IN THE MATTER OF THE *INDUSTRIAL RELATIONS ACT* RSNB c. I-4

AND IN THE MATTER OF A REFERENCE TO ARBITRATION

BETWEEN

MONCTON TYPOGRAPHICAL UNION LOCAL 636, A LOCAL OF TNG CANADA, COMMUNICATIONS WORKERS OF AMERICA FORMERLY A LOCAL OF THE PRINTING PUBLISHING AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA
(DAVID FRANCIS)

Grievor

- and -

TIMES & TRANSCRIPT, MONCTON PUBLISHING DIVISION OF BRUNSWICK NEWS INC.

Employer

AWARD

Dates of Hearing:

December 3, 4, 5, 2002, April 22, 2003, August 28, 29, 2003, September 3, 4, 5, 11, 2003 in Moncton, NB

Appearances:

Nelson J. Roland, Esq. for the Grievor
William B. Goss Q.C., for the Employer

Arbitration Board:

Greg Murphy, Union Nominee
Leo Morehouse, Employer Nominee
G.L. Bladon, Chair

Written Submissions:

October 24, 2003

Date of Award:

December 19, 2003

INTRODUCTION

This rather complex matter was initiated on October 30, 2001 with the filing of two documents by the grievor which the parties agree constitute a single grievance. It alleges that the employer harassed, intimidated and discriminated against the grievor in September and October of 2001 by advising him not to attend work for three days, canceling his columns in the *Times & Transcript* newspaper, removing his bylines, depriving him of the title of Associate Editor and reducing his wages. These and other matters became the subject of an unfair labour practice complaint and reconsideration request filed by the Union with the New Brunswick Labour and Employment Board on February 19, 2002. The Board rejected the reconsideration request and, as it had done with respect to an earlier complaint, deferred the complaint to arbitration. As a result the grievor sought direction from this panel regarding its jurisdiction particularly as the harassment, discrimination complaint was now broadened to include an allegation that the employer was interfering with the administration of the short term disability benefit plan by providing misinformation to the administrator. On July 19, 2002 the board ruled that it had jurisdiction over the broadened harassment, intimidation, discrimination issue articulated in the unfair labour practice complaint. The grievance arbitration began in December, 2002.

In the meantime the grievor commenced a civil action against J.D. Irving Limited (JDI) and Canada Life Assurance Company for short term disability (STD) benefits. J.D. Irving Limited provides a salary continuance program for 51 weeks for employees of Brunswick News Inc., among others, as a subsidiary of J.D. Irving Limited. Canada Life administers the program. However, Canada Life provides long term disability coverage under which the grievor is also advancing a claim in the civil action. The employer took the position that the claim for short term disability benefits was properly the subject matter of the grievance process and sought by motion to limit the scope of the civil proceeding. On April 25, 2003 Rideout, J. ruled that the Court of Queen's Bench was without jurisdiction to deal with the grievor's short term disability claim. Consequently, the grievor's claim for one year of salary continuance under the plan provided for employees of the *Times & Transcript* is a matter to be determined by this board in addition to the grievance.

FACTS

i) The grievances

The grievor, David Francis, joined the *Times & Transcript* as a reporter in December of 1989. He began with general assignments across the spectrum of news gathering and reporting. More recently, in addition to his news reporting assignments, he wrote two

weekly opinion columns - City Views and The Moral Ombudsman. Al Hogan, the Managing Editor of the paper, held Francis in high regard as someone particularly skilled at cutting to the very essence of a news story. For example, Francis wrote extensively, and arguably influentially, on the tolling of the Trans Canada Highway in 1998 and the removal of the tolls with the change of government in 1999. In 1998 Francis became Associate Editor of the *Times & Transcript*. That responsibility meant filling in for Murray Guy, the News Editor, when Guy was absent. The News Editor meets twice daily with the editorial staff, determines the news stories to be covered and assigns reporters and photographers. He monitors the reporters' progress throughout the day and assesses the resulting stories or - as Francis described it: "He runs the hour-to-hour activities of the newsroom developing a package for the Managing Editor for publication the following day". With the appointment as Associate Editor came an increase in wages. Initially Francis' hourly rate was increased for the time he substituted for Guy and subsequently this was converted to an increase in his annual wage.

