

**THE NORTHWEST TERRITORIES HUMAN
RIGHTS ADJUDICATION PANEL**

**IN THE MATTER OF The Northwest Territories
Human Rights Act, R.S.N.W.T, 1988. as amended,**

BETWEEN:

TRACY THORSON

Complainant

-and-

**The Government of the Northwest Territories
(Department of Public Works and Services)
Respondent**

Reasons for Decision

Before: James R. Posynick, Adjudicator

Place of Hearing: Yellowknife, NT

**Dates of Hearing: May 26-29, 2010; March 28-29, 2011; October 3-6th, 2011;
February 6-10, 2012; July 17-19, 2012.**

Appearing:

Jacek Janczur and Robert Blair, Legal Counsel for the Complainant

Erin Delaney, Legal Counsel for the Respondent

Nicole McNeil, Labour Relations Officer, GNWT

Statutes considered:

Sections 1, 4, 5(1), 7(1) and (4), 62 of the *Human Rights Act* 2002 S.N.W.T. c. 18, as amended;

Section 16 of the *Public Service Act* 1988 S.N.W.T. c. P-16, as amended

REASONS FOR DECISION

A. The Complaint

[1] Tracy Thorson filed a human rights complaint with the NWT Human Rights Commission on August 18, 2009. In it she alleged the Government of the Northwest Territories, Department of Public Works and Services (“DPWS”), terminated her employment knowing she suffered from a disability that prevented her from performing her job duties and functions and without accommodating her needs and circumstances.

[2] DPWS does not dispute Ms. Thorson’s claim that she suffered from a disability during her employment. Nor does it dispute the impact of her disability including the impact on her ability to attend work. It concedes that Ms. Thorson has made out a *prima facie* case of discrimination. However DPWS also says Ms. Thorson’s employment was terminated for reasons of ‘innocent absenteeism’ after making efforts to accommodate her to the point of undue hardship.

[3] Ms. Thorson’s complaint contained allegations of harassment however she chose not to pursue those allegations at the hearing.

B. Summary

[4] Tracy Thorson was employed by DPWS in Inuvik from July 2004 until May 22, 2007. In 2004 she was diagnosed as suffering from a depression disorder that resulted in significant absenteeism from work. She subsequently received confirmation that she suffered from Major Depression Disorder (“Depression”) from her treating psychiatrist. In October, 2005, DPWS notified her that she was in danger of losing her job due to ‘innocent absenteeism’. Ms. Thorson’s illness deteriorated to the point where she was not able to work at all for several consecutive months in 2005 and 2006. When she returned to work in March, 2006, her workload was reduced and her absentee record showed improvement. However in January 2007, she missed a significant amount of work due to illness. DPWS felt it had accommodated Ms. Thorson to the point where its operation in Inuvik was suffering “undue hardship”. On May 22, 2007 her employment was terminated.

[5] For the reasons set out below, I find the Respondent discriminated against Ms. Thorson, a person with a disability, contrary to Sections 5(1) and 7(1)(a) of the Northwest Territories *Human Rights Act* (the “HRA”).

C. Issues for Decision

1. Did DPWS unlawfully discriminate against Ms. Thorson?
2. Did DPWS accommodate Ms. Thorson to the point of undue hardship?

D. Findings of Fact

Ms. Thorson is Hired

[6] Tracy Thorson was hired as a Project Officer by DPWS and she and her son moved from Winnipeg Manitoba to Inuvik in July of 2004. Her previous work experience included 8 years as a Senior Project Officer and another 8 years as a Regional Projects Manager, all in Rankin Inlet (then in the Northwest Territories).

[7] Project Officers oversee the construction of buildings and facilities involving public funds, from tendering to construction to the completion of warranty and deficiency work. On a day-to-day basis they deal with contractors, architects and public agencies to ensure building standards and deadlines are met and public funds are well spent. They are assigned projects and supervised by a Regional Projects Manager (the "RPM") who reports to a Regional Superintendent (the "Superintendent").

[8] Typically, Project Officers have 3-4 "major" projects to deal with, e.g. tendering and construction, and a few "minor" ones, e.g. warranty work. More experienced Project Officers have a larger inventory of projects. They have significant budgetary responsibility and reporting requirements (especially to government clients) and frequent deadlines. Consequently their work is stressful. Besides Inuvik, Project Officer positions exist in Yellowknife, Fort Smith and Hay River. Project Officers tend to stay in Inuvik for relatively short periods of time and hiring replacements is challenging. Consequently it is not unusual for Project Officers from other regional offices, especially Yellowknife, to help out in Inuvik, from time to time. There were more than 1200 employees in DPWS territory-wide, during Ms. Thorson's period of employment.

Ms. Thorson's Performance Appraisal

[9] As early as November of 2004 she was being treated by Inuvik physicians for symptoms of depression. Nonetheless her performance appraisal of April 20, 2005 demonstrated that she was meeting all job requirements but suggested she might "Look at ways of dealing with stress in the workplace". By June of 2005 she was seeing a psychiatrist who, in concurrence with her physicians' diagnosis, determined she suffered from "major depression disorder".

What is "Major Depression Disorder"?

[10] Major Depression Disorder (hereinafter "Depression") is sometimes misunderstood as, or likened to, transient experiences of 'feeling low'. Depression, however, affects every aspect of a person's daily living activities including work. It is manifest in a variety of symptoms including sadness, anxiety, irritability, impatience,

fear, fatigue, loss of motivation, insomnia or restless sleep, lack of confidence, guilt, loss of libido, loss of concentration, forgetfulness, indecisiveness, headaches, withdrawal, loss of appetite or overeating. Seven to fifteen percent of people diagnosed with Depression commit suicide. It is, according to the World Health Organization, the leading cause of disability and the leading contributor to world disease, generally. Depression afflicts 20% of the population. Depression is curable using a combination of medications and counseling however it may reoccur months or years later. For example, Dr. Mowat treated Ms. Thorson from June, 2005 until October of 2007. Ms. Thorson's condition did not go into remission during that time. In short: Depression is a serious illness.

Absenteeism Begins

[11] In the fall of 2005 Ms. Thorson missed work with increasing frequency. She had difficulty with her basic personal needs including eating and sleeping. At work she felt profoundly sad, cried a lot and found it difficult to stay awake. She worried about being absent because she was supporting a child and that increased her anxiety. In September, 2005, she was away from work more than she was there. The RPM and a Senior Projects Officer met with her to discuss the absenteeism. She explained she was preoccupied with family problems. She was apologetic and said she would "do better" and be sure to phone-in if she was unable to make it work.

The Arrival of the New RPM

[12] In October of 2005, a new RPM came to the Inuvik office. He took over from the Senior Projects Officer who was "acting" at the time. He and the Senior Projects Officer had a strained relationship because the RPM wanted to change the way the Senior Projects Officer had been doing his job. The RPM was apt to suggest solutions to problems rather than have a discussion about them.

[13] The RPM is a Civil Engineer with 25 years' experience, almost all of it in the private sector. When he arrived, DPWS had at least 5 Project Officers, including Ms. Thorson, and 2 clerical/support workers. From time to time other Project Officers from other regions came to Inuvik to work on projects. The office also had the benefit of a term Project Officer for six months in 2006.

[14]. One of the RPM's roles was to sign off employee attendance records before they went to the Superintendent (via Human Resources staff) and, for that reason, and because she missed a training day, he became aware that Ms. Thorson had attendance problems.

The RPM's 1st Letter to Ms. Thorson

[15] On October 7, 2005, the RPM had a brief discussion with Ms. Thorson about signing attendance records. He then spoke with Human Resources ("HR") staff. The HR person told him she had a lot of experience and that they needed to deal with Ms. Thorson "properly". HR, likely with the assistance of Labour Relations staff ("LR"), drafted a letter for his signature. The letter, dated October 25, 2005, set out the details of Ms. Thorson's absences during the past seven months.

[16] During the previous seven months she was absent for 28% of her working hours. The letter warned her to reduce her absenteeism to the governments annual "average". It warned that a dismissal for innocent absenteeism would be considered, not as a disciplinary action, but because her employment contract was frustrated. It required her to produce a 'prognosis' if her absences were due to a medical condition and said her progress would be monitored every month for 3 months.

[17] The letter expressed the RPM's concern that Ms. Thorson's absences were having adverse effects on hers and her coworkers work. He was concerned that other Project Officers had to answer her client inquiries about warranty issues.

[18] Ms. Thorson was home on medical leave when the letter was delivered to her by a staff member. At the time she was "confused" and "wanting to be dead". She was having difficulty financially. She was struggling with the cost of prescribed medication and recently had to deal with an injury to her son. She was waiting to see her psychiatrist who made infrequent visits to Inuvik from his office in Edmonton. During the ensuing week, Ms. Thorson called-in several times to say she would not be in due to illness. The reasons included having the "stomach flu", she was "on medication" or simply that she was not feeling well. On occasion she told the RPM she would go to work the next day but was incapable of following through.

