result, the Complainant, G.K. and L.L. went and skipped stones, while someone else stayed behind in the apartment to empty out the beer that was there. After a while, when the Complainant was ready to leave, they went to a restaurant for lunch. Someone stayed with the Complainant that afternoon, then G.K. took her to a Chinese restaurant for dinner. G.K. did not remember whether someone stayed with the Complainant that evening or not, but he believed that he picked her up for breakfast the following morning. He said that this was not the first time the Respondent had bought the Complainant meals, and been there for her; that he had done this on previous binges.

The Conference

In mid-June or July 2008, G.K. and the Complainant discussed the possibility of her attending the CMHA National Conference (the "Conference") to be held August 22 to 23, 2008, in Halifax, Nova Scotia. The Complainant was excited to go, as she had never been to the East Coast. G.K. testified that he himself had attended all but one of the previous National Conferences. He knew that it was one of the

Complainant's dreams to see the East Coast, and he wanted to send her to the Halifax Conference as an acknowledgement and reward for all of the good work that she had done. The Complainant was going to fly to Halifax a couple of days early, and to stay there for a week after the Conference, on vacation time, returning to work on Tuesday, September 2, 2008.

The Complainant's evidence was that she was feeling absolutely overloaded and "stressed to the hilt" in her job in August 2008. She was being paid to work 50 hours a week, and was on call 24 hours a day. The basement in the apartment had been flooded in February 2008, and the floor had to be replaced. This meant that it had to be jack hammered, and because it was not properly vented, fire alarms were continually going off, and all of the tenants had to be evacuated and the fire department called. Other things that the Complainant had to deal with included tenants who locked themselves out when they were doing laundry or at other times, loud parties, and tenants who had to be evicted. The police were often in the building, and there had been two deaths in the building while the Complainant was there which she had had to attend to.

The Complainant indicated that she communicated her feeling of being overwhelmed to G.K., and was pretty sure that at the July team meeting, she requested some assistance on weekends. This was not disputed by the Respondent. The Complainant said that G.K. did eventually put another staff member on for weekends, but her employment was terminated shortly thereafter.

On or about August 12, 2008, the Complainant gave G.K. a letter requesting “a petty cash advance for $500 to cover expenses for [her] trip to the conference in Halifax.” The request was approved that same day, and a notation was made on the letter by J.N. indicating “conference float” (Agreed Doc. No. 5).

August 19, 2008

The Complainant testified that she was off work on Monday, August 18, 2008, was scheduled to work for three hours, from 1:00 to 4:00 p.m., on Tuesday, August 19, and was to fly to Halifax on Wednesday, August 20.

Her evidence was that a couple of strange things happened around that time. On or about August 18, she was scheduled for a root canal, but problems developed, and the tooth had to be pulled. She was given prescriptions for antibiotics to prevent any further infection (Ex. 7). In addition, the hospital phoned on the Friday before she was to leave for Halifax, and wanted her to go in for a bone scan on Monday, August 18. She said that this scared her as it came “out of the blue”, and you just don’t get bone scans in Brandon out of the blue. She thought that this might be related to the cancer she had had before.

She said that she was feeling stressed, and did not know if she could follow through with the trip. She was scheduled to work from 1:00 to 4:00 p.m. on August 19, but the whole side of her face was still hurting and she was not ready to go to the Conference. As a result, she called the Respondent’s office, and left a message on the office telephone to advise that she could not report to work because she was not feeling well.

The Complainant had a late breakfast that morning with another staff member, D.J., at a restaurant. She remembered being very upset and emotional at the time, and that D.J. tried to calm her down. After leaving the restaurant, she went home and had a nap. Later, she went to Walmart, and remembered buying an overnight bag there. She returned to her apartment fairly late, around 8:00 p.m., where she found a letter from G.K. which had been left under her door.

The text of that letter (Agreed Doc. No. 6) read as follows:

> As I am concerned about your health and well being it is essential that you be seen by a doctor immediately. Dr. Benning's office is open until 7:00 PM and Brandon Clinic West is open until 8:00 PM, or any other doctor of your choosing. In order to attend the CMHA National Conference you are required to produce a note from a doctor stating that you are ill today but you should be well enough to attend the conference.
>
> If you are unable to produce such a note you will not be permitted to attend the CMHA National Conference. Please call me on my cell phone at [number removed] once you have received the above note from a doctor, otherwise you are NOT to attend the CMHA National Conference.

There was a notation at the bottom of the letter made by N.M., indicating that it had been delivered at 5:40 p.m.

The Complainant's reaction to that letter was that she was absolutely furious. She knew that she was being watched on camera. She had been having issues with the Respondent for a long time with respect to its staff watching her, both on cameras which had been installed in the hallway right above the door to her apartment, and through the windows to her apartment, which was located on the main floor of the building. She said that she had raised this with G.K., and that at one point he had told her she was being paranoid.

The Complainant did not recall doing anything else that evening other than going to bed.

G.K. was on vacation at this time. His evidence with respect to August 19, 2008, was that the Complainant was scheduled to work not only from 1:00 to 4:00 p.m. that day, in support and housing, but also from 5:00 to 8:30 p.m., in fundraising. He testified that he received a phone call from N.M., advising him that the Complainant had called in sick that morning, and that her voice was slurred. While N.M. did not say that the Complainant was intoxicated, he took this as a possibility. He was told that a construction worker had seen the Complainant bumping into the walls in the hallway, and that a tenant had raised a concern that she was intoxicated. He asked N.M. to check on the Complainant by knocking on her door, noting that in the past when the Complainant was on a binge, she might answer the door but not the phone. N.M. reported back, however, that there was no answer. He said that he tried calling the Complainant himself from Winnipeg, but again there was no response.

G.K. said that he had no conclusive evidence that the Complainant was on a drinking binge, but suspected as much. Having been unable to contact her, he directed N.M. to view the cameras in the apartment block, but only during the times the Complainant was supposed to be at work, to see if she saw the Complainant or saw her bringing in a 12-pack of beer. This, he said, would have been almost conclusive evidence that she was on a binge.

Eventually, G.K. directed N.M. to write and deliver the above letter to the Complainant.

On cross-examination, G.K. stated that he only tried to call the Complainant once, as there was no sense trying again if she was screening her calls. He had no idea whether he left her a message when he called. When asked what he was hoping to gather from speaking to her himself, he responded that while he had his suspicions, he needed to talk to her to understand the situation. He said that anytime he had asked the Complainant if she was drinking, she had not lied to him. He said that if she had said that she was not drinking and there was a reasonable explanation, he would have accepted that.

N.M.'s evidence was that she received a phone call from the Complainant on August 19 saying that she was not coming in to work because she was sick. She said that the Complainant's voice sounded slurred. On cross-examination, when asked when the Complainant had called, N.M. indicated that the Complainant had left a message which was on the answering machine when N.M. came in to work. N.M. testified that later, a staff member said that he had seen the Complainant walk down the hall in the apartment building and bump into the wall. An undated note to this effect, addressed "To Whom It May Concern" was filed as Exhibit 17. The author of that note, however, was not called as a witness.

N.M. testified that she then called G.K., who told her to call the Complainant. When she received no response, G.K. asked her to check the cameras to see if she could see anything. She took another staff member with her to do so.

D.J.'s evidence with respect to August 19, was that he went for a late breakfast with the Complainant, around mid-morning, and they talked. The

Complainant was quite distraught and crying a little bit. She was beating herself up about her two daughters who had passed away tragically the previous year, and was concerned about her own health. She had wrestled with cancer before and was very concerned that it had come back. The Complainant did not appear to him to be intoxicated, but was very upset. After breakfast, D.J. said that he went to work and the Complainant went home.

D.J. said that G.K. phoned him that day, and wanted to know whether the Complainant was drunk. D.J. said no, but that she was upset. He did not elaborate on that with G.K., as he was not prepared to share what he had been told in confidence.

<u>August 20, 2008</u>

At about 6:00 a.m. on August 20, 2008, D.J. picked the Complainant up and drove her to the bus depot in Brandon, where she was to catch a bus to the Winnipeg airport to depart for the Conference. She bought a bus ticket to Winnipeg, and was having breakfast with D.J., when J.B. arrived with the Respondent's homeless coordinator's cell phone, and said that the Complainant was to telephone G.K. It was an agreed fact that the Complainant did so immediately, and was advised by G.K. that she could not attend the Conference.