Francis has had a history of depression from the time he was twenty-three years of age. In 1995 he was absent from the workplace for four-to-five continuous months as a result. In 1998 he was seen and treated by Dr. Mahmud, a psychiatrist, for that condition. He had recovered by February 2, 1999. In the summer of 2001 the grievor was again experiencing symptoms of depression as a result of a failed relationship, its adverse financial impact and the consequent need to sell his house. His parents' health was failing and his girlfriend's father was dying of cancer. Francis' solution was to consider starting anew. He spoke to his friends and co-workers, including Hogan and Guy, advising that he would be leaving the paper for Florida or Australia once he sold his house. At about this time Francis met with Guy who expressed his displeasure with Francis' work attitude as being too blasé, off-hand and unfocused. Francis' expression of his intent to leave was taken seriously by his employer particularly after Francis offered to resign in return for a buyout about the end of August, 2001. The buyout proposal was motivated by a rumour that there were going to be layoffs in the newsroom and Francis suggested he be let go in order to keep a younger reporter on the job. In fact, the offer was rejected by Hogan as the reporter to be laid off had not proved satisfactory through his probation period. Nonetheless, Francis' intent to leave was well known but his anticipated departure date was not - although November, 2001 seemed to be the common understanding. Hogan and Francis addressed this issue directly. Francis was a part of the decision to train Tammy Scott -Wallace for the Associate Editor position. In mid-August 2001 Scott -Wallace filled in for Guy. Francis assisted and supported her in learning the Associate Editor role and its attendant duties and responsibilities. The reporter who had been let go at the end of August had been hired specifically to cover the courts. Francis had reported on the courts previously and, while it was not a favorite assignment, he took the job once again in the late summer of 2001 as a favor to Hogan and in view of his impending departure.

Guy was on vacation during the week of September 17, 2001. Scott-Wallace was substituting as the News Editor for the second time. She assigned a number of stories to Francis in addition to his court reporting responsibilities on the Monday and Tuesday - a common and accepted practice. Francis, who was in the final stages of selling his home, did not welcome these additional assignments and did not produce the stories Scott-Wallace expected. On Wednesday, September 19, 2001 Scott-Wallace acted on Hogan's suggestion that Francis be assigned a follow-up story on the painting of the Gunningsville Bridge. This assignment was given to Francis on his return to the newsroom from court and prior to his doctor's appointment at 12:15 pm. Francis asked Scott-Wallace to email him the specifics and left to go to the doctor. He called Scott- Wallace and there was a brief discussion as to the extent of his assignments that day and Francis mentioned the need for overtime approval. A second call from Francis followed shortly thereafter. He advised Scott-Wallace of the information that he had been able to obtain up to that moment on the bridge story - in the interval he had spoken to the government Minister involved - and Francis' expectation regarding further information from the Minister's office. According to Scott-Wallace, Francis said:
"I'll write the story based on the numbers I can get, and if that isn't good enough, 'they can fire me tomorrow'."

Francis denies expressing himself so forcefully. In any event Scott-Wallace was shaken. She spoke to Hogan, who told her to call Francis and tell him to take the rest of the week off and use the time to complete the sale of his house. Scott-Wallace reached Francis on his cell phone in the doctor's waiting room and advised him of Hogan's instructions. Francis was startled. This was the first time in his career that he had been "sent home". When he saw his family doctor that afternoon he was given a note from his doctor reading:
"Mr. Francis is off work indefinitely pending an appointment with a specialist for medical illness."