The RPM's 2nd Letter to Ms. Thorson

[19] On November 1st, 2005, 7 days later, the Supervisor had another letter (drafted by HR and LR) delivered to Ms. Thorson. It said her absences were being recorded as "absent without approved leave" because she did not produce a medical certificate and a prognosis "indicating [she was] too ill to perform all of [her] duties and indicating when [she] can return to work". The letter was critical of her failure to come in to work as promised; it claimed her duties were reassigned making her colleagues' work more difficult. It said her projects "suffered greatly". It warned this time her that absences without a physician's certificate may result in her position being "deemed... abandoned". It reiterated termination for innocent absenteeism would be considered. Finally, the letter enclosed a copy of her job description and requested it be given to her doctor to enable "making a prognosis

on [her] ability to return to work and perform [her] duties”.

[20] Ms. Thorson immediately went to see her local physician, Dr. Seaman, where she obtained a medical certificate for her absences and hand delivered it to the RPM. She told him she was sick and that she had “depression”.

[21] The work that made Ms. Thorson’s colleagues work more difficult at the time included answering warranty questions about Aurora College, “constant discussion” about a deteriorating building foundation at the Young Offenders facility and a renovation issue at Samuel Hearne School. The RPM assigned those matters to 3 other Project Officers.

[22] Another Project Officer took over a project in Fort MacPherson. When he received it the file was in “normal” condition.. [as] if somebody was going for holidays and [he] just took [it] over”. Another acknowledged that while projects were delayed when a Project Officer was away from work, it was routine for Project Officers to fill in for one another. It was not uncommon for DPWS office to be short-staffed. The Finance Administrator in the office said that Project Officers came and went “a lot”. Project Officers from other regions, especially Yellowknife, routinely helped-out.

The Deputy Minister’s Letter to Ms. Thorson

[23] The (then acting) Deputy Minister (the “DM”) became aware of Ms. Thorson’s attendance issues in the fall of 2005. He did not question the decision by the RPM to send letters threatening termination to Ms. Thorson. In his view it was “enough” that she was missing work and impacting projects that the RPM sent the letters. He reviewed them and, with the help of LR, on November 17, 2005, sent a letter to Ms. Thorson under his signature.

[24] The letter stated the RPM recommended her employment be terminated. It said her attendance had worsened and drew attention to her inability to attend work despite calling to say she would be in. It said her current medical certificate was insufficient since it did not include the requested prognosis. The letter said Ms. Thorson’s failure to tell DPWS that she was getting medical treatment amounted to “withholding information”. It stated that despite telling the RPM she would work afternoons, the medical certificate of her physician said she could not work and “This contradicts the doctor’s note and indicates you are not too ill to perform your duties”. The letter said she was absent without leave from November 1st to 15th pending “adequate verification from a medical practitioner to justify [her] absence”. It stated the DM was considering termination for innocent absenteeism or abandonment of her position. She was offered the opportunity to reply by November 25th, 2005.

[25] Ms. Thorson was still unable to work after November 15th but did call-in to let the RPM know she could not do so. She did not understand why her employer wanted to fire her when she was sick. She had never heard of ‘innocent absenteeism’ and she was unable to deal with it. She thought the medical certificate from Dr. Seaman was sufficient to prove her illness and did not understand what was meant by a “prognosis”.

[26] During Ms. Thorson’s absences at this time the RPM had to deal with emails from Ms. Thorson’s contacts. He described them as “a lot of emails, sort of”.

Dr. Page’s Medical Certificate

[27] On November 22nd, 2005, DPWS received a handwritten letter from another local physician, Dr. Page, advising that Ms. Thorson was under the care of another physician, Dr. Seaman, since November, 2004 and was absent from work “for genuine reasons” since October 24th, 2005. He said she saw a specialist in June and August was still in treatment and remained unfit to return to work. The letter resulted from a meeting with Ms. Thorson after she was admitted to Inuvik Hospital where sought emergency care. She was suicidal. She was afraid she would harm herself so she sent her son to live with his father shortly afterwards.

Ms. Thorson’s 1ST Letter to the Deputy Minister

[28] On November 25th, 2005, she wrote a letter responding to the DM’s November 17th letter explaining the reason she missed so much work. She set out a number of family circumstances including problems her son had at school and the death of her grandfather and stepdaughter. Ms. Thorson stated she was motivated to get well because she had a son to support. She stated she intended to return to work November 28th and noted “Dr. Payne” (Dr. Page) had already given what she believed was a “medical prognosis”.

The Deputy Minister’s Response to Ms. Thorson

[29] On November 30th, the DM sent a letter to Ms. Thorson acknowledging receipt of her response and Dr. Page’s Certificate. He said that he was “troubled” by her failing to disclose the information in Dr. Page’s letter “much sooner”. He said she was “withholding information” and providing contradictory information. He gave her a “final” opportunity to provide a prognosis so the GNWT could determine its obligations to her and demanded the prognosis by December 7th, 2005. A copy of her position description was once again provided for her physician.

[30] Ms. Thorson was “shocked” by the letter. She thought the response was “inhuman”. She had no income from DPWS at this time. She was obtaining food from the food bank. Her son was with his father. She could not afford the

medication prescribed by her physicians and Dr. Mowat.

Dr. Seaman's Letter to the Deputy Minister

[31] Ms. Thorson gave the DM's letter to Dr. Seaman and he responded by letter on December 13th, 2005. She said Ms. Thorson was not fit for work, citing specific examples in her job description of what she would not be able to do. She explained Ms. Thorson's inability to keep the office informed of her availability for work was due to her medical condition. She reiterated Ms. Thorson was seeing a specialist and said the earliest she could return to work would be January 3rd, 2006.

[32] Dr. Seaman recommended she have "less demanding duties" on her return to work and that she work half days and increase to full time over a 2 to 4 week period. She said Ms. Thorson's prognosis was "good" subject to her following the recommended "treatments and appointments". Nobody at DPWS, HR or LR discussed the contents of the letter with Ms. Thorson nor were Dr. Seaman's recommendations implemented at any time.

The Deputy Minister's Letter to Ms. Thorson

[33] Two days later, on December 15, 2005, the DM responded by stipulating conditions for Ms. Thorson's return to work on a graduated basis beginning on January 9th at 1 p.m., her physician permitting. It stated that she would resume her normal working hours on February 6, 2006. She was expected to increase her project management work until reaching the normal workload by February 6th. Medical certificates were required for her weekly medical appointments as well as an updated prognosis. She was to provide her physician the DM's November 30th letter, her job description and the medical certificates of November 21st and December 13th, 2005.

The Arrival of the New Regional Superintendent

[34] A new Regional Superintendent of DPWS Inuvik took office on January 26, 2006. He received no briefing about Ms. Thorson upon his arrival; not from the RPM or anyone else. He left the day-to-day supervision of Ms. Thorson to the RPM. The Superintendent did not take much interest in her until May 2006 when he reviewed her personnel file. It was at that time he came upon Dr. Mowat's January letter to the DM explaining that Ms. Thorson suffered from Depression. Even then he did not talk to the RPM about her illness. He did, however, have discussions about her illness with others, probably with HR and LR.

[35] He viewed Ms. Thorson's history of absenteeism suspiciously. He looked for – and found – reasons other than her illness as the cause of her absence. He viewed her failure to call in sick on time as a reflection on her "integrity". In his view

an employee had to be “pretty well on death’s bed... not to call in appropriately”.

Dr. Mowat’s Letter to the DM

[36] On January 13th, 2006, Dr. Mowat informed the DM in writing that he had been treating Ms. Thorson for Depression since the summer of 2005. He said as of December 22nd, 2005 she was depressed and incapable of working. He apologized for not writing to the DM sooner to explain Ms. Thorson’s condition.

[37] Dr. Mowat recommended she not return to work until she is “medically recovered and medically fit for employment”. That would take longer than 4 weeks and he would correspond again with the DM in February. He invited the DM to call or fax him to answer any questions.

[38] In February 2006, Dr. Mowat increased her antidepressant medication. Ms. Thorson reported her mood was better. She was “desperately keen” to return to work. He was concerned about her returning to work at the time. He had some doubt about whether she was ready but he did not feel the risks were sufficient to discourage her. He knew she was under financial pressure to return. He expected she would return to full time work and that she would work with her employer to achieve a successful return.

[39] He wrote to the DM on February 10th, 2006 advising him that she was still “unwell”. Dr. Mowat expressed concerns about Ms. Thorson’s financial circumstances arising from her being classified as “non-employed”. He said having significant financial problems would make it difficult for her to recover. He asked the DM to review and take action to change her classification. He said he would be “happy” to hear from the DM via telephone. The DM took no action on the classification question. The DM never called Dr. Mowat.