The Complainant's recollection with respect to that telephone conversation was that G.K. told her that she was not going to the Conference because she had not provided him with a doctor's note, and that that was final, then he hung up. She said that she started to cry, was hustled out of the depot by D.J. and J.B., and went home.

She thought that she was told by J.B. sometime later, that G.K. had called back and said that if she got the doctor's note, she could go to the Conference the next day.

It was an agreed fact that later that day, the Complainant obtained a medical note from her family doctor indicating that she had been required to be off work from August 19 to 20, 2008, and provided that note to the Respondent. (Agreed Doc. No. 9)

On cross-examination, it was put to the Complainant that G.K. specifically asked her to provide a doctor's note stating that she was well enough to go to the Conference. When she was asked why she had not provided such a note, her response was that she had a doctor's note which said that she was sick for one day, and would assume that meant she was well the next day. She said that she did not understand G.K.'s letter to say that she needed to get a "wellness note".

It was an agreed fact that on August 20, 2008, G.K. made alternate flight arrangements for the Complainant to travel to the Conference the next day (August 21), and directed his Administrative Assistant to write and deliver a letter to the Complainant, requesting that she meet him at the Winnipeg airport the next morning.

The text of that second letter (Agreed Doc. No. 7) read as follows:

> [G.K.] has asked me to get this note to you.
>
> He asks that you meet him at the Tim Horton's at the Winnipeg Airport on Thursday morning at 9:15 AM when your bus arrives there. He states that he will have your boarding pass [sic] for you and will give them to you.
>
> If you need to talk to him prior to this you are to call him on his cell at [number removed].

G.K.'s evidence with respect to what occurred on August 20, 2008, was that after talking with the Complainant at the bus depot, he thought that she was going to comply with his request, and therefore gave her additional time.

On cross-examination, G.K. denied having hung up on the Complainant. He said that they had a good conversation. He asked why she was at the bus depot, and she responded that she was going to the Conference. He said that she had been told that she was not to go to the Conference until she provided a doctor's note saying that she was well enough to go, and she said that she had not had time to do so. His evidence was that he told the Complainant during that telephone conversation that he would rebook the flights for the following day.

G.K. agreed that he rebooked the flights without having the doctor's note, saying that he trusted that she was going to get it. He said that he specifically explained what he was looking for, and strongly believed that the Complainant was very clear as to what was expected of her. There was not the slightest hint in his mind that she did not understand, only that she needed more time.

G.K. testified that he attempted to contact the Complainant after he had rebooked the flights, to arrange to meet her at the airport and give her the boarding passes, but again received no response. He therefore instructed N.M. to put a letter under the Complainant's door with that information.

G.K.'s evidence was that he wanted to meet the Complainant at the airport not just to hand off the boarding passes, but also to receive the doctor's note saying that she was well enough to attend the Conference. He said that this was very important for

two reasons: first, she was to be the Respondent's sole representative at the Conference, and it would have been a huge embarrassment for the Respondent if she went in the middle of a binge or started on a binge at the Conference; and secondly, he had previously been told by J.B. that the Complainant had been hospitalized during a drinking binge, where one of her major organs had shut down, and he did not want her going to the Conference if it might possibly result in her being in a life-threatening situation.

On cross-examination, when G.K. was asked whether he had considered allowing the Complainant to go to the airport, get her boarding passes and get on the plane as anyone else would, or whether he personally wanted to be there, he said that he personally wanted to be there. Asked whether he was going to ask and personally assess whether she had been drinking, he said "absolutely", and that if she said no, he would have believed her. When it was put to him that he did not believe her when she phoned in sick, he said that he believed that she was sick, but did not know the cause of her illness.

G.K. confirmed that the Respondent received the above doctor's note from the Complainant, but added that he was in Winnipeg at the time. It is unclear whether he received a copy of that doctor's note by fax or if he was made aware of its contents by N.M. In any event, he stated that the note only addressed the first part of what the Complainant was to provide, and not the second part, being whether she was well enough to attend the Conference.

The evidence does not disclose at what point in time G.K. directed N.M. to deliver the second letter (Agreed Doc. No. 7) to the Complainant, whether it was before or after the Respondent had received the doctor's note, or at what time the letter was left under the Complainant's door. Nor was the Complainant sure as to when she would have received this letter. She said that she was angry when she did receive it. She felt that she was being harassed and intimidated, and had had enough.

J.B. recalled that G.K. called her on August 20 on the homeless coordinator's phone and asked if the Complainant was going to the Conference. When she said yes, G.K. asked her to take the phone to the Complainant and have her call him, which she did. J.B. said that G.K. asked her if the Complainant was drinking. Her impression of the Complainant at the time was that she was sober. J.B. added that she is hypersensitive about this, and can tell if the Complainant has had even one beer. She said that she did not have a conversation with the Complainant, but that the Complainant looked upset. She stayed while the Complainant phoned G.K., and said that the Complainant was just listening during that call. J.B. said that she did not recall what happened afterwards, but thought that the Complainant indicated that G.K. told her he wanted a sick note. J.B. said that she left then, and could not recall whether she saw the Complainant again that day.

<u>August 21 to September 1, 2008</u>

The Complainant testified that she could not sleep that night. Her mouth was sore, and she was so tired that she was starting to throw up. At approximately 5:00 a.m. on August 21, 2008, she phoned G.K. and left a message on his cell phone, advising him that she was ill and would not be able to travel to the Conference. When

asked whether she was worried about how he would react, she said that she did not really care at that point. She had been working 50 hours a week, the work in the basement was not getting done, the alarms were going off all the time, and she was totally and utterly exhausted.

G.K. did not call the Complainant back after he received her message on August 21. He testified that that was the end of the matter until he came back from vacation.

The Complainant did not attend the Conference. She remained in Brandon and was away from work, first on sick time and then on vacation, from August 21 to September 1, 2008. She testified that she did not remember a lot about that period of time. She thought that she must have been "on a pretty good bender" and got to the point where she wanted to hurt herself. She got prescriptions from her doctor's office for anxiety, but does not know if she took them, adding that she doesn't usually do so when she's drinking.

September 2 to 16, 2008

The Complainant returned to work on September 2, 2008. Before going into work that day, she went to AFM, on a self-referral basis.

G.K. was not in the office for the first couple of days after her return to work, and the Complainant proceeded to go about her duties.

In the week or so following G.K.'s return to the office, the Complainant thought that she met with him two or three times at Chicken Delight, but was unclear as

to what each meeting was about, saying that the meetings sort of blurred or ran together there.

The Complainant believed that G.K. told her that because she had not attended the Conference, she was expected to pay the money or some of the money back. At some time, she communicated to G.K. that she was experiencing stress and personal difficulty. She told him that she had been called in for a bone scan, had had a tooth removed, and had gone to AFM. According to the Complainant, she had never had any discussions with G.K. about AFM before. In August 2008, when she was really struggling, he had suggested that she look at counselling. She had made inquiries of Foster's Counselling Services and had been told that she needed a letter from the Respondent indicating that the Respondent would pay for the counselling. She had drafted a letter (Agreed Doc. No. 10), but never went for counselling as G.K. was on holidays then, and the letter was never signed. In his evidence, G.K. testified that to the best of his recollection, he did sign that letter sometime after September 3, 2008.

The Complainant testified that at one point, G.K. said that she had been taking sick time because she was drinking, and that her drinking was affecting her work performance. She said that she had the time sheets to show that that was not true, but that he would not look at them.

On cross-examination, it was put to the Complainant that when she met with G.K., she stated that she had been on a drinking binge prior to receiving the letter dated August 19 (Agreed Doc. No. 6), as the result of a friend suddenly dying of cancer.

Her response was that she remembered telling G.K. about her friend, but did not remember saying that she had been on a drinking binge.