Francis, however, "thought that [he] could handle it". While he did not write the Friday Moral Ombudsman column for September 21, 2001, he went back to work on Monday, September 24, 2001. Guy, the Newsroom Editor, had returned from his vacation. Guy had been in the office on September 19 and was aware of the conflict between Scott-Wallace and Francis and asked them both on the 24th for the circumstances which gave rise to the discord in the newsroom. He received reports verbally from Scott-Wallace and by email from Francis. Guy was able to satisfy Hogan that a rumour apparently circulating in the Premier's office that Francis had called saying he was fired was false. At that time, from Hogan's standpoint, the matter ended.

During the week of September 24, 2001 Francis learned he would no longer be writing his two columns: City Views and The Moral Ombudsman. Shortly thereafter Francis' byline disappeared from the Police Beat column and he perceived the loss of his byline generally except for the Gunningsville Bridge story. About this time Guy advised Francis that his title as Associate Editor was being taken away with the corresponding reduction in wages to that of a reporter.

Francis knew of other editors who had been returned to reporter status without a wage reduction. This reinforced his perception that he was being targeted and disciplined or punished for his failure to respond positively to the request to report on the Gunningsville Bridge story as Hogan had asked during the week of September 17, 2001.

The employer's view of the matter is quite different. Francis was no longer doing the job as Associate Editor and there was therefore

no reason why he should carry the title or be paid for it. Francis had announced his departure, he had not written The Moral Ombudsman column for the Friday, September 21 and as he was leaving there was no need to continue the column as it would be stopped ultimately. A similar rationale applied to the City Views column. Bylines are attached by the Night News Editor based on merit and there was, according to the employer, no discussion as to the treatment of Francis' stories and the use of his byline or the lack thereof subsequent to the week of September 17. The employer says the fact that these matters all came about at the same time was coincidental and motivated by Francis' decision to leave. However, these factors, from Francis' standpoint, tied into his already existing depression from other causes and resulted in Francis going off work on October 19, 2001. He filed the grievance on October 30, 2001. Francis has not returned to the workplace. He has been and continues to be seen by his family doctor, his psychiatrist and a psychologist for depression.

ii) STD Entitlement

On November 1, 2001 Francis filed his application for short term disability benefits with Canada Life through Kathie Blomsma, the payroll clerk at the *Times & Transcript*. It included "An Attending Physician Statement" from his family doctor with the diagnosis: "Major depression recurrent with melancholia" and a note of the referral to a psychiatrist.

While Francis was off work and initially in receipt of STD benefits, he was not inactive. Following the delivery of the two letters constituting the grievance on October 30, he wrote and delivered a letter dated November 6, 2001 to the employer requesting "a complete, detailed explanation, in writing of the reasons" for what Francis saw as measures taken against him and set out in paragraph 6. On November 7, 2001 Francis had a meeting with Murray Guy and Edith Robb - the Assistant Managing Editor in the newsroom, at the second step of the grievance process. Francis testified that Guy was upset and accused Francis of stabbing him in the back. The parties were unable to resolve the dispute as Francis did not identify a specific violation of the collective agreement. On that basis the employer refused to recognize Francis' complaints as a grievance within the collective agreement. Consequently Francis wrote twice to the employer on November 8, 2001 pursuing the grievance at the next level. When he delivered the letters to the employer he learned that access to his computer had been withdrawn and that his entry card to the building was no longer operational. On November 9 the employer confirmed its position in writing - "Its not a grievance" - by email from Hogan to Dwayne Tingley - the Shop Steward. Francis responded by letter November 15, 2001 attempting to move his grievance to arbitration. He furthered his efforts on December 4, 2001 with another letter requesting the employer to name its nominee to the board of arbitration which he delivered to the employer.