[40] In early March Dr. Mowat had a telephone conversation with the DM. The conversation was brief and concerned “restrictions to performing her job” and whether she was fit to return to full capacity. The DM did not take any action as a result of what was discussed. Dr. Mowat sent a follow-up letter to the DM on March 13, 2006, stating that she was ‘recovering well and... is ready to return to work”. Again he invited the DM to call him but no call was forthcoming.

Ms. Thorson’s Return to Work

[41] Ms. Thorson returned to work on March 15, 2006 after a 4 month absence. The Superintendent and the DM had a discussion about her return but there was no discussion between them, or between the Superintendent and the RPM, about how her return to work would be managed.

[42] It was close to fiscal year-end. It was a slow period work-wise. She worked on her own year-end project summaries. The RPM asked her to complete the summaries for the other Project Officers and she refused. Instead she obtained the financial information for the projects from the DPWS information system and gave it to the RPM. She left it to him to discuss those statements with the respective Project Officers and complete the summaries.

[43] In Ms. Thorson's absence the building occupied by DPWS, the Perry Building, was "condemned" in an engineering report. Initially the employees were moved out of the building but by March of 2005, they returned to occupy the main floor. After a short meeting with the RPM, and HR person and her union representative, Ms. Thorson was directed to her former office on the 3rd floor. The engineering report that condemned the building specifically stated that occupying the 2nd and 3rd floor of the building was unsafe.

[44] She was the only employee on the third floor. A Fire Marshall's Notice posted near her desk stated that the building was condemned and warned occupants to leave the premises if the building made any creaking noise. She felt afraid, lonely and like she was being punished. She was still suffering from Depression. She was moved to the first floor on May 5th, 2006, 7 weeks later. She was moved to an office with mechanical noise problems. She had to call-in the Workers' Compensation Board to investigate before she was moved to another office.

Ms. Thorson's Relationship with the RPM

[45] Ms. Thorson and the RPM had a strained relationship. She felt he was confrontational. They argued about work and she felt he was 'yelling' at her repeatedly. The RPM came to see her about work frequently while she was on the 3rd floor and they argued. She complained to Dr. Mowat about the RPM. She was taking antidepressants and they were making her drowsy on the job. She felt she was 'losing it' and was admittedly "defensive and anxious" on the job.

[46] She moved down to the main floor in May. The office she was given was next to a noisy compressor and, after complaining about the noise to the RPM and having a Workers' Compensation Board inspection, steps were taken to reduce the sound and then she was moved to another office. But her relationship with the RPM did not improve, nor did her condition.

[47] Ms. Thorson felt the RPM scrutinized her work unnecessarily. They disagreed on how to manage projects. Ms. Thorson raised her past experience as a projects supervisor with the RPM in her defense. He did not like that. The arguments were loud and sometimes overheard by the Finance Administrator who tried to avoid listening-in. She heard Ms. Thorson's voice mostly. She had a

characteristically loud voice. It was not a daily occurrence. The Senior Projects Officer heard arguments, also. Sometimes the Senior Projects Officer and the RPM spoke in raised voices too when they disagreed but they never yelled at each other and he heard no yelling from the RPM or Ms. Thorson. During the arguments personal comments were made to Ms. Thorson about her family and she felt they were inappropriate. The discussions were very heated and on at least one occasion, Ms. Thorson felt threatened by the RPM's demeanor.

[48] Her work on the Tulita School project was reassigned. She continued to work on the Inuvik hospital, the Young Offenders facilities, the Gwich'in Park and several other projects for the Department of Economic Development and Tourism, including renovations to their offices. Her other main client was the Department of Justice. She was sent to Sachs Harbour for a week to deal with a water intake problem. She did some small projects like signage work for the Gwich'in Park. She also provided advice to the Project Officers who were now managing some of her projects. The combination of work and the stress of dealing with the RPM was making her less well. She stayed home crying and feeling sick to her stomach. She was on leave almost half the time in March and April and a third of the time in May.

Ms. Thorson and the RPM's 2nd Meeting

[49] The RPM spoke to the Superintendent about Ms. Thorson sometime in May, 2006. The Superintendent and the RPM consulted HR and LR "extensively" and they recommended a meeting with Ms. Thorson to discuss her absenteeism.

[50] The RPM met with Ms. Thorson, the Manager of HR and her union representative on May 26th, 2006. The RPM discussed Ms. Thorson's "sporadic absences" and how they were causing difficulty for DPWS. The difficulties included "last-minute imposition" on other Project Officers to attend meetings and follow-up with project clients and consultants.

[51] The RPM said she neglected to attend a meeting with a Justice client from Yellowknife and she had fallen asleep at her desk. The RPM reminded her that the latest physician's certificate said she could return to work without any limitations. He requested she obtain another prognosis from her physician.

[52] Ms. Thorson spoke about some family matters that were affecting her attendance. She complained to the HR employee about "harassment" from the RPM but there was no follow up to her complaint by HR and none by the Union Representative.

The RPM's 3rd Letter to Ms. Thorson

[53] The RPM's letter of May 29th, 2006 documented the meeting and

requested a prognosis letter confirming that she was able to perform all of her duties full time. A job description was attached for her physician to make a “well informed assessment”. The letter also required she produce medical certificates for all absences due to illness and to call him before work to request approval for any absences due to illness. Finally he confirmed that “frequent and/or sporadic absences” may result in his recommendation for termination due to innocent absenteeism.

[54] Ms. Thorson visited Dr. Mowat on June 8th, 2006. She reported having a lot of problems with the RPM at work. She was becoming more anxious and unhappy at work. She felt the RPM treated her very badly and made her feel very uncomfortable. She gave him a copy of the RPM’s letter.

Dr. Mowat’s Response

[55] Dr. Mowat read the job description. His response to the request for a “well informed assessment” of Ms. Thorson’s ability to perform her duties as a Project Officer was contained in a June 16 letter to the RPM. He identified Ms. Thorson’s illness as “depression”. He said it had “improved sufficiently” for her to return to work in March however her illness worsened recently. He attributed that to stress at work. He stated that anything that would minimize stress would help her.

[56] Dr. Mowat was intentionally vague in his response because he did not have the time to analyze the job description. In any case, he felt her employer, and the RPM in particular, was in a better position to initiate action to minimize on-the-job stress. He did not feel it was appropriate for him to raise Ms. Thorson’s concerns about the RPM nor report her concerns to the Superintendent.

[57] When Dr. Mowat met with Ms. Thorson on August 17th, 2006, he noted she was doing “reasonably well”. She still found her work stressful and complained that the RPM frequently interrupted her work and was increasing her workload. From time to time she found herself “easily overwhelmed” with the workload. Ms. Thorson vented to Dr. Mowat about the RPM and was angry but he could not recall, and did not record, the details of what she said.

[58] Despite this disclosure Dr. Mowat did not make any recommendations to DPWS about her workload. He felt it was inappropriate to be critical of the RPM and expected the workload issues would come up and be resolved in conversations between the RPM and Ms. Thorson in the context of his recommendation that on-the-job stress be reduced.

[59] The RPM and the Superintendent discussed Dr. Mowat’s letter and decided they were doing all that could be done to reduce her stress because she had

“small and uncomplicated” projects. However during the summer of 2006 neither the RPM nor the Superintendent met with Ms. Thorson to discuss her workload and they had no plan and made no specific effort to adapt any of Ms. Thorson’s working conditions.

The RPM’s 4th letter to Ms. Thorson

[60] DPWS sent a letter under the RPM’s signature to Ms. Thorson on August 23, 2006. The Superintendent assisted in the drafting of the letter as did HR and LR. Ms. Thorson was missing more work that month. She missed two interdepartmental meetings. It stated Dr. Mowat’s letter was “helpful” but it did not give information required to accommodate her illness. Another job description was provided asking her to obtain the following information from Dr. Mowat:

- “address in a specific and practical way the impact of [her] medication condition on [her] ability to perform all of the duties of [her position] on a regular full-time basis Monday to Friday, 7.5 hours per day”;
- determine what duties she can perform and when she will be able to perform all of her duties if she is unable to do so;
- identify what duties she could perform if her hours of work are changed;
- identify ways that her work environment can be enhanced (“office space and/or equipment”)

[61] The letter reiterated the employer would consider termination if her absences due to illness continued. The prognosis was required by September 15, 2006. The letter suggested she call a departmental resource if “personal problems” were affecting her work.

[62] Ms. Thorson responded to the RPM’s letter by email the same date. She said Dr. Mowat would not be in Inuvik for a few months. She asked why the RPM did not correspond directly with him since he gave the RPM his contact information and invited him to call. She felt the RPM’s conduct amounted to “harassment”. She invited the RPM to call Dr. Mowat to discuss her condition “or what [she] required to remain healthy”. She expressed her frustration with the RPM’s “lack of understanding” and asked whether it would ever be possible to “move forward... without this axe hanging over [her] head”. No response was forthcoming from the RPM.