G.K.'s evidence was that there was a team meeting on September 11, 2008, at which a combination of measures were identified to provide the break that the Complainant had previously requested. The Minutes of that meeting (Ex. 25) indicate that these measures included: an on-call system for covering the apartments, where someone else would cover weekends from Saturday at 5:00 p.m. to Tuesday at 9:00 a.m., at a rate of pay to be discussed; a fee for tenants who locked themselves out of their apartments ($10.00 if during business hours, $30.00 if after hours); and a $10.00 fee for knocking on the Complainant's door. In addition, J.B. was to arrange a tenant meeting, where tenants were to be told about the charge for locking themselves out and instructed to get their laundry change from somewhere other than the Complainant. G.K. said that he asked the Complainant if she needed anything more, and she said no.

On cross-examination, G.K. confirmed that this was the accommodation that the Complainant had requested, and that he specifically asked her if she needed more, and offered her more, but she declined that offer. Asked whether putting these measures in place would be difficult or manageable, he said that he would not have put them in place if he did not think that they were manageable. He said that several staff were willing to help with this.

The Complainant remembered meeting with G.K. at Chicken Delight in the morning of September 16, 2008. She said that he wanted to know how much money she was prepared to pay back with respect to the Conference. There was no

discussion at that point of the $500 cash float. She said that G.K. also asked her a number of personal questions, including whether she was going to the addictions counsellor and what the counsellor had said, but that she shut him down and told him that he was not entitled to ask her that. In her testimony, she said that she did not believe that she had to disclose that type of personal information in the workplace, adding that “that workplace is toxic”.

There is no dispute that early in the afternoon of September 16, 2008, N.M. informed G.K. that the Complainant had not returned the $500 float provided to her in respect of the expenses for the Conference. Upon being so advised, G.K. met with the Complainant and requested the return of the $500 float. According to the Complainant, this was the first time that G.K. had brought up the return of the $500 cash float.

The Complainant testified that she told G.K. that she did not have it on her right then. She thought that at that point he said that they were going to go to her apartment, and that he wanted her keys. She subsequently testified that she did not know if that was before or after she returned the $500 float.

The Complainant’s evidence was that out of the $500 she had been given, she still had $400 in cash at her apartment, having spent about $90 on the bus and air shuttle to Winnipeg. It is unclear from her evidence whether she went home to pick up the $400 then went to the bank, or whether she simply went to the bank and arranged to get a money order to repay the cash float. She said that she was feeling angry and

humiliated, and that she stopped and had a coffee with D.J. before returning to the office with the money.

On the Complainant's return to the office, she gave a $500 money order directly to G.K. Approximately one to 1½ hours had passed between the time she had been asked to return the $500 float and the time she returned to the office with the money order.

When asked on direct examination why she had not returned the conference float before being asked to do so, the Complainant said that she had never thought about it. She had the $400 at home and had no reason not to return the money, but there was so much going on at the time that she just forgot. During cross-examination, she commented that having not attended the Conference, she would of course have assumed that she would repay the $500 float.

The Complainant testified with respect to a second meeting with G.K. at Chicken Delight on September 16, in the afternoon. Her evidence was that G.K. gave her the option of two weeks' notice, which she could work out so that she could go on Employment Insurance ("EI"), or being fired on the spot, and told her that she had one week to decide. She stated that she did not consider herself to have been fired at that point. Among other things, G.K. had given her time to decide how much money she would pay back. On cross-examination, she agreed that she did turn in her keys on September 16, stating that G.K. came to her apartment and got them.

G.K.'s evidence was that on his return to the office, he met with C.R. at least a week before September 16. He believed that they went to Chicken Delight for a

coffee, as it is a little bit away from the office and more private. He told the Complainant that he was concerned with her conduct, that she had been insubordinate when she attempted to go to the Conference, having clearly been told that she was not to go without a doctor's note stating that she was well enough to attend.

He said that the Complainant mentioned having gone to bingo and hearing about a person who had died of cancer. She said that she had found it hard to take, that she had started drinking, and was drinking both before and after she received the letters from the Respondent. He said that he did not remember whether she had taken any steps at that time, but thought she said that she had gone to AFM a week earlier. She was still troubled by the deaths of her two daughters, and requested a variety of supports. G.K. told her that the Respondent would pay for any counselling services she required. She also said that she was going to go to AFM and to see about going to AA. G.K. said that he was very impressed with the Complainant's attitude, as this was the first time she had expressed an initiative to seek assistance "with her disability". All of the previous times when he had offered supports to her, including grief counselling, AFM and AA, she had declined them.

G.K. said that he informed the Complainant that her "misconduct" was serious and that she could be fired for it. As a result of her missing the Conference, no one from the Respondent had attended, and they were not able to benefit from the presentations. Her "insubordination and misconduct" has resulted in significant costs to the Respondent. He told her that she was going to be placed on probation, and that they would be meeting in another week to discuss the terms of her probation. He

testified that that next meeting never happened because she was fired. He then corrected himself, saying that that might be wrong and he couldn't quite remember.

G.K. went on to testify that a meeting was scheduled for the morning of September 16, which he said might have been to discuss probation, but that when he asked the Complainant how things were going, she just flew off the handle at him. He said that he could not recall her exact words, but she told him that her personal life was none of his business. He agreed that it was her own business off the job, but that she had requested supports and he was concerned with her behaviour on the job. He said that she was very angry, and that it was a very hostile conversation.

When testifying, G.K. referred to three looseleaf pages of handwritten notes (part of Ex. 26), which he said he wrote right after the matters mentioned therein. The notes referring to a meeting at 10:00 a.m. on September 16, 2008, state as follows:

> Met with [the Complainant] to discuss terms of her probation. She informed me that her private life was none of my business and that she had not missed much work due to her drinking. She admitted that she had been drinking before and after she had received the letter from me and that it was my fault that she had missed the conference.
>
> I reminded her that I was not concerned about what she did on her own time but repeatedly her drinking behaviour had caused problems for CMHA. In the most recent situations, CMHA had spent over a thousand dollars on flights etc. to a conference etc.
>
> As she was not willing to take any responsibility for her actions I was not willing to continue the meeting and I was considering suspending her. She asked when would she know. I told her by day end.

G.K. testified that at 1:29 p.m. on September 16, N.M. informed him that the Complainant had not returned the conference money that she had received, at

which point he immediately went to her office and asked her to return the $500 petty cash cheque. Referring to his notes, he said that she replied that she would have to make arrangements to pay it back, and that when he asked her how much of it she had left, she replied that she had none of it.

G.K. stated that, realizing that this was a very serious issue, he stopped the conversation and went to his desk. He pulled out the policy manual and looked on the "labour website" with respect to causes for dismissal and theft, as he wanted to be certain that this was serious.

Referring again to his notes (Ex. 26), he said that he met with the Complainant at Chicken Delight at 2:00 p.m., and told her she was fired. The notes indicate that when she asked why, he said that it was because she had spent the conference money, that he told her that he might be willing to change it to a resignation provided she would in return train another staff member in her fundraising duties, and that she was to return to the office and turn in her keys, but she remained at the coffee shop.

G.K.'s notes go on to indicate that the Complainant brought in a money order for $500 at 3:30 p.m., and turned in her keys. G.K. testified that he then handed the money order to J.N., who issued a receipt for "return of conference float" in the amount of $500. (Agreed Doc. No. 11)

J.N. was asked about this on cross-examination and confirmed that the receipt was in his handwriting and that the money would have been returned at that

time. He also said that he did not remember receiving the money order, or that there was anything significant or unusual about the return of the money

N.M. confirmed in her evidence that she informed G.K. on September 16 that the Complainant had not returned the $500 float. When it was put to her, on cross-examination, that she had not asked the Complainant for the float, her response was that it was not up to her. N.M. testified that G.K. told her that same day that the Complainant had been dismissed and asked her to delete the Complainant's security access code to the main building, which she did.

After September 16, 2008

G.K.'s evidence was that, having given the Complainant the evening to consider the option of resigning, he was supposed to meet with her on September 17 to hear what she had decided, but she did not show up.

The Complainant testified that on September 17, she obtained a doctor's note indicating that she had sought advice relative to ill health and was to be off work from September 17 to 22, inclusive. (Ex. 9) She said that there was no other way to describe this than that it was for stress leave. Her evidence was that she gave that doctor's note to N.M., or may have left it on N.M.'s desk.

N.M. testified that the note was not left on her desk. She said that G.K. found it on his desk and showed it to her a day or two after the Complainant was dismissed, i.e. a day or two after September 16.