Francis testified that on December 8, 2001 he went to a Union meeting for the first time in three years as he was concerned with the processing of his grievance because the current President had been laid off. This appears to contradict his letter to Canada Life of July 15, 2003 wherein he says he attended the November Union meeting and learned at that time that the office of President was about to become vacant. In any event the December meeting involved the "election" of the local executive. Francis said that in his experience rarely was there an election as such, but rather individuals were reluctantly pressed into service. When no one "volunteered" for the position of President, Francis - who had been the Union President from 1995 to 1997 - was asked if he would take the job on a temporary basis. As Francis put it: "There was no speech, no campaign, and no vote". Francis agreed to assume the Office of President candidly admitting his self-interest in seeing his grievance pursued and the need for help, both moral and financial, from the Union's national counterpart.

On December 10 or 11 Francis, in his role as Union President, called Victor Mlodecki, the recently-appointed Publisher, suggesting that they meet. Francis received a message from Mlodecki's office that as there were no issues to discuss, there was no need to meet.

Francis delivered another grievance he had drafted regarding the Press Room to the employer on December 13, 2001 and at the same time left a Union membership form for signature with Mlodecki's phone receptionist asking her to return it to the Union Secretary.

As nothing had been heard from the employer in response to Francis' letter of December 4, 2001 asking for its nominee to the Arbitration Board, Francis wrote to the Minister of Training and Employment Development on December 13, 2001 requesting his assistance in moving the grievance process forward. On December 14 the Union issued a Press Release over Francis' signature as President complaining of the employer's failure to process grievances in accordance with the agreement between the Union and the employer and further noting a request made by the Union to Minister of Training and Employment Development "to intervene by either launching an investigation into the company's actions or by naming arbitrators on behalf of the company so that the matters can proceed."

In addition to his own grievance, as Union President Francis became a fixture in the Union grievance process generally. On December 17, 2001 he drafted a grievance concerning the use of non-union employees in the Press Room. On December 29, 2001 he wrote a follow-up letter attempting to move that grievance to step two of the grievance process. January 17, 2002 saw the filing of a grievance on behalf of Greg Perry, a cartoonist, who had been allegedly discharged. The grievance was prepared and delivered by Francis with a second letter drafted by Francis concerning the same grievance. During the month of January Francis placed a call to the sales staff in an effort to recruit in response to a rumour that there might be some interest in that department.

It was about this time that Francis approached Jonathon Franklin. Franklin and Francis enjoyed a positive relationship when Franklin served as Publisher of the *Times & Transcript* from 1996 to 2001. In fact Franklin authorized an STD benefit claim in 1996 arising from an earlier bout of depression which Francis had suffered that had been a matter of dispute between Francis and the previous Publisher. In January 2002 Francis telephoned Franklin to complain about being banned from the building by Mlodecki and asked

Franklin to intervene on his behalf to obtain a buyout for Francis. The issue was discussed in the one telephone call. The attempt by Francis was unsuccessful.

The Step Two Grievance Committee meeting regarding Perry was held on February 1, 2002 which Francis attended. On February 4, 2002 Francis drafted a request for expedited arbitration. In mid-February, 2002 Francis assisted counsel in the preparation of a complaint filed with the New Brunswick Labour and Employment Board. He attended the Perry arbitration hearing on March 15 and participated in the settlement discussions ultimately signing the settlement agreement on behalf of the Union.