[63] The Superintendent, who was copied on the email, later asked Ms. Thorson what she meant by “harassment”. A discussion took place “around the water cooler... hallway [or] ...in [his] doorway”. Ms. Thorson said that she resented the repeated threats of termination. He told her it was “standard language”. He did not investigate her allegation any further.

[64] At least two other Project Officers had complained to the Superintendent about the RPM. The Superintendent intervened in those cases by talking to both sides and resolving the complaints. He never raised Ms. Thorson's complaint with the RPM.

[65] The deadline for Dr. Mowat's response, September 15th, passed. Ms. Thorson sent an email to the RPM apologizing and advising that her next appointment with Dr. Mowat was in October. She asked him for a response but she never received one. The RPM and the Superintendent discussed the delay and decided to "wait and see what happens".

Ms. Thorson's Illness in the Fall of 2006

[66] Early in September, the RPM found her asleep at her desk. He sent an email to her, copying the Superintendent, setting out what happened. He then met with her to convey "napping during the office hour is not acceptable and must be corrected. Any future such incident will be dealt with accordingly". Ms. Thorson explained that she fell asleep because of her medication. The RPM said she should not be in the office if she was not well.

[67] In October Dr. Mowat met with Ms. Thorson and found her illness and her working conditions, particularly her relationship with the RPM, to be about the same. Her home life was more stressful and she continued to require medications. She was considering looking for another job. They discussed the RPM's letter of August 23rd.

[68] On November 16, 2006, by letter to the RPM, Dr. Mowat reiterated his recommendation about stress-reduction. He said he kept his recommendation vague because the RPM knew her duties well. Although he did not say so in the letter, he felt it would be helpful for he and Ms. Thorson to discuss the contents of her job description together. He offered to talk to the RPM about these issues and invited him to call his office but the RPM did not call.

[69] The RPM and the Superintendent discussed Dr. Mowat's letter. They decided it was not helpful. The Superintendent was concerned that it did not help them "reduce the level of stress that is causing the depression". They decided to take no action because Christmas season was coming-up and they received a notice from Dr. Seaman that Ms. Thorson had several counseling sessions scheduled. Again the strategy was 'wait and see'.

[70] Ms. Thorson met with Dr. Mowat on December 6th, 2006 and she was in improved condition, "more energetic, less depressed and no longer tearful". She was pleased to hear the RPM gave notice of his departure and he felt that would be a "change for the better" for her. She felt greatly relieved when the RPM left. So

much so she wanted to take on more project work. Her big projects were more or less wound down. She asked other Project Officers if she could help them. She took on the review of several contractor proposals.

[71] In December the RPM left DPWS. The Superintendent became the acting RPM for a while until help arrived from the Yellowknife office. In February the Yellowknife office sent two Project Officers to help out, for two weeks each.

The Superintendent's Letter of January 22, 2007

[72] Ms. Thorson's absences increased to more than 50% of her working hours in January. She phoned in sick with pneumonia. She produced a medical certificate. Her son had strep throat and she had to stay home with him. The Superintendent heard snide comments from two staff members about Ms. Thorson's absences. He consulted HR and LR and a letter making a "final request" for a prognosis was delivered to Ms. Thorson. It stated that Dr. Mowat's letter of November 16th failed to set out her "capabilities or limitations". It explained that DPWS had a duty to accommodate her in relation to duties that she is unable to complete for medical reasons. It requested yet another "prognosis" for the impact of her illness on her ability to work and enclosed the same job description. The letter set out in point form a summary of her sick leave. It said that the medical certificates recommending the minimization of stress in her job did not give the employer the information it required. It set a deadline of February 9th, 2007 or an alternate date that Ms. Thorson could provide.

[73] DPWS said it wished to support Ms. Thorson so she could fulfill her duties "while at the same time ensuring that [her] personal health requirements" were not worsened. Again it warned her that absent the "required medical information indicating [she had] a condition or disability requiring accommodation", DPWS would consider dismissal for innocent absenteeism. At this point the Superintendent felt that Ms. Thorson's workload had been reduced since March 2006 and DPWS met its obligation to do what was necessary to reduce stress for her. He did not feel the need to discuss Ms. Thorson's workload or her individual needs with her, however.

Dr. Mowat's call to the Superintendent

[74] After the January 22nd letter was given to Ms. Thorson, Dr. Mowat called the Superintendent. The Superintendent explained that DPWS had taken steps to reduce her workload and give her only local projects. They discussed her complaints about the former RPM. The Superintendent was unaware of any "stressed relationship" between the RPM and Ms. Thorson. He told Dr. Mowat there were no other jobs "in the department" that would suit Ms. Thorson. Dr. Mowat confirmed he had not read Ms. Thorson's job description however he would try to meet the

February deadline.

[75] The Superintendent and the DM discussed whether there was any other work for Ms. Thorson in operations, maintenance and finance. He talked to two managers in Inuvik about it. The discussions were informal, not at meetings. Whoever he talked to said they needed people who would work “all the time” and would not take someone who worked “sporadically”. He did not discuss these matters with Ms. Thorson “in any way, shape or form”. He thought about Ms. Thorson doing clerical work but because she balked when the RPM requested she provide the Project Officers summary to him in March of 2006, he felt she would not be interested.

Ms. Thorson’s Response

[76] Ms. Thorson delivered a letter to the Superintendent on January 24, 2007 in which she made several points:

- she did not receive the letters that Dr. Mowat sent to DPWS;
- the contact with the RPM “increased her anxiety levels and made it harder for [her] to cope with her daily duties;
- she recently had a bad cold and influenza for which she provided a medical certificate.

Ms. Thorson’s Illness in February and March, 2007

[77] In February her son was sick again and she went to her brother-in-law’s funeral. She told Dr. Mowat her anxiety had decreased since the RPM left the office but it increased since the Superintendent’s recent letter. Dr. Mowat prescribed medication to assist with her anxiety. He noted she was receiving counseling and anticipated she would benefit from it. He was going to draft a letter to the Superintendent that he hoped would be “helpful”.

[78] On February 12, 2007, Dr. Mowat sent a letter to the Superintendent acknowledging that her recent absences were due to ‘other medical problems’ and family issues rather than Depression. He stated “She feels confident that absences for anxiety and depression will no longer occur”. Referring to their recent teleconference, Dr. Mowat said the Superintendent mentioned DPWS accommodated Ms. Thorson by reducing the number of projects she worked. Dr. Mowat made other recommendations to reduce her stress, namely:

- reducing travel time to avoid being away from home overnight
- minimizing public speaking and public presentations
- avoiding ‘accelerated deadlines’
- minimizing the number of “complex or politically pressured projects as possible”

[79] He concluded by stating that with these accommodations in place he was “confident” Ms. Thorson’s stress would be reduced and her performance would improve.

[80] The Superintendent once again consulted with HR and LR about Ms. Thorson’s absenteeism. They decided that Ms. Thorson’s absences were “excessive”, that she had several warnings about termination and the “trust relationship” between DPWS and Ms. Thorson was “broken”. The trust was broken because she would sometimes call-in late to report her absences. The Superintendent felt there was no “convincing” evidence that Ms. Thorson would ever return to full duties.

[81] On March 30, 2007, he recommended Ms. Thorson’s termination to the DM. The letter stated that her absences affected the morale at DPWS and “...had a negative impact on the division’s ability to achieve the required goals and objectives and has adversely impacted other project officers as a result of the workload having to be redistributed to accommodate Ms. Thorson”.

[82] The Superintendent felt steps were taken to accommodate Ms. Thorson since her return to work in March, 2006 although they were, in his words, taken by “coincidence or accident”. He doubted the RPM had enough knowledge about Ms. Thorson and her needs to actually have planned to accommodate her and he made no plan himself.

[83] Ms. Thorson travelled out of town only once since March and she did not have any projects that involved public speaking although some of her projects, e.g. Tulita School and the water treatment plant, inherently involved dealing with the public. While she had no “accelerated” deadlines, every project had deadlines. There was one politically high profile project, the female young offenders facility, that she worked on but another Project Officer took the lead. When GNWT Ministers got involved, Ms. Thorson was taken off the project. That was in March, 2007 just before her termination. In the fall of 2006 she worked on “major problems” at the Inuvik Hospital until file was turned over to the “risk management” section.