On September 22, 2008, the Complainant went straight to Chicken Delight to meet with G.K. She testified that when G.K. arrived, he asked her if she was going to train new staff or get a lay-off slip. She did not remember whether G.K. had the September 17 doctor's note with him at that time. The Complainant asked G.K. why she would train new staff, and he got angry and left.

G.K. testified that he believed that the Complainant called and arranged to meet with him on September 22. At that meeting, she apologized for her attitude at the previous meeting, and indicated that she had not done anything wrong and was not interested in resigning.

On cross-examination, G.K. reiterated that the Complainant had been terminated on September 16, 2008. He said that he would have hired her and paid her for another two weeks, but only if she was going to train someone else for the fundraising work. Training was vital because no one else knew how to operate the system. He said that he and another staff member would have been present for any training, as the Complainant was not trusted in any manner at all.

The Complainant did not receive a letter of termination. She said that she eventually received a Record of Employment ("ROE"), but only after she requested one.

Handwritten and typed copies of four ROE's issued to the Complainant, in respect of the occupations of caretaker, fundraising coordinator (wage), fundraising coordinator (commission), and housing coordinator/community support worker, respectively, and dated between September 22 and September 30, 2008, were included in the Agreed Book of Documents (Doc. Nos. 15-22). The reason for their issuance is

indicated on each of these ROE's as "M" (Dismissal). The ROE's for fundraising coordinator (wage) and housing coordinator/community support worker both indicate that the Complainant was paid for accumulated "stat time" and banked time, and for wages in lieu of notice. The Complainant confirmed on cross-examination that she did receive two weeks' severance pay or wages in lieu of notice as indicated on the ROE.

The Complainant filed a claim for EI, which was originally turned down based on the reason given for her loss of employment. Her claim for benefits was, however, eventually approved, and the Respondent was notified of that by letter from Human Resources and Skills Development Canada ("HRSD Canada") dated November 26, 2008 (Agreed Doc. No. 26), which stated, in part, as follows:

> We are writing to inform you that we have approved the claim for benefits of your former employee [the Complainant].
>
> We have made this decision based on the Employment Insurance Act because we consider that the reason(s) for losing his/her employment does not constitute misconduct.
>
> You are responsible for advising us if you are required to pay your former employee any wages, pension, severance payments or damages for wrongful dismissal. If this occurs, please contact us prior to the payment of these monies to determine if you must deduct and remit directly to us a portion of these monies to repay any Employment Insurance benefits paid to the claimant now covered by this settlement.

The letter went on to advise the Respondent that if it disagreed with that decision, it had 30 days to file an appeal. No such appeal was filed by the Respondent.

G.K. testified that after the Complainant applied for EI benefits, the Respondent was contacted by EI and advocated on her behalf. G.K. said that the EI worker had told him that the Complainant was not entitled to benefits because she was dismissed for misconduct, and he said yes, but that the Complainant had been

punished enough for her misconduct and he did not feel that it was just that she also be denied EI. He felt that it was wrong that she should have no income. He told the EI worker that the Complainant had had a difficult life, and asked if there was any way she could still get benefits. The EI worker said that they would see what they could do. G.K. said that when they received the letter advising that the Complainant's claim for benefits had been approved, they did not appeal because that was what they had requested.

The Complainant testified that the EI benefits were backdated to September 16, 2008, though she first had to use up her holiday time and go through the applicable waiting period.

<u>The Board of Directors</u>

At the Respondent's Board of Directors meeting on October 8, 2008, the Board was advised that the Complainant had been dismissed. In this regard, the Minutes of that meeting (Agreed Doc. No. 25) state, under the heading "New Business":

> A) Report on Dismissal: [C.R.] has been dismissed. Some Board members suggested that a letter be sent to [the Complainant] thanking her for her previous good work. [G.K.] will seek legal council [sic] on the matter.

A.G. and B.P., who were both in attendance at the meeting, stated that the only reason they were given for the Complainant's dismissal was misappropriation of funds. On cross-examination, A.G. stated that details were not given and were not important; what was important was that they could not have misappropriation. A.G. recalled that there was some discussion about money and some mention of a float, but did not recall it having been communicated that the money had been paid back when it

was requested. He also did not recall any comments with respect to the Complainant drinking or having an addictions issue, and said that he would not have wanted it to be discussed, as that would have been outside the purview of what they were dealing with and, in his mind, would not have been an issue.

A.G. testified that he was satisfied that the Respondent had done the right thing. When pressed as to why he was satisfied, he said that he would not want to hear anything that he would construe as being outside the purview of what they were dealing with. If this happened, it was wrong, and that was all that he would need to know. In his words, he would put the "fluff 'n stuff" aside and deal with the issue. He said that he would not have wanted to get into the detail of the amount or how it was misappropriated, noting that "if a guy uses two bullets or one bullet, it is still a crime". He added that it was his understanding that the amount of money which was taken was significant enough for him to make a clear judgment.

On cross-examination, B.P. recalled the Board being told that the Complainant had been given money to go on a trip for the Respondent, that she had not gone on the trip, and that the money had not been returned. He said that the Board was never told the amount of money or that the money had been returned. He also said that he was not aware of the Complainant having an addiction to alcohol.

G.K. testified that as Regional Manager, he reports to the Respondent's Board of Directors. Referring to a chart listing the responsibilities of the Board and the Regional Manager (Ex. 22), he stated that the Board has no role in hiring or firing staff or with respect to staff grievances, and that such matters would not be discussed at

Board meetings. According to the chart, it is the Regional Manager who approves all hiring and makes final termination decisions, and all staff grievances stop at the Regional Manager except grievances involving "personal policies". With respect to personnel policies, he said that some of them were there when he started and he had drafted others. Two Board members had taken on the task of reviewing some sections of the personnel policies, and a respectful workplace policy had been adopted through an ad hoc committee.

On cross-examination, he was asked whether any member of the Board was charged with human resources and providing him with background with respect to such issues. He replied that that was not a Board issue. When asked if he would seek legal counsel with respect to human resource issues, he responded "if necessary". He did not seek legal advice at the time the Complainant was dismissed, but did speak to counsel later when the Board raised the issue of sending her a letter as indicated in the Minutes of the October 8 meeting. With respect to the alleged misappropriation, he said that there was no need to seek legal advice, as it was clear cut: she had taken the $500 and spent it without authorization.

G.K. testified that he was trained as a social worker, having completed the academic part of that training, but did not have the degree. He said that he did not have any addictions training, but added that he thought there would have been some "addictions stuff" in the host of opportunities that he had been sent on.

G.K. referred in his evidence to the Respondent's Reasonable Accommodation Policy (Ex. 27), which he said was approved in 2011. He said that the

Respondent did not know that it needed such a policy in 2008, but that even though it did not have such a policy, its practice exceeded what was required, because the Complainant denied that that there was any problem, and according to the Commission's own Accommodation Checklist, "If the employee denies there is anything wrong and refuses assistance, then the employer has discharged its duty to inquire as to whether there is a need for accommodation." (Ex. 27, p.4)

Petty Cash and Floats

Various witnesses testified on the subject of petty cash and/or floats as used by the Respondent.

The Complainant testified that she had had other floats while working for the Respondent, totalling around $700 to $800, including $300 for the apartment and $200 for support and housing. In addition, she said that it was common to be into one's own resources to pay for things. She referred to an instance where she had had to go to Leon's and pay for a new fridge herself, to replace a tenant's fridge which had broken down, and that she had had to wait to be reimbursed for that.

J.B.'s evidence was that everyone was given a float for their department, to buy such things as cleaning supplies. Receipts for whatever was purchased would be taken to N.M., who would go through them and issue money for what had been spent. J.B. did not know of any timeline for reporting back, and with respect to whether the Respondent monitored these funds, said that the only time she had been asked about them was the last day of the fiscal year. As to whether staff ever used such funds for personal expenses, J.B. testified that quite a few employees, if they were short until

payday, would take money out of petty cash, then put it back in on payday. As far as she knew, G.K. was aware of this.