On April 8, 2002 Francis prepared and forwarded a grievance to the Mail Room Supervisor regarding the staffing in the mail room. April 9, 2002 saw Francis attend the Press Room staffing arbitration where he instructed counsel. He wrote to Mlodecki on April 9, 2002 expanding the scope of the Press Room grievance and again attended the arbitration hearing on April 10, 2002 when the Press Room grievance was adjourned. April 22, 2002 and May 8, 2002 finds Francis writing to the Mail Room Supervisor concerning the grievance filed April 8, 2002. During May 2002 Francis was involved in the possible merger of the three typographical union locals in New Brunswick which did not, in fact, take place. On June 11 and July 31, 2002 Francis attended the Labour and Employment Board hearings in Fredericton and Saint John. He wrote regarding the Press Room seniority grievance to a potentially effected employee on August 14, 2002 and on August 15, 2002 he assisted counsel regarding the production of documents in this matter. He emailed the Union Nominee on the Mail Room Arbitration Board regarding the appointment of a Chair and followed up with a clarifying email on September 6, 2002. On September 30, 2002 Francis attended the Press Room staffing grievance taking notes and making audio tapes of a portion of the proceedings. He was present and instructed counsel for the Press Room seniority arbitration on December 2, 2002. On December 19, 2002 Francis, as the Union President, met with members of management to discuss possible changes to the Union benefit coverage and he later prepared a memo to the Union members of slightly more than three pages setting out the proposed changes in considerable detail.

iii) STD "Harassment, Intimidation, Discrimination"

The STD plan entitled Francis as an employee with 10 or more years of service of up to 51 weeks of full pay if disabled following which the employee may apply for Long Term Disability. The STD plan is administered by Canada Life Assurance Company but fully funded by J.D. Irving Limited. The agreement between Canada Life and JDI requires the insurance company to adjudicate all weekly benefits paid under the plan. JDI is obligated under the agreement to:

"(c) furnish the administrator with such other reasonable information as is required by the administrator in order to perform its duties and responsibilities hereunder, and

(d) determine a claimant's eligibility for benefits under the plan."

The employer, no doubt pursuant to this obligation, became interested in Francis' activities while he was in receipt of full salary replacement in the Fall of 2001. The Canada Life file indicates that Mary Martel, who is described as "Disability Manager, JDI Managed Care" - she did not testify - called Joan Davidson of Canada Life who apparently was responsible for the administration of Francis' STD claim - she did not testify - on December 6, 2001. The file note reads in part:

"Mary Martel advised that she has been told this claimant had taken part in a Xmas Daddy's Show last weekend as an announcer. Based on his present condition, the employer finds it difficult to understand how David Francis could manage to play this part in his present condition. Managed Care advised a taped copy of the show has been requested & this claimant's part reviewed.

Advised Managed Care that we could not recommend this claimant's salary continuance benefits be terminated until we had proof of David's part & the extent of his part in the Xmas Show.

She agreed & will advise."

This communication from Martel begins a course of conduct which the grievor says was a calculated and deliberate attempt by the employer to wrongly deprive him of his STD entitlement.

As noted, on December 8, 2001 Francis was acclaimed as the Union President and on December 10 or 11, 2001 offered to meet with Victor Mlodecki, the new Publisher, who Francis did not know. Francis was told by Mlodecki's secretary that there were no issues to discuss and therefore there was no need to meet.

On December 17 Edith Robb, the Assistant Managing Editor in the newsroom, - she did not testify - emailed Kathy Blomsma, apparently the employer's Payroll Clerk - she did not testify - detailing in five brief paragraphs "what [Francis] would have to do to prepare and distribute this Press Release" of December 14, 2001 and in the sixth paragraph of that email she provides her "professional" estimate that "this exercise took at least three hours of time." The final paragraph reads:

"Our point is that these skills and concentration needed to produce this document are precisely the level of skill and concentration needed to do Dave's job as a Newspaper Reporter. Yet this Reporter continues to draw sick pay."

Francis testified that the "exercise" took approximately 30 minutes in addition to a phone call.

On the same date Robb again emailed Blomsma about Francis' "securing the Union Presidency". The memo outlines what "normally would be involved in acquiring the position of Union Presidency" which then concludes "All of these are assumptions. But now, to move to certainties, we can say that Dave took on his new role with gusto." The memo then notes Francis' attempt to meet with Mlodecki, his presence in the Newsroom on December 13 to deliver a medical note and to have an employee sign a Union card, and the presentation of a grievance which Francis had prepared. The two final paragraphs of Robb's note of December 17, 2001 read:

"All of these activities outlined - the researching, the interviewing and the writing of reports are precisely the tasks Dave would be doing in his regular Reporting job, a position that he has advised the company he is too ill to conduct. The fact that he was seen in the Times & Transcript building at 939 Main Street for several hours and at different times of the day of Thursday, Dec. 13th, also makes us puzzled as to how this individual can claim to be too ill to work."