The Termination

[84] On April 3rd, 2007, Ms. Thorson was called into the Superintendent’s office where he gave her a letter signed by the DM. It said the Superintendent recommended her termination because of “high levels of absenteeism”. It stated that the recommendations for accommodating Ms. Thorson’s illness had been in place since March, 2006 and that despite Dr. Mowat’s determination that she was able to work immediately, since returning her absenteeism continued. According to the DM, the “extensive accommodation measures” were not having the effect

anticipated by Dr. Mowat. He offered Ms. Thorson the opportunity to make submissions to him and suggested she contact her union representative. She was also given the opportunity to obtain another prognosis "If the prognosis currently on file is not accurate..." It was also recommended that she obtain information from the Pay and Benefits Administrator about how termination would affect her benefits and entitlement to Disability Insurance benefits.

[85] Ms. Thorson felt she was "fired". She felt it was not fair because her health had improved since the RPM left. She was not crying in the office, she was able to do more work and concentrate better. She was in control of her emotions again. She felt Dr. Mowat's February prognosis did not reflect her improved condition.

[86] She called Dr. Mowat. On April 13th he sent a letter to the DM. He said Ms. Thorson has found the reduced workload helpful "and... a gradual return to fulltime work is now possible... over the next few weeks..." He invited the DM to call him if he required further information. The DM did not call.

[87] Ms. Thorson sent her own letter to the DM on April 19th. She apologized for the effects of her illness on DPWS and asked that she be allowed to return to her "normal workload" within a reasonable amount of time. She asked for an extension to April 30th to allow for an updated prognosis. By letter dated April 23rd, the DM granted the extension.

[88] On April 27th, Ms. Thorson met with Dr. Mowat. He faxed a brief letter to the DM stating Ms. Thorson was well and confirming his recommendation that she have a gradual return to work. Once again he invited the DM to contact him for any further information.

[89] The DM drafted a letter to Ms. Thorson dated May 22, 2007, terminating her employment. The letter set out the following "absenteeism rates", based upon her normal hours of work:

- April 1, 2005 to October 23, 2005: 28%
- March 15, 2006 to May 26, 2006: 24.4%
- April 2006 to January 22, 2007: 16.1%

[90] The letter said because of Ms. Thorson's high rate of absenteeism the DM lacked confidence in her ability to return to full time work. It said the accommodation recommendations of Dr. Mowat were implemented in March of 2006. The DM was "satisfied that [DPWS] made every reasonable effort to accommodate [her] medical condition". He said that her workload of 89 days was "far from the normal 150-250...typically... assigned to project staff". He accepted the recommendation of the Superintendent but assured her that the termination

was not “disciplinary... but a result of absences ... due to illness that have not been substantively improved by extensive accommodation”.

Post Termination

[91] After her termination Ms. Thorson stayed home. She did not apply for work. She suffered a hand injury in September and had a series of surgeries that prevented her from working with her hands for about a year. In the fall of 2008 she began doing some contract work around Inuvik. She earned approximately \$3500 in 2008. Ms. Thorson was in personal counseling sessions between December, 2008 and September, 2009 when she moved to Ontario. In Ontario she was able to obtain counseling and psychiatric support.

Credibility and Reliability

[92] In making my findings of fact, I preferred the evidence of some witnesses over others. I found some witnesses to be more credible or reliable with respect to parts of their testimony. In doing so I generally placed less weight on demeanor and more on whether their testimony was consistent with the whole of the evidence.

[93] For example, I heard expert testimony about how a person suffering from Depression would perceive her world as threatening, confusing and difficult to understand. Ms. Thorson was frank about her condition. There were times – especially from the fall of 2005 until her return to work in 2006 – when she was, as she put it, “messed up”. Consequently I was cautious about the credibility and reliability of her testimony. Nonetheless I found her to be truthful and, despite having the opportunity to embellish her evidence, she did not do so. Her memory was imperfect. When she was uncertain about what happened, she said so. The confusion resulting from her illness was obvious in parts of her testimony but she also had a good memory of details surrounding the work she did at DPWS and her relationship with her coworkers and the RPM. Her testimony was largely consistent with the whole of the evidence.

[94] With respect to the reliability, or “trustworthiness”, of Ms. Thorson’s testimony one point of contention was her allegation that her relationship with the RPM was strained resulting in unwanted attention or “harassment”. The RPM denied both. I heard testimony from them and from other Project Officers and support staff about that relationship. I am satisfied that while Ms. Thorson’s interactions with the RPM were seen through the sometimes hypersensitive lens of Depression, their relationship was seriously strained. The RPM said that even when he went near her she would get “really frantic”. They disagreed on a variety of workplace issues and both were frustrated by the actions and inactions of each other. In my view her perceptions about his conduct, colored as they were by her illness, were, on the whole, credible and reliable. It is understandable that their

relationship coupled with letters threatening to terminate her employment were construed by Ms. Thorson as unwelcome attention.

[95] I have other reasons to question the RPM's testimony. I found him very tentative at times. One important instance was when he said he did not learn Ms. Thorson had Depression until August, 2006. Ms. Thorson said she told him November 1st, the day she went into his office after receiving the second of two letters signed by the RPM threatening her livelihood at a time when she was extremely ill and incapable of working. Even though she was ill, she went to get a medical certificate and delivered it to the RPM at his office. It was an act of desperation and it seems to me a very memorable event. In my view it is more likely than not that she told him about her diagnosis at that time.

[96] When the RPM was cross-examined about when he learned about her Depression, he was very careful in his responses to counsel. He said he heard about it from Dr. Mowat's June 16, 2006 letter but said that was the first "outside source". When asked if he had been told about it before that he said "not exactly". When asked if Mr. Clarke told him about that he said "Not in the exact memory that I have conversation with him". He also said he did not recall hearing from HR that she suffered from Depression although the evidence is the DM was notified that she was depressed on January 13, 2006 and that was certainly conveyed to HR at the time by the DM who apparently relied on HR and LR for advice. The RPM was certainly getting his information and direction from HR and an HR/LR letter went out under his signature on May 29th, 2006. The net effect of this testimony was to make his recollection of when he learned about Ms. Thorson's depression unreliable. It seemed to me that he was at times trying to exonerate himself from any suggestion of error or wrongdoing. That impression lessened the weight I placed on his testimony, generally.

[97] I also had concerns about the Superintendent's testimony as to when he became aware of Ms. Thorson's illness. He said he did not learn about her Depression until May of 2006, almost 4 months after his arrival at DPWS Inuvik. He said he had no briefing from anyone about Ms. Thorson's illness. He did not know she had a serious mental illness and he did not ask anyone. Being the immediate supervisor of the RPM who testified Ms. Thorson's absences were creating hardship for him and his Project Officers, one has to question his recollection about what information he had especially since the DM said he spoke to both the Superintendent and the RPM about Ms. Thorson.

[98] In any case the Superintendent's testimony was that he let the RPM handle Ms. Thorson's workload because he did not want to "usurp" his authority. However despite his espoused lack of involvement until May of 2006, he testified about having a conversation with the DM in March, 2006 about Dr. Mowat's letter and being equally surprised that there were no conditions attached to Ms. Thorson's

return to work. It seems to me if he was surprised in March, 2006; he had to know about Dr. Mowat's letter to the DM of January 13, 2006.

[99] Also, when asked when he learned about Ms. Thorson's illness he said "...it's always, well she was depressed, she was depressed, she was depressed. Going back to 2005, just the discussion was she was depressed..." (underlining added). When asked who participated in any one of those discussions he could not remember but his "educated guess" was HR and the (then) DM. The Superintendent certainly heard the word or saw the word "depressed" repeatedly perhaps as early as 2005. Given his great effort in preparing and revising notes based on Ms. Thorson's personnel file dating back to April 2005, it struck me as incredible that he would not recall the source.

[100] The notes he made were revised several times. Even with the knowledge of Ms. Thorson's condition, he repeatedly characterized Ms. Thorson's inability to phone-in sick and come in to work when she expressed the intention of doing so as an issue of "integrity". The notes were made long after he was aware of Ms. Thorson's diagnosis and a medical report from December, 2005 stating that her illness was the reason behind her failure to keep the workplace informed of her availability. He seemed to have an exaggerated view of employee obligations as exemplified by the latter characterization and his comment about employees failing to call-in sick.

[101] Looking at the Superintendent's testimony and how it fit with the whole of the evidence, he left the impression that he was keen to show no wrongdoing on his part. Where his testimony conflicted with other evidence, I tended to place greater weight on other evidence.

E. ANALYSIS AND DECISIONS

Issue 1. Did DPWS unlawfully discriminate against Ms. Thorson?

What is "Discrimination"?

[102] Discrimination is "a distinction, whether intentional or not but based on [in this case, "disability"] which has the effect of imposing burdens, obligations or disadvantages on [a person which are] not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society" (*Andrews v. Law Society of B.C.* [1989] 1 S.C.R. 143).

[103] Section 5 (1) of the Northwest Territories *Human Rights Act* 2002 S.N.W.T. c. 18 (the "HRA") prohibits discrimination against persons who have a disability. Section 1 of the HRA says that "disability" means "any degree of physical

disability, infirmity...or illness” and includes “a condition of mental impairment...[and] a mental disorder”.