On cross-examination, J.B. clarified that what she had referred to previously would be petty cash. She agreed that she had also been given floats in the past, including a $1,000 float which she had been given to purchase something for the homeless while S.L. was on leave. She also agreed that she received the float to purchase things for the homeless, and handed in any receipts once she was done, which would probably have been about a week later.

D.J. testified that he had petty cash for the store, and was responsible for accounting for it. The petty cash was to purchase things that were needed for the store, such as tools and adhesive. He kept track of receipts, and as the petty cash whittled down, he would hand in the receipts and the petty cash would be topped up. He testified that the Respondent was not completely strict in monitoring petty cash. Asked whether he knew of employees who used money from petty cash for personal expenditures, he said that G.K. himself did, and referred to a time when he went to take money from his petty cash, but could not do so, because there was an unsigned IOU in his petty cash. When he asked G.K. if this was his, G.K. said yes, then opened his wallet and repaid the amount of the IOU.

G.K.'s evidence was that whenever money was removed from petty cash, there had to be a statement from the individual who removed it. He explained that whenever he took money out, he would put an IOU in the petty cash. Once he had paid

for whatever was needed, he would put a receipt in and submit it as an expense. An IOU was a temporary way of showing who took the money out.

S.L. stated that she never put IOU's in the petty cash. She disagreed that employees could use petty cash for personal reasons, saying that it was not what the money was for, nor did they have permission to do so. Her petty cash of $150 was spent directly on homeless issues. She could choose to keep it in the bank or in their petty cash box, but it was her responsibility to have the cash or the receipt for any amount spent.

J.N. testified that petty cash and floats are quite different. Petty cash is set aside permanently as part of the regular operations of the Respondent. A float is temporary, and is provided for a specific purpose.

On cross-examination, J.N. testified that when an employee asks for a float, and J.N. is the one writing it up, he writes a note which remains in accounts receivable until receipts are handed in. Asked whether it was his responsibility to monitor a float, J.N. said it was the responsibility of whoever was doing the books to get the receipts in, together with any money which was left. Whether it was he or N.M., whoever was looking at the books would be responsible as long as there was an outstanding account receivable which had not been reconciled.

J.E.B. / Addictions Foundation of Manitoba

J.E.B. is a rehabilitation counsellor in AFM's family program in Brandon, who focusses mainly on family counselling and does some intake work. J.E.B. had been personally involved in providing assistance to the Complainant. His first

involvement with her was in September 2006, when she came to AFM as a result of an impaired driving charge. The Complainant was required to, and did, complete the impaired driving program at that time.

His next contact with the Complainant was in September 2008, when she referred herself to AFM. The Complainant first saw an intake worker, who completed an initial assessment, then referred the Complainant to him. J.E.B. spoke of the assessment process used by AFM, and made reference to two categories in particular. The first category related to an assessment based on different levels of involvement. In the Complainant's case, she was classified in the category of dependent involvement. The second category related to stages of change, and looked at what an individual was wanting to do at this point in their life. The spectrum of stages ranged from pre-contemplation to maintenance. The Complainant was identified as falling within the preparation stage, as someone who was wanting to make something happen, but was not sure where to go.

J.E.B. believed that the Complainant's assessment was discussed with her, and that at that point, they were able to address the issues which were before them. J.E.B. stated that the Complainant was also dealing with a couple of grief issues at the time with respect to two very significant losses in her life. As J.E.B. also did grief counselling outside of his work with AFM, it was felt that he was a good fit for the Complainant.

J.E.B. stated that there can be a variety of forms of binge drinking, including weekend binges or weeks upon weeks of drinking. What is significant, and of concern, is the continued use of the substance.

J.E.B. stated that the Complainant's period of treatment with AFM ended in October 2008. He said that to his knowledge, the Complainant also sought help from AA, and he believed that she was going twice a week to her chosen AA group.

Analysis and Decision

Relevant Provisions and Principles

Subsection 14(1) of the *Code* prohibits discrimination with respect to "any aspect" of an employment, and reads as follows:

> **14(1)** No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

The term "any aspect" of an employment or occupation is defined in subsection 14(2) in part, as follows:

> **14(2)** In subsection (1), "any aspect of an employment or occupation" includes
>
> (a) the opportunity to participate, or continue to participate, in the employment or occupation;
>
> (b) the customs, practices and conditions of the employment or occupation;
>
> . . .
>
> (f) any other benefit, term or condition of the employment or occupation.

"Discrimination" is defined in subsection 9(1) of the *Code*, *inter alia*, as follows:

> **9(1)** In this Code, "discrimination" means
>
> . . .
>
> (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
>
> . . .
>
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

One of the characteristics referred to in subsection 9(2) is "physical or mental disability or related characteristics or circumstances. . . ." (s. 9(2)(l))

In a claim of discrimination under the *Code*, the Complainant bears the onus of establishing a *prima facie* case of discrimination. Where a *prima facie* case of discrimination is established, the onus shifts to the Respondent to prove that one of the exceptions to the prohibitions enacted by the *Code* applies. These exceptions include that there is a *bona fide* and reasonable cause or justification for such discrimination, or that reasonable accommodation has been made or is not possible in the circumstances.

With respect to any issues of credibility, I would observe that the principles which are to be applied where it is necessary to make findings of credibility in respect of the factual issues in a case have been set out in the oft-cited case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) ("*Faryna*"), and in particular, the following passage from page 357 of that decision:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In

> short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
>
> (Emphasis added)

A *Prima Facie* Case of Discrimination

To establish a *prima facie* case of discrimination, the Complainant must establish, on the balance of probabilities, that she had a disability at the relevant time, that her employment was adversely affected in some way, and that her disability was one of the factors which motivated the decision or action that adversely affected her employment.

With respect to the first of these requirements, the Commission submitted that an addiction to alcohol is clearly encompassed within the definition of disability under the *Code*. As for whether the Complainant had such a disability, Commission counsel noted that the Complainant had been assessed as dependent on alcohol by AFM. Her evidence and that of J.B. indicated that she had had such a dependency for all of her adult life. The evidence of G.K. and others was that they knew early on in her employment that the Complainant had an addiction. In sum, it was submitted that there was no dispute that the Complainant had an addiction and therefore a disability under the *Code*.

Commission counsel went on to submit that if the evidence did not establish that the Complainant had such a disability, it was nevertheless clear that everyone believed that she had an addiction. The Commission relied on the decision in *Halter* v. *Ceda-Reactor Ltd. (No. 1)* (2002), CHRR Doc. 05-314 (Alta. H.R.P.) ("*Halter*"),

and submitted that a perceived addiction constitutes a disability within the meaning of the *Code*.

The Respondent did not dispute that the Complainant had an addiction to alcohol or that this constituted a disability.

I am satisfied that it is well-established that an addiction to alcohol constitutes an illness, and falls within the meaning of a disability under the *Code*. (See e.g., *Halter*, at para. 121)

As to whether a particular individual has an addiction or illness, clear and cogent medical evidence is generally required in order to establish that that is the case.

No medical evidence was led in this instance to establish that the Complainant suffered from an addiction or abuse of alcohol amounting to an illness. The evidence indicates that the Complainant was assessed by AFM in 2008, at least initially, as being "dependent" on alcohol. There was little or nothing, however, to indicate the steps or process involved in making such an assessment, the qualifications of the person who performed the assessment (assuming, as it appears, that that assessment was made by someone other than J.E.B.), or the level of dependency or nature and severity of the Complainant's condition. On the whole, there is limited evidence as to the history of the Complainant's use or abuse of alcohol, and any treatment she received for this. The evidence with respect to the Complainant's attendance at AFM in September 2008 was that her treatment ended the month after she referred herself to AFM.

I recognize, of course, that the parties did not dispute that the Complainant suffers from alcoholism, and that there were repeated references in the evidence to her "addiction" to alcohol. I am not satisfied, however, that this is sufficient proof of the existence of actual illness or an actual disability.

Accordingly, based on the evidence which is before me, I find that it has not been established that the Complainant suffers from an addiction to alcohol amounting to a disability within the meaning of the *Code*.