We are informed that on December 29th, when another member of Local 636 plans to challenge the legality of Dave's Presidency, he has served notice he plans to attend to defend it. It would be our contention that such a meeting would certainly be stressful,if not more so, than a routine day on the job, which this employee maintains he too ill to do."

With respect to the final paragraph Francis testified that the Union meeting whereat his Presidency would be challenged was January 26, 2002. He learned of the challenge January 24, 2002. The meeting was attended by a large number of Newsroom staff who did not normally attend Union meetings. A second vote was taken in light of the opinion expressed by the Newsroom component that the December 8 "election" was "illegal". The vote confirmed Francis as President by 24 votes to 20. There was no evidence that Francis had served notice that he intended to defend his Presidency at any time prior to the meeting of January 26, 2002.

Robb's email was apparently forwarded to Martel, who responded on December 18, 2001:

"Kath, I have reviewed this, looks good, can I have dates as to when the campaigning started, how visible was Dave..."

Blomsma forwarded the Martel inquiry to Robb who responded in part on December 18, 2001:

"Kathy ... we know for sure that active campaigning has been happening for at least three weeks."

Franics' testimony leading to his acclamation as Union President has been set out earlier - "There was no speech, no campaign and no vote."

By December 20, 2001 Davidson of Canada Life was in receipt of a tape of the Xmas Daddys telethon and had reviewed it. Canada Life concluded that:

"This incident did not support the claimant was actively partaking in activities substantiating he was capable of performing his job duties."

Francis was not contacted by either the employer or the insurer about his participation in the December 2, 2001 telethon. He gave evidence at this hearing that his involvement was limited to reading pledge cards on the air with another person for a total of 10 minutes. The transcript of the show indicates two time allotments of five minutes each to Francis and another pledge reader.

On December 24, 2001 Davidson wrote to Dr. Patricia Thomas, the grievor's family physician, indicating that the employer had invited Francis to return to work on a graduated basis and requesting a psychiatric narrative and answers to seven questions should the doctor not consider the return to work advisable. Davidson attempted to contact Thomas on January 7, 8, and 10 (forwarding the return-to-work plan omitted from the December 24, 2001 letter). Davidson advised Blomsma on January 10, 2002 that Francis' benefits had been continued to January 13, 2002. Further attempts to contact the doctor were made January 13 and 14 at which time she was advised that Francis had an appointment with the doctor that day. On January 18, 2002 Davidson was told that Thomas had dictated the letter to Canada Life which needed to be typed and would be faxed that afternoon. The second paragraph of the Canada Life file note for January 18, 2002 reads:

"Checked fax machine at 5:30 pm; requested medical information has not been faxed. Medical information on file does not support the recommending of Salary Continuance benefits beyond January 13, 2002."

And in fact Francis' benefits were terminated as of January 13, 2002 and have not been reinstated; hence this claim for the period January 14, 2002 through October 18, 2002.

The insurer's file next notes that Davidson spoke to the doctor's office on January 22, 2002 and was told that the letter had been reviewed, corrected and should be received the following day. It was. The doctor, at length, rejected the return-to-work program. She judged Francis' depression at this time as more severe than previously. Dr. Thomas went on to say:

"A patient who is sleep deprived, depressed, unable to concentrate and ill enough to drop 15-20 pounds is not well enough to return to work."

Finally she noted that Francis had been referred to a psychiatrist, Dr. Mahmud, and was awaiting an appointment.