[104] Section 7(1) of the *HRA* prohibits discrimination in relation to employment by refusing to employ or continuing to employ an individual protected by Section 1.

[105] I must be satisfied that the evidence establishes a *prima facie* case of discrimination. A *prima facie* case is “one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a [decision] in [Ms. Thorson’s] favor in the absence of an answer from [DPWS]” (*Ontario Human Rights Commission and O’Malley v. Simpsons-Sears* [1985] 2 S.C.R. 536 @558).

[106] Ms. Thorson was an employee of DPWS in Inuvik between July 2004 and May, 2007. By June of 2005 she was receiving medical treatment for Depression, a disabling illness. During her treatment DPWS became concerned about her absenteeism. Over the next 23 months her employer repeatedly warned her about losing her job because of absenteeism and, on May 22, 2007, her employment was terminated, citing “innocent absenteeism” as the cause. “Innocent absenteeism” occurs when an employee is unable to attend work due to illness and through no fault of their own.

Conclusions

[107] I find Ms. Thorson suffered from Depression during the course of her employment. The Respondent does not dispute that Depression is a “disability” as defined in the *HRA*. The Respondent does not dispute that her termination resulted from absenteeism caused by Depression. I am satisfied that the evidence in this case is complete and sufficient enough to establish discrimination based on disability. I now turn to the question of ‘accommodation’.

Issue 2. Did DPWS accommodate Ms. Thorson to the point of undue hardship?

What is “Accommodation”?

[108] There is an exception to the prohibition against discrimination in employment contained in Section 7 of the *HRA*. Section 7 (3) says that a practice that is based on a *bona fide occupational requirement* (a “BFOR”) is not discriminatory.

[109] The Respondent says the BFOR in this case is the occupational requirement to attend work. The Respondent must prove that it adopted the BFOR for a work-related purpose rationally connected to the performance of the job in an honest and good faith belief that it is necessary for that purpose and which is

reasonably necessary to the accomplishment of that purpose [*B.C. (Public Service Employee Relations Commission v. BCGSEU* [1999] S.C.R. 3 (“*Meiorin*”)].

[110] To prove the BFOR is reasonably necessary, the employer must show that the requirement for attendance at work is inclusive and not discriminatory, i.e. that it takes into account the individual needs and circumstances of an employee who has a disability. Taking into account those individual needs and circumstances and by adapting the workplace and job functions and duties, the employer will fulfill its obligation to “accommodate” the employee.

[111] Further, in *Meiorin* (ibid) the court stated that the procedural aspect of accommodation, i.e. *how* it is achieved, is as important to the objective of treating employees with dignity and respect, as the actual result of any efforts to accommodate those employees. Hence accommodation is an inherently collaborative process. Employer and employee must work toward a “reasonable compromise” (*McGill University Health Centre (Montreal General Hospital) v. Syndicat des Employés de l’Hopital general de Montreal* [2007] 1 S.C.R. 161. In other words, accommodation is, and must be, a multi-party process.

[112] So while employees must disclose information about their illness to employers and be prepared to facilitate the implementation of reasonable accommodation proposals from employers, both must be active participants in the process of searching for reasonable accommodation. Using the basic tools of collaboration, e.g. dialogue, exchange of information, reaching consensus and monitoring results, the accommodation process maximizes the likelihood that the result will be reasonable for all participants.

What is “Undue Hardship”?

[113] The employer’s responsibility to accommodate is not limitless. It ends where the employer is able to prove “undue” hardship. When hardship becomes “undue” depends upon the impact of the accommodation on the operation of the employer’s business. Factors such as cost, the size and nature of the employer and its workforce, the impact on other employees, availability of other work, etc. are to be considered when determining whether the point of undue hardship has been reached. Where an employer’s business is “hampered excessively” by an employee with an illness “or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate..., the employer will have satisfied the test”. Employers are in the best position to determine the limits of accommodation (*Renaud v. Board of School Trustees, et al* [1992] 2 S.C.R.

The Search for Accommodation for Ms. Thorson

[114] The duty to accommodate must be assessed in a way that takes into

consideration the entire time the employee was absent: *Hydro-Quebec v. Syndicat des employe-e-s techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000* [2008] 2 S.C.R. 561.

[115] The duty to accommodate and enter into a dialogue with Ms. Thorson should have been apparent to the employer by November 1st 2005 when Ms. Thorson showed up in the RPM's office with a medical certificate and spoke to him about her illness. At that time she was extremely ill. She was dealing with family problems as well. She began receiving letters threatening the termination of her employment for innocent absenteeism and abandonment. To say that she felt under attack by her employer is probably not an exaggeration.

[116] On November 21st, 2005 DPWS was informed by Dr. Page that Ms. Thorson was receiving specialist treatment. The DM's response was to send a letter with accusatory overtones giving her a "final" chance to provide the medical information DPWS was seeking.

[117] DPWS submitted that, within days of receiving the December 2005 letter from Dr. Seaman containing recommendations for a graduated return to work with less demanding duties, it "backed-off going down the road of termination". Instead, the DM required Ms. Thorson follow a work schedule that reflected Dr. Seaman's recommendations. It was also submitted DPWS DID not have knowledge of Ms. Thorson's Depression until January 2006 and that it's approach changed then, also. It did not "move" to terminate her.

[118] The DM's work schedule was an imposed schedule. It did not result from any meeting or discussion between DPWS and Ms. Thorson. As to the so-called change of approach by DPWS when it learned she suffered from depression in January 2006 (contrary to my findings of fact in this case), after her return in March, 2006, letters in May and August from the employer contained more of the same threats of termination for innocent absenteeism. More to the point: the so-called 'new' approach did not include meetings and discussions with Ms. Thorson about her need for accommodation. DPWS continued to look to Dr. Mowat to, in effect, give the employer a prescription for meeting its duty to accommodate.

[119] There is a theme running through the Respondent's argument suggesting that Dr. Mowat was responsible for (a) not giving the employer the information it sought about Ms. Thorson's ability to fulfill her job functions and, (b) the paucity of accommodation actually afforded Ms. Thorson. It is true that requests were repeatedly made to Ms. Thorson for "a prognosis" beginning in the fall of 2005. Never mind that in her condition she did not know what was meant by that, it is not apparent from those letters that the authors knew either. A "prognosis" as defined by Merriam Webster, is a "forecast; a prospect of recovery from disease". That is what Dr. Mowat's principal response to the inquiries was because, as I understood

his evidence, that was his field of expertise. As I understood his evidence, he did not respond to letters asking for his opinion about Ms. Thorson's ability to perform various functions on the job because he was not knowledgeable about those functions and felt her employer was in a better position to determine what she was capable of doing. If it was not obvious to DPWS from Dr. Mowat's correspondence of January 13, 2006, March 13, 2006 and June 16, 2006 that he was not going to accept responsibility for determining what Ms. Thorson's job was and whether she could perform all of its functions, DPWS must have realized that was the case on November 16, 2006. On that day Dr. Mowat wrote to the RPM telling him he made general recommendations because the RPM, not he, was familiar with her job functions.

[120] To be clear: the responsibility for providing reasonable accommodation lay with DPWS, not Dr. Mowat; the responsibility to review Ms. Thorson's job functions in the context of her illness lay with DPWS, not Dr. Mowat. Further, if DPWS was dissatisfied with Dr. Mowat's responses, it had Ms. Thorson's consent to discuss those responses with him and it was free to discuss those responses with Ms. Thorson herself.

[121] The evidence demonstrates that there was no collaborative search to accommodate Ms. Thorson. Neither the RPM nor the Regional Superintendent engaged Ms. Thorson in any kind of discussion about her workplace needs. There were no meetings scheduled for that purpose nor were there any meetings during which those needs were discussed even incidentally. The DM, who was the final arbiter of her employment, never talked to her. He never directed anyone to talk to her. HR and LR staff who provided advice, who drafted letters for signature and who obviously informed and directed the actions of the RPM, the Superintendent and the DM, did not have a single conversation with her about her needs.

[122] Had DPWS spoken to Ms. Thorson it would have learned that her relationship with the RPM and her work environment, particularly when she returned to work after four months of sick leave in March, was making it extremely difficult for her to do her job. Her working environment and her relationship with the RPM worsened her medical condition. The procedural component of the duty to accommodate is an element of the need to treat employees with dignity and respect. It is also needed to alleviate the acute risk that critical information for both the employee and employer is overlooked.

[123] Of course because there was no collaboration there was no discussion with her about how to resolve the employer's purported difficulty in trying to determine how to accommodate her. There was no effort made to discuss sending her to another specialist in the hope of getting more or better information. Nor was there a proposal made for an independent medical examination.