That is certainly not the end of the matter, however, as it is clear that the term "disability" under the *Code* must be interpreted in a broad and flexible manner. Thus, a disability "may be the result of a physical limitation, an ailment, a social construct, a *perceived limitation* or a combination of all of these factors." (emphasis added) (*Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Montreal*, [2000] 1 S.C.R. 665, 2000 SCC 27, at para. 79)

Assessing the evidence in this case from the perspective of a perceived disability, I am satisfied that it clearly establishes that the Complainant was perceived by the Respondent as having an addiction to alcohol. As noted previously, the Respondent did not dispute that the Complainant had such an addiction. G.K., the Respondent's Regional Manager, and most if not all of the other employees of the Respondent who testified, indicated that they knew that the Complainant had an addiction to alcohol. Accordingly, I am satisfied that it has been established that the Complainant had a disability within the meaning of the *Code* at all relevant times.

I am also satisfied that the Complainant's employment, or aspects of her employment, were adversely affected. The Complainant was scheduled to attend the CMHA Conference in Halifax, but her departure was delayed, and she ultimately did not travel to Halifax or attend the Conference. In addition, there is no question that the Complainant's employment was adversely affected when it was terminated in September 2008.

Was the Complainant's disability one of the factors which motivated the decision or action that adversely affected her employment? The Respondent has said that it was not. In particular, it has argued that the only reason the Complainant's employment was terminated was for misappropriation of funds. I do not agree.

It is well-established that it is not necessary that the disability or discriminatory reason be the only factor, or even the primary factor, that motivated the decision or action that adversely affected an employee's employment. It is sufficient that it is one of the factors that influenced the decision or action. (See, e.g., *Buchanan* v. *WMC Management Services BC Ltd.*, 2006 BCHRT 339, at para. 57)

In my view, it is clear from the evidence that the Complainant's addiction to alcohol was an issue for G.K. and the Respondent in August and September 2008. After hearing that the Complainant called in sick on August 19, G.K. suspected that she was binge drinking. As a result, he took a number of steps to determine whether that was in fact the case, including directing N.M. to watch for the Complainant on the camera outside her apartment, calling both D.J. and J.B. to ask them whether the Complainant was drinking, and requiring the Complainant to provide him with a specific

type of doctor's note attesting to her wellness. G.K. continued to pursue this issue, even after D.J. and J.B. had both told him that the Complainant was sober, and to refuse to allow the Complainant to leave for the Conference unless she satisfied all of his demands. In the circumstances, I am satisfied that the Complainant's addiction to alcohol was at least one of the motivating factors in the Respondent's treatment of the Complainant at this time.

I am also satisfied that the Complainant's addiction continued to be an issue for G.K. and the Respondent after that, and was one of the motivating factors in the termination of her employment. When G.K. met with her on his return to the office, he spoke of her "insubordination and misconduct" in trying to go to the Conference without providing the specific doctor's note which he had requested (attesting to her wellness) and in missing the Conference, stating that she could be fired for this and was going to be put on probation. Later, he spoke about how her drinking behaviour had caused problems for the Respondent, and that he was considering suspending her. It was in this context that he received the news that the Complainant had not yet returned the $500 float, and decided to terminate her employment. Given the Respondent's expressions of an intention to put the Complainant on probation and then to suspend her, due at least in part to issues related to her addiction, I do not accept that its decision later that same day to terminate the Complainant's employment was based solely on misappropriation of funds.

In arriving at this conclusion, I also note that while the Respondent has steadfastly maintained that it was entitled to terminate the Complainant's employment as the result of her (alleged) misappropriation of funds, it has contradicted or at the very

least cast serious doubt on the sincerity of that position by its own actions. Thus, for example, the Respondent paid the Complainant wages in lieu of notice, a payment which was inconsistent with its claim that the Complainant's employment was terminated for just cause. Further, it advocated on the Complainant's behalf when she was denied EI benefits, saying that the Complainant had been punished enough for her misconduct. Then, when HRSD Canada notified the Respondent that the Complainant's claim for EI benefits had been approved because HRSD Canada did not consider the reason for dismissal to constitute misconduct, the Respondent did not appeal this conclusion.

I am not convinced, moreover, that the evidence establishes that there was any misappropriation of funds. An allegation of misappropriation of funds or theft is a serious matter. Evidence to establish such an allegation should be clear and compelling. In my view, the evidence falls far short of this.

To begin with, the Complainant did not take money from the Respondent without its permission or knowledge. The Complainant requested a float and it was approved. Consistent with its practice, the Respondent kept a record of that float as an account receivable. The evidence indicated that the policy and practice with respect to the use or repayment of petty cash and floats was somewhat loose or flexible, and was not strictly enforced. The Complainant had the float for less than one month, during parts of which she and others were on vacation. No one had asked the Complainant to repay the float, or sought any explanation as to why it had not yet been repaid.

The Respondent argued, however, that the Complainant spent the float without its permission. I am not convinced that that is the case. In this regard, the Respondent relied on G.K.'s evidence to the effect that the Complainant told him that she had spent all of the money and there was none left. The Complainant, on the other hand, testified that she told G.K. that she did not have the money on her right then. On this point, where there is a conflict in the evidence, I prefer the evidence of the Complainant which, applying the above-referenced test as set out in *Faryna*, I find to be in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

The Complainant's evidence, which I accept, is that she had spent money on the bus and air shuttle to Winnipeg, but still had $400 in cash at home. I also accept her evidence that she assumed that she would be repaying the float, since she had not attended the Conference, and am satisfied that she intended to do so. The money was in fact repaid, in full, between one and 1½ hours after it was requested.

There is no question that G.K. did not inquire as to how, or on what, the money or any part of it may have been spent. He said that he immediately left to consult the policy manual and the "labour website" to be sure that this was serious. He then decided to terminate the Complainant's employment, without making any effort to seek any further information from the Complainant, or any further information or advice from the Employment Standards Division or from legal counsel. In my view, G.K. did not want to know anything more. Rather, he seized upon the fact that the Complainant had not yet repaid the conference float as a convenient excuse for terminating her employment.

In summary, I am satisfied that the Complainant's addiction to alcohol was at least one of the motivating factors both in the Respondent's treatment of the Complainant in the time immediately preceding her scheduled attendance at the Conference, and in the termination of her employment.

Based on the foregoing, I find that the Complainant has satisfied the onus of establishing a *prima facie* case of discrimination.

Reasonable Cause or Accommodation

The onus thus shifts to the Respondent to prove, on the balance of probabilities, that there was a *bona fide* and reasonable cause or justification for such discrimination or that reasonable accommodation was made or was not possible in the circumstances.

The Respondent argued that it works very hard to help and to accommodate people with disabilities. A significant amount of evidence was adduced with respect to good work the Respondent and G.K. have done, commendations they have received, and how they have helped and accommodated the needs of various individuals. That is not, however, what this case is about. The issue in this case is whether the Respondent discriminated against the Complainant in her employment based on her disability and/or failed to reasonably accommodate her special needs or disability.

The Respondent's position was that it had repeatedly bent over backwards in supporting and accommodating the Complainant, even when she was denying that she had a drinking problem. Whether that is true or not, I am not satisfied

that it did so in or around August and September, 2008.

The Respondent relied on offers of addictions counselling which G.K. said had repeatedly been made to the Complainant, but she had declined. Little or no detail was provided with respect to offers of counselling, including when any such offers may have been made. As noted by the Commission, there was no written record of any such offers. The only documentation in this regard is the copy of the draft letter to Foster's Counselling Services dated September 3, 2008. I am not satisfied that that letter was ever signed by G.K. or anyone else on behalf of the Respondent, and in any event, the Complainant herself had already sought help and counselling from AFM by that time.

The Respondent referred to the measures which were identified at the team meeting on September 11, 2008 to provide a break for the Complainant. The uncontradicted evidence of the Complainant, however, was that she had been feeling absolutely overloaded and had requested such relief back in July. The new measures were only identified two months later, just before the Complainant's employment was terminated. There was no indication as to why these or other measures could not have been identified and implemented earlier.

It was also suggested that the Respondent accommodated the Complainant by rebooking her flights on August 20, 2008 for the next day. The Respondent only had to rebook the flights, however, because of its suspicions with respect to the nature of the Complainant's illness, and its insistence, arising out of those suspicions, that the Complainant provide a specific type of doctor's note before she

would be allowed to leave for Halifax.

In the circumstances, I am not convinced that the Respondent had reasonable grounds for requiring what he was seeking or that the request was timely or otherwise reasonable. In addition to the foregoing, the letter telling the Complainant to provide such a note was put under her door no earlier than 5:40 p.m. on August 19, and she did not receive it until at least 8:00 that evening. By that time, it was too late for her to get a note from her doctor or from any of the other doctors referred to in the letter, and she had to leave Brandon early the next morning in order to catch her flights.

Further, by the time G.K. spoke to the Complainant on the telephone on August 20, he had already spoken with both D.J. and J.B., who had told him that the Complainant was sober. G.K. testified at one point that he needed to speak to the Complainant, and ask her if she had been drinking, as he said that she had never lied to him before. Yet, there is no indication that he asked her if she had been drinking (or asked her anything else that he said he needed to know) when he was talking to her on the phone from the bus depot. He simply refused to let her proceed to Winnipeg to catch her flights.

In rebooking the flights for the next day, G.K. continued to require the medical note that he had previously requested. Although he said that he “strongly believed” that the Complainant understood what he wanted in terms of a doctor’s note, I am not satisfied that she did. The Complainant subsequently obtained and provided a doctor’s note to the Respondent saying that she was required to be off work from August 19 to 20. G.K. said in his evidence that that was only part of what he had asked

for, but there was nothing to indicate that he advised the Complainant that that was the case.

G.K. also had another letter delivered under the Complainant's door saying that she was to meet him at the airport on August 21, where he would give her her boarding pass. He did not consider allowing the Complainant to get her own boarding passes and get on the plane as anyone else would. Rather, he acknowledged that he intended to meet her personally and assess whether she had been drinking.

In light of the foregoing, I cannot agree with the Respondent's assertion that it reasonably accommodated or supported the Complainant by its actions in rebooking her flights.

In his evidence, G.K. repeatedly indicated that he was concerned for the Complainant and her health. He pointed to this as being one of two reasons that it was so important for him to meet with her and to receive the note that she was well enough to attend the Conference: he did not want her to go if she was on a binge and there was a possibility that she would be in a life-threatening situation. In the face of his expressions of concern for the Complainant's well-being, it is telling, in my view, that he did not try to contact her after he received her message that she was ill and could not travel to the Conference, or take any steps within the next couple of weeks to check and see that she was alright. In the circumstances, I am of the view that it could also not be said that any such concerns constituted a *bona fide* and reasonable justification for its treatment of the Complainant in the days leading up to the Conference.

With respect to the termination of the Complainant's employment, the

Respondent has argued that it was justified in doing so because she was in an important position of trust and, as a result of her misappropriation of funds, could no longer be trusted. I have already found that the evidence falls short of establishing that there was a misappropriation of funds, and on this basis, this argument must fail.

On September 16, 2008, G.K. was aware that the Complainant was under considerable stress and was seeking help from AFM. He stated in his evidence that he was very impressed with the Complainant's attitude. Nevertheless, he proceeded to tell her that he was putting her on probation and considering suspending her. Then, after learning that the $500 float had not yet been repaid, he decided to terminate her employment without making any further inquiries or considering any possible mitigating factors or accommodations.

In all of the circumstances, I am not convinced that the Respondent has satisfied its onus of establishing, on the balance of probabilities, that there was a *bona fide* or reasonable cause or justification for its treatment of the Complainant immediately prior to her scheduled attendance at the Conference, or in its subsequent termination of the Complainant's employment, or that reasonable accommodation was made or was not possible in the circumstances.

In conclusion, for all of the above reasons, I find that the Respondent contravened section 14 of the *Code* by discriminating against the Complainant in her employment on the basis of her disability, being a perceived addiction to alcohol.

It is therefore necessary to consider what remedies would be appropriate in the circumstances of this case.

Remedies

Counsel for the Commission has requested a number of different remedies, including wages in lieu of notice, general damages, exemplary damages, and a monitoring order, each of which will be dealt with separately.

The first remedy which was requested by the Commission was an order for reasonable notice or wages in lieu of notice. Referring to the principles and factors set out in the leading case of *Bardal* v. *Globe and Mail Ltd.*, [1960] O.J. No. 149 (H.C.), counsel asserted that an appropriate period of notice, given the Complainant's age and length of employment, would be six weeks. As the Complainant had already been paid two weeks' wages in lieu of notice, the Commission requested an order for a further four weeks' wages in lieu of notice, calculated from the date the Complainant's employment was terminated, on the basis that she was employed in all positions.

The Respondent did not make any submissions with respect to this or any of the other remedies which were requested by the Commission.

Under clause 43(2)(b) of the *Code*, an adjudicator may order a party who has contravened the *Code* to compensate any party adversely affected by the contravention "for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate".

The remedy which is available under clause 43(2)(b) of the *Code* is not the same as the remedy of wages in lieu of notice. The remedy under clause 43(2)(b) is intended to restore the affected party, so far as is reasonably possible and appropriate,

to the position she would have been in if the discrimination had not occurred. The remedy of wages in lieu of notice, on the other hand, is the measure of damages in a claim for wrongful dismissal at common law, and is intended to place the former employee in the position she would have been in if her employment had been terminated on reasonable notice. The nature and purpose of these remedies therefore differ, and the amounts which would be awarded for each of them in a particular case may or may not be the same, depending on the facts and circumstances of the case.

There is little direct evidence in this case as to what financial losses the Complainant may have sustained by reason of the contravention of the *Code*. The evidence does indicate that the Complainant's claim for EI was ultimately granted on November 29, 2008, retroactive to September 16, 2008. In my view, it is a reasonable and obvious inference that the Complainant remained unemployed until at least November 29. The Complainant was paid two weeks' wages in lieu of notice, and has sought an order for the equivalent of a further four weeks' wages. In the circumstances, I am satisfied, on the balance of probabilities, that the Complainant remained unemployed for at least that length of time and is entitled to an order in the amount of four weeks' wages, as requested, as compensation for wages lost during that period of time by reason of the Respondent's contravention of the *Code*.

The precise amount which would constitute the equivalent of four weeks' wages was not identified at the hearing. Commission counsel indicated that the amount should be calculated based on the information disclosed in the ROE's, and in particular, the wages in lieu of notice referred to in the ROE's. Accordingly, based on the amounts paid on account of two weeks' wages in lieu of notice as listed on the ROE's for the

positions of fundraising coordinator and housing coordinator/community support worker (no amount having been indicated on the other ROE's), I have calculated four weeks' wages to be in the amount of $1,894.20. I therefore order, pursuant to clause 43(2)(b) of the *Code*, that the sum of $1,894.20 be paid to the Complainant as compensation for lost wages. In the event that that calculation is incorrect, I will retain jurisdiction for the purpose of resolving any issues which may arise with respect thereto.

The second remedy which the Commission has sought is an order for general damages in the amount of $6,000. Commission counsel referred to the decision in *Budge* v. *Thorvaldson Care Homes Ltd.*, [2002] M.H.R.B.A.D. No. 1 ("*Budge*"), where it was noted that awards in Manitoba in respect of general damages have been historically small. In that case it was accepted that damages awards ought not to be minimal, but should provide true compensation.

The Commission conceded that its request in this case for $6,000 in general damages was high, but highlighted the facts that the Respondent is an organization which deals with and employs a large number of individuals who have disabilities, and that the Respondent's reliance on what the Commission submitted was a fabricated pretext for the Complainant's dismissal only served to further hinder her future employment prospects. Counsel for the Commission relied on the decision in *Dodds* v. *2008573 Ontario Inc. (c.o.b. Sharks Sports Pub)*, 2007 HRTO 17 ("*Dodds*"), where it was found that allegations of theft were pretexts to justify the employee's termination, and $10,000 was awarded for general damages. Here, she said, the Commission is only seeking $6,000.

General damages, or in the language of the *Code*, “damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect” may be ordered pursuant to clause 43(2)(c) of the *Code*.

What is “just and appropriate” will depend on the particular facts and circumstances of each case. Guidance on this issue may be drawn from relevant authorities.

In this case, I consider that the affront to the Complainant’s dignity, feelings or self-respect was relatively serious. The evidence is clear that the Complainant was a capable and valued employee. The Conference was portrayed by G.K. as a reward for her good work.