[124] The most telling testimony about the employer's "approach" to accommodating Ms. Thorson came from the Superintendent. He said anything that was done to accommodate Ms. Thorson was "accidental and not by design".

[125] DPWS argued that some responsibility lay with Ms. Thorson's physician, the UNW or Ms. Thorson to raise the "idea" of a collaborative approach. I have dealt with the physician's alleged responsibility, above. I have also considered the UNW's role in this case but Ms. Thorson's relationship with the UNW ended after she became dissatisfied with their representation. As for Ms. Thorson, Dr. Mowat's evidence about Depression, generally, and its effects on her specifically, I conclude she was simply too ill and preoccupied with her illness and her employer's intention to terminate her employment to take the initiative.

[126] In my view DPWS, supported as it was by HR and LR, had the resources to initiate non-confrontational discussions. I reject the argument that it was "unrealistic" given Ms. Thorson's condition. It was simply a matter of determining the best way to accomplish the task. Dr. Mowat might have had an opinion on that if DPWS asked. DPWS might have sought other professional opinions about how to deal with Ms. Thorson but I heard no evidence of that.

[127] The law contemplates having employees, employers and unions involved in the accommodation process but there is no reason that other persons, particularly at the request of the employee, cannot participate to provide support and ensure meetings are non-confrontational. In any event, HR and LR ought to have known about the employer's responsibility to accommodate a disabled employee and how to go about it since these events occurred years after the law relating to the employer's obligation was settled.

[128] I have looked at the entire period of Ms. Thorson's employment, from the fall of 2005 until her last day at work, April 3, 2007. I examined the many letters issued by the employer and the medical professionals. It is striking that the employer consistently relied upon Dr. Mowat's opinion, however unsatisfactorily from its point of view. But it did so only until February 12, 2007, when Dr. Mowat told DPWS Ms. Thorson's condition had improved and recommended action to reduce stress. Again, on April 27, 2007 when Dr. Mowat recommended a gradual return to work and said that Ms. Thorson had improved to the point that she was able to return to her full workload, DPWS decided to terminate her employment.

The Court in *Hydro-Quebec* stated:

A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation. Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not

optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship. (underlining added)

[129] The facts in this case are distinguishable from the *Hydro-Quebec* case where the employer tried for several years to accommodate the employee by modifying her workstation, employing her part time and even putting her into another job. In this case the time period was much shorter and DPWS had optimistic medical opinions from Dr. Mowat about Ms. Thorson returning to normal working capacity. Steps to reduce her workload were accidental and, based on the evidence, ineffective in meeting her needs.

[130] In my view DPWS failed to meet the procedural requirement for accommodation and it unlawfully terminated her employment because of her disability.

Undue Hardship

[131] Having found DPWS failed to accommodate Ms. Thorson, there is no need to explore the issue of “undue hardship”. However if I am incorrect about DPWS’ failure to accommodate, I also conclude DPWS did not suffer undue hardship as a result of Ms. Thorson’s absenteeism for the reasons that follow.

[132] DPWS suggested in argument that the “undue” aspect of the hardship it endured resulted from the length of time that Ms. Thorson was absent taking into account the “sporadic” nature of the absences, the size of the office and that the office was understaffed.

[133] Ms. Thorson was absent for about 4 months from November 2005 to mid-March, 2006. Before that she was working intermittently and the RPM took steps to reassign her project work. When she returned to work in March, her absenteeism improved from 52.1% of working hours in April to 7.4% in March of 2007 (although in January 2007 she was away 51.3% of her working hours, explained by medical certificates and her son’s serious illness).

[134] When Ms. Thorson returned to work in March, 2006, it was year-end so there was a reduction in work as part of the yearly budget cycle. She was given an assortment of project work including work on the Deline School (which, according to the RPM was “quite political”) and was even sent on a week-long travel assignment to Sachs Harbour. In August of 2006 she continued to work on projects including the “shower building” project which was, according to the RPM a “bigger project” and the Inuvik Hospital which had “many issues”. In December of 2006 the RPM left DPWS and that had a rejuvenating effect on her. She felt able to take on more work.

[135] I accept evidence that Ms. Thorson's illness resulted in the reassignment of her projects and the result was an increase in the workload of some other Project Officers. None of the testimony I heard from them, however, distinguished the additional work from work that is taken-on when Project Officers are on holidays. None of the Project Officers complained about being overburdened or that the projects were in disarray or suffered serious setbacks due to Ms. Thorson's absences. The RPM testified that there were some problems on various projects that either were handled by Ms. Thorson or which were transferred to other Project Officers. The evidence suggested to me that they were problems that were part of the day-to-day work of Project Officers. The office was short staffed periodically for various reasons. The Project Officers took on work as the need arose. There was a measure of hardship for certain but it was not, on the evidence, excessive, hampering or "undue".

[136] Neither the RPM nor the Superintendent testified about any economic impacts to DPWS created by accommodating Ms. Thorson. The Superintendent said there were remarks made by staff about Ms. Thorson's illnesses and at one point he said her absences "poisoned" the workplace which suggests an environment in which comments were made or behavior was ongoing that ridicules, belittles or degrades people. He suggested it without elaboration. None of the other witnesses spoke about working in such conditions. It would have been surprising if they did. The Project Officers who gave evidence did not speak disparagingly about Ms. Thorson. They were impressed with her knowledge and experience. In my view it is another example of the Superintendent's tendency to use hyperbolic descriptions.

[137] I find the employer did not accommodate Ms. Thorson to the point of undue hardship.

Conclusions on Accommodation and Undue Hardship

[138] DPWS did not accommodate Ms. Thorson, an employee with a disability, and terminated her employment because of that disability. While Ms. Thorson's workload was adjusted from time to time following her absences from the workplace, those adjustments were imposed, unilateral and without a reasonable effort by DPWS to consider her individual needs and circumstances. The adjustments to her workload did not result in any undue hardship to DPWS.

[139] Having found DPWS discriminated unlawfully against Ms. Thorson I now turn to the question of "remedy".

F. REMEDIES

[140] The preamble to the *HRA* acknowledges the "inherent dignity and the equal and inalienable rights of all members of the human family". It speaks of the

“importance to promote respect for and observance of human rights”. It requires those “who have duties to others and to the community to which he or she belongs [to be]... responsible to strive for the promotion and observance of the rights recognized in [the Act]”. These are important principles that I must observe in deciding what remedies are appropriate in this case.

[141] I must also keep in mind the purpose of human rights legislation, generally, is to prevent discrimination and not to punish those responsible for unlawful discrimination. I must consider remedies that will prevent discrimination in the future (*C.N.R. Co. v. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 114). Victims of discrimination are to be made whole – returned as much as possible to the position they would have been in had they not suffered unlawful discrimination – and to be compensated for personal indignities and actual damages (*Cashin v. C.B.C.* (1990) 12 C.H.R.R. D/222 C.H.R.C.; *Canada (Treasury Board) v. Robichaud* (1989) 11 C.H.R.R. (Can.Rev. Trib.).

[142] Section 62(3) of the *Act* sets out the specific remedies that I may consider:

62. (3) If the adjudicator finds, under subsection (1) that a complaint has merit in whole or in part, the adjudicator

(a) may order a party against whom the finding was made to do one or more of the following:

- (i) to cease the contravention complained of,
- (ii) to refrain in the future from committing the same or any similar contravention,
- (iii) to make available to any party dealt with contrary to this Act the rights, opportunities or privileges that the person was denied contrary to this Act,
- (iv) to compensate any party dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act,
- (v) to pay to any party dealt with contrary to this Act an amount that that the adjudicator considers appropriate to compensate that party for injury to dignity, feelings and self respect,
- (vi) to reinstate in employment any party dealt with contrary to this Act,
- (vii) where the adjudicator finds that the party acted willfully or maliciously, or has repeatedly contravened this Act, to pay to any party dealt with contrary to this Act an amount not exceeding \$10,000 as exemplary or punitive damages, 41
- (viii) to take any other action that the adjudicator considers proper to place any party dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act; and

(b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Act.

[143] Ms. Thorson seeks the following Order against The GNWT Department of Public Works and Services:

1. That the conduct complained of is discrimination;
2. That DPWS cease the discriminatory conduct and refrain from committing such conduct , or any similar conduct, in the future;
3. That she receive compensation for all or any part of any wages or income lost or expenses incurred by reason of the discriminatory conduct;
4. That she be reinstated to employment with DPWS;
5. That she receive compensation for injury to her dignity, feelings and self-respect in the range of \$20,000.00 to \$35,000.00;
6. That DPWS be required to pay \$10,000.00 for willful or malicious conduct;
7. That I require a review of DPWS' Accommodation Policy.

[144] With respect to item 6., Ms. Thorson says DPWS acted “recklessly” in denying her right to accommodation.