The Complainant was also vulnerable. She had been struggling with the loss of two daughters, and had been working very long hours. She was feeling overwhelmed and stressed in her work, and had communicated this to the Respondent, with a request for help. The day before she was to leave for the Conference, she was in pain as the result of a tooth extraction, and was concerned about a possible re-occurrence of cancer.

As a result of the Respondent’s actions and its treatment of her between August 19 and 21, 2008, the Complainant felt harassed and intimidated. She ultimately reached the stage where she was unable to travel to a place that the Respondent knew she had dreamed of visiting. Instead of being able to attend the Conference then spend her vacation in Halifax, as planned, she remained in Brandon and ended up on a binge.

The harassment continued in September when she was threatened with probation, then suspension, and then her employment was terminated. The situation was clearly exacerbated by the manner in which she was treated, and the bald allegation that she had misappropriated funds. The Complainant felt humiliated by this.

With respect to this remedy, as indicated above, the Commission further highlighted as a fact that the Respondent deals with and employs a large number of individuals who have disabilities. It did not, however, elaborate on this point, and I am not clear as to how it is suggesting that this may be relevant in determining an appropriate amount for damages for “injury to dignity, feelings or self-respect” to the Complainant in this case. The Commission also highlighted that the Respondent’s reliance on a fabricated pretext for the Complainant’s dismissal further hindered her future employment prospects. There was no argument or evidence to support what any such impact on future employment prospects may have been. In any event, in the circumstances of this case, this suggested impact, if any, would in my view be a consideration more in assessing financial losses under clause 43(2)(b) than in determining an appropriate amount for injury to “dignity, feelings or self-respect”.

The Commission referred to *Budge*, a 2002 Manitoba decision, involving a sexual harassment complaint. At paragraph 118 of that decision, Adjudicator Peltz referred to the following passage as representing the prevailing view in human rights jurisprudence:

> Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damages awards ought not

> to be minimal, but ought to provide true compensation other than in exceptional circumstances, for two reasons. First, it is necessary to do this to meet the objective of restitution … Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the Code. It is important that damage awards not trivialize or diminish respect for the public policy declared in the *Human Rights Code*. *Cameron* v. *Nel-Gor Castle Nursing Home* (1984) 5 C.H.R.R. D/2170, approved in *Miller*, a 1995 decision cited earlier at para. 201. . . .

Noting that the case before him involved an extended period of harassment (10 months), a vulnerable employee, both physical and verbal harassment, and dismissal which was based at least in part on advancing a complaint, Adjudicator Peltz went on to order damages for injury to dignity, feelings and self-respect in the amount of $4,000.

The other authority which was cited by the Commission, *Dodds*, was a 2007 decision of the Ontario Human Rights Tribunal, in which the Complainant was awarded $10,000 in “general damages”. The Tribunal determined that the Complainant in that case suffered “serious discrimination” in her employment based on sex. It determined that her rights were directly and indirectly infringed in numerous different ways, two of which were that she was wrongfully accused of improperly billing a customer, then later of theft as a pretext for her wrongful termination.

Having carefully reviewed the above authorities, it is my view that the nature and extent or duration of the discrimination in this case, while certainly serious, was not as significant or egregious as was the case in either *Budge* or *Dodds*. I recognize, of course, that *Budge* was a Manitoba case, but also that it was decided several years ago. Considering the relative seriousness of the affront to the

Complainant in the circumstances of this case, and the authorities cited by the Commission, I have concluded that a just and appropriate award of damages for injury to dignity, feelings or self-respect is $4,000.

The third remedy being sought is an order for exemplary damages in the amount of $1,000. Acknowledging that such relief is awarded in limited circumstances, the Commission submitted that this was the type of exceptional case in which an award of this nature was warranted. The Commission likened this case to *Werestiuk* v. *Small Business Services Inc.* (1998), CHRR Doc. 98-216 (Man. Bd. Adj.) ("*Werestiuk*"), where it was found that there had been a deliberate and planned abuse of authority, and exemplary damages of $1,000 were awarded. The Commission referred to the fact that human resources were handled in the instant case by only one individual, and to the manner in which the contravention occurred. Counsel argued that allegations of dishonesty were made against the Complainant when she was at her most vulnerable and seeking help, and that the impact on her and her health leading up to the hearing were exceptional.

Clause 43(2)(d) of the *Code* allows an adjudicator to order a party to pay any party adversely affected by the party's contravention of the *Code*, "a penalty or exemplary damages . . . as punishment for any malice or recklessness involved in the contravention". As noted by the Commission, punitive or exemplary damages are rarely awarded by human rights adjudicators, and in the circumstances of this case, I am not satisfied that such an award is warranted.

In this regard, I am not convinced that there was the type of "deliberate

and planned abuse of authority" that was found to have existed in *Werestiuk*. At one point, the Commission characterized the actions of the Respondent, through its Regional Manager, as demonstrating a paternalistic attitude towards an individual with an addiction. I agree with that characterization. I find, however, that the evidence falls short of establishing malice or recklessness such as would support an order for punitive or exemplary damages as against the Respondent, and decline to make such an order in this case.

A fourth remedy being sought by the Commission is a monitoring order for some period of time, similar to the orders in *Budge*, *Werestiuk*, and *Dodds*.

As indicated previously, the Respondent made no submissions in this regard.

Under clause 43(2)(a) of the *Code*, an adjudicator may order a party to "do or refrain from doing anything in order to secure compliance with this *Code*, to rectify any circumstance caused by the contravention, or to make just amends for the contravention".

The circumstances in which a monitoring order is appropriate were considered in *Werestiuk*, at para. 38:

> A monitoring order is a very invasive measure, of course, and should not be granted in every case. However, given the remedial rather than punitive purpose of the legislation, I agree with the commentary in *Lampan v Photoflair Ltd.* (1992), 18 C.H.R.R. D/196 that the primary purpose of an order of this nature is to achieve compliance with Human Rights legislation both in respect of past and future practices. Monitoring potentially provides an opportunity for a party to be made aware of the obligations imposed by the *Code*. It is, in my

> view, justified where there is reason to believe that a Respondent will not comply with the *Code* in the future. Such evidence may be in the form of a pattern of repeated violation of the *Code*, or a single incident where a Respondent demonstrates a lack of understanding of the obligations imposed by the *Code*, or alternatively, an absence of intention to meet those obligations.

In *Werestiuk*, Adjudicator Suche (as she then was) ordered that the Respondents "shall each allow the Manitoba Human Rights Commission to monitor their employment practices in any operation they maintain . . . for a period of two years from the date of this decision."

I agree with the Commission that a monitoring order is warranted in this instance. In my view, the Respondent has demonstrated a clear lack of understanding of its obligations under the *Code*. While the Respondent has now developed a Reasonable Accommodation Policy, its position at the hearing was that even before that policy, it had exceeded what was required of it. In the circumstances, I am not satisfied that the Respondent or its Regional Manager (who, according to its Policy, is largely responsible for dealing with requests for accommodation and monitoring accommodation) truly appreciate what their obligations are under the *Code*.

Accordingly, I order that the Respondent allow the Commission to monitor its employment practices for a period of two years from the date of this decision.

The Commission also asked that the Complainant's full name not be used in the written Reasons for Decision, due in particular to the substantial amount of personal and sensitive information which has been disclosed in these proceedings. The Respondent did not object to this request. In the circumstances, as is evident from

these Reasons, I have acceded to this request. Given the nature of the evidence and the relationship between the Complainant and witnesses, I have similarly substituted initials for the full names of witnesses in these Reasons for Decision.

Conclusion

In summary, having found the Respondent in breach of section 14 of the *Code*, I order the following:

1. That the Respondent pay to the Complainant:

   (a) the sum of $1,894.20 to compensate her for lost wages; and

   (b) the sum of $4,000.00 to compensate her for injury to dignity, feelings and self-respect;

2. That the Respondent allow the Manitoba Human Rights Commission to monitor its employment practices for a period of two years from the date of this decision.

I will retain jurisdiction for the purpose of resolving any issues which may arise from the implementation or interpretation of this decision.

Dated at the City of Winnipeg, in Manitoba, this 7th day of January, 2013.

"M. Lynne Harrison"
Adjudicator