[145] DPWS says that I may make an Order reinstating Ms. Thorson to her former position but not to any other position because only the Minister responsible under the N.W.T. *Public Service Act* may “appoint” employees to positions in the Public Service after a competition.

[146] DPWS also says this is not a case where punitive or exemplary damages ought to be made because the employer was simply trying to manage a difficult situation.

[147] Finally, DPWS says if I award damages for injury to Ms. Thorson’s dignity, feelings and self-respect I ought to consider what was awarded in a particularly egregious case of sexual harassment decided by my colleague, Adjudicator Mercredi. In that case the award was \$15,000.00, the highest award in our jurisdiction to date. DPWS says the harm done in this case is less serious does not merit that size of award.

[148] The parties agree that I should not make any Order in relation to item 2. before giving them the opportunity to resolve that part on their own.

Conclusions on Remedies

1. Declaration:

[149] DPWS discriminated against Ms. Thorson, a person with a disability, by refusing to continue to employ her without affording her reasonable accommodation as required by Section 7 (4) of the Northwest Territories *Human Rights Act*.

2. Cessation of Discriminatory Conduct:

[150] DPWS says that it now has an Accommodation Policy in place. Having a policy is an excellent idea. However I am also concerned about how the policy is and will be applied. I make the following Orders:

[151] The GNWT is required to cease discrimination against its employees by failing to afford those who suffer from a disability their right to accommodation including their right to be an integral part of the process of accommodation.

[152] This case hilites the terrible consequences of having supervisory staff and management who are unfamiliar with their obligations toward employees who have a disability. I further Order the GNWT to ensure all employees, contractors and appointees having supervisory duties and functions receive training relating to the employer's duty to accommodate persons with disabilities. Implementation of this Order for incumbent supervisors is to take place within 90 days of this decision; new supervisors are to receive the training within 90 days of their appointment to the public service.

[153] Finally, taking into account the statutory role of the Human Rights Commission, in particular its role and experience in developing programs of public information designed to eliminate discriminatory practices, the GNWT is Ordered to provide a copy of its Accommodation Policy, including all instructions or directives about how the Policy is to be applied in practice, to the Commission for its information, comment and advice.

3. Wages, Income Loss and Expenses:

[154] The parties have 90 days in which to provide me with a proposed resolution of the quantum of damages relating to wages, income loss and expenses, failing which the parties may proceed with submissions by teleconference arranged via the Panel's Office Administrator.

4. Reinstatement:

[155] Ms. Thorson testified she was prepared to return to Inuvik to her job as Projects Officer because the RPM no longer works there and the Superintendent has retired. However Dr. Mowat rendered an opinion in writing in 2010 which says her return to work in Inuvik may cause a relapse. Her legal counsel said the latter evidence is not contradicted but, in fact, it is by Ms. Thorson's testimony.

[156] DPWS' legal counsel stated I do not have jurisdiction to reinstate Ms. Thorson to a position other than the one she left in Inuvik because the authority to

make appointments to positions in the NWT lies with a Minister of the GNWT as per s. 16 of the N.W.T. *Public Service Act*.

[157] Section 4 of the *HRA* says:

This Act binds the Government of the Northwest Territories.

I do not find any ambiguity in section 4. It means the GNWT is bound by the provisions of the *HRA* including the remedial provisions and must give effect to them. As Zinn points out: “Tribunals have ordered... employees be reinstated to their original positions, promoted to another position, placed in a position or offered the opportunity to apply for the next vacant position...” (The Law of Human Rights in Canada, Hon. Justice Russel W. Zinn, 2012, Thomson Reuters Canada Limited, para. 16:30.4). However there *is* ambiguity between the evidence of Dr. Mowat and Ms. Thorson in this case, so I make the following Order:

I Order the Respondent to reinstate Ms. Thorson to the position of Project Officer. If the parties are unable to agree on the implementation of this Order, either party may apply for further direction.

5. Damages for Injury to Dignity, Feelings and Self-respect:

[158] Legal counsel for DPWS says the award \$15,000 made by Adjudicator Mercredi in the *Savage v. 984239* case (HRAP, November, 2008) should be viewed as too high for this case. In *Savage* the complainant was subjected to 7 months of particularly egregious acts of sexual harassment in the workplace. The evidence showed that she became “moody, argumentative, withdrawn, negative and insecure”. Her personal relationships were affected. She quit her job and took psychological counseling to deal with the effects of the harassment.

[159] In my view the facts and circumstances in this case are more like those in *Toivanen v. Electronic Arts (Canada) (No. 2)*, 2006 BCHRT 396. In that case Ms. Toivanen was employed for 7 years and suffered depression during her last year. The B.C. Human Rights Tribunal heard testimony about her being a committed and productive employee. It found the employer knew she suffered from depression and saw its effects. The Tribunal noted that “for most people, work is one of the defining features of their lives” and “any change is bound to have far-reaching repercussions”. It ordered an award of \$20,000.00 for injury to dignity, feelings and self-respect, the highest award by that Tribunal for those kinds of damages, at the time.

[160] Ms. Thorson came to DPWS Inuvik with 16 years’ experience as a Project Officer. Just months before the chain of termination letters began, Ms. Thorson received a favorable performance appraisal. DPWS knew she was a single parent. In

the fall of 2005 DPWS knew she suffered from Depression and was seriously ill. The RPM saw her symptoms. DPWS knew she was in treatment even when she was terminated in April, 2007. Ms. Thorson's psychological, financial and familial sense of security was seriously affected by the discriminatory conduct of DPWS. Putting her on the 3rd floor of a condemned building was at best thoughtless and at worst reprehensible. So was the lack of interest in investigating her allegation of harassment against the RPM and the general lack of interest in talking to this troubled employee about her working conditions.

[161] In my view this case contains elements of the egregious conduct and their impacts in both *Savage* and *Toivanen*, cases that were decided 5 and 7 years ago, respectively. However this case is distinguishable by the length of time (at least 18 months) DPWS failed to accommodate Ms. Thorson and she had to endure the threat of termination and its impacts.

[162] I Order the Respondent to pay \$25,000.00 to Ms. Thorson for injury to her dignity, feelings and self-respect.

6. Exemplary or Punitive Damages

[163] As noted above, *generally*, the purpose of remedying a victim of discrimination is not to punish perpetrators. However section 62(3)(a)(vii) of the N.W.T. *Act* does allow me to award exemplary or punitive damages in appropriate cases.

[164] I may award punitive damages "where the conduct giving rise to the complaint is found to merit punishment because of its harsh, vindictive, reprehensible and malicious nature". (*McKinley v. B.C. Tel*, 2001 SCC 38 (CanLII)). Punitive damages are to be awarded in exceptional cases and with restraint. The objective in awarding them is threefold: to punish, to deter the wrongdoer and others and to denounce egregious conduct (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (Can LII)).

[165] Legal counsel for DPWS says there is no evidence of any malicious intent on the part of her client. She says it was difficult for the employer to deal with Ms. Thorson's chronic absenteeism.

[166] Legal counsel for Ms. Thorson says DPWS acted recklessly when it continued to breach her right to accommodation. In other words, DPWS was aware that its conduct would cause harm to Ms. Thorson and failed to take action to prevent the harm. I find that was the case when the Superintendent placed Ms. Thorson on the 3rd floor of the condemned building and I have taken those facts and circumstances into account in awarding her damages for injury to dignity, feelings and self-respect.

[167] The difficulty I have making an award for punitive damages is that I was impressed by the evident lack of awareness of the RPM, Superintendent and DM about the duty to accommodate Ms. Thorson. I do not believe they disregarded the risks to Ms. Thorson's health or employment knowingly.

[168] I am satisfied that the award for injury to dignity, feelings and self-respect along with the other monetary and non-monetary Orders made in this case are sufficient to deter this wrongdoer and others. I am satisfied DPWS does not require further punishment. Publishing this decision on the HRAP website will give effect to the need for denunciation in this case.

7. Interest

[169] I am not convinced I have the jurisdiction to award interest on any part of an award made under the *HRA*. I will leave it open to the parties to settle that issue between them or make further application before me.

8. Form of Order

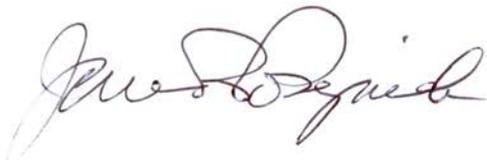
[170] The parties, or either of them, may request a signed Order for filing with the Clerk of the Supreme Court of the Northwest Territories pursuant to Section 64(1) of the *HRA*.

9. Costs

[171] Neither party made a request for costs pursuant to Section 63 of the *HRA*. I make no Order as to costs.

Should the parties require clarification in relation to any of the Orders made, they may arrange for a teleconference via the HRAP office.

Dated this 8th day of March, 2013.



James R. Posynick, Adjudicator