It would appear from the Canada Life file that Martel had the file reviewed by Dr. Robert Bartlett - apparently a physician associated

with JDI Managed Care. He examined the material contained in Francis' file to date including Dr. Thomas' report dictated January 21, 2002. He seems to found his opinion on the employer's characterization of Francis' union activities - Francis was not contacted - and his January 28, 200[2] report concludes:

" . . . It would be quite unusual to see someone with a significant refractory depression taking on large new challenges - particularly if those new activities were demanding, rigorous, and frequently emotionally charged. Generally, these intense activities are the ones most avoided by a person who is having difficulty.

It is not to disagree that Mr. Francis had a significant depression in the Fall, but rather to observe that his present level of union activity would indicate that he likely is capable of resuming his usual job."

Dr. Bartlett's opinion was faxed by Martel to Davidson on January 29, 2002 with a note reading:

"Re David Francis
Please note attached information is not to be released to any other outside party." [underlining in original]

When Francis learned that his benefit cheque had not been deposited in his bank account on January 31, 2002 he called Davidson. The Canada Life file note reads in part:

"Explained to claimant the family physician did not reply to our specific questions and as a result the medical information did not substantiate why David could not return to the work place with modified hours. I told the claimant that we would be writing to his physician later today or tomorrow in reply to her letter and the claimant could contact Dr. Thomas."

On February 1, 2002 Davidson wrote Dr. Thomas noting that the information in Dr. Thomas' letter of January 21, 2002 "along with Mr. Francis' demonstrated activity level does not appear to be a basis for an ongoing disability". The letter then requested assistance in understanding the medical basis for Dr. Thomas' lack of support for a gradual return to work.

On February 11, 2002 following a phone call placed by Francis to inquire the reason for the termination of his sick leave benefits without notice to him, Francis wrote at length to Davidson describing his symptoms and the insurer's failure to verify the information about Francis' activities. Davidson wrote again to Dr. Thomas on February 15, 2002 after speaking with Francis and again requested "information relative to your patient's ability/inability to return to the workplace on a graduated basis and modified duties based on his psychiatric condition, supported by medical documentation." Dr. Thomas' definitive response is dated February 27, 2002 and faxed to Davidson on February 28, 2002. It reads:

I have seen Mr. Francis in my office and have read your correspondence and his. I tend to concur with his letter regarding his symptoms and his disability. I also am in agreement with his concern about discontinuation of benefits due to "information" regarding other work. You did not make any attempt to contact me or Mr. Francis prior to making this decision. This was inappropriate.

He now ha[s] an appointment with psychiatry. Getting timely access to specialists in New Brunswick is a huge problem. I find that often insurance companies are unwilling to continue benefits if the waiting period is long. This patient has not deteriorated significantly while awaiting an appointment, but has not significantly improved either. The pattern I see in these cases is that each letter from the insurance company asks for longer and longer explanations of what has already been addressed.

Essentially the patient is on a "hold Pattern" awaiting intervention. There should not be a penalty for this. The patient and myself are probably as frustrated if not more so than you are. A gradual return to work schedule implies that the patient is gradually improving. He is not therefor, I do not believe this is a valid concern.

Sincerely,
Patricia Thomas, M.D."

Davidson's file note on March 8, 2002 reads in part:

"Discussed the additional information received from Dr. Thomas, though appreciated, it does not contain the required medical information we have been requesting concerning the severity of this claimant's condition, the substantiating symptoms and any available medical documentation supporting David Francis's inability to perform his job duties & in addition, a graduated return (hours) to the workplace with modification to his usual work place duties."

The note goes on to point out that an independent medical examination has been arranged with psychiatrist Dr. Mark Rubens of Halifax on April 5, 2002 in advance of his appointment with his own psychiatrist on April 22, 2002 which Davidson has noted in her file. Dr. Rubens conducted the examination as scheduled and provided an undated 14-page report by fax to Davidson on May 26, 2002. Rubens summarized his conclusions in this way:

"To summarize, this patient appears to have a recurrent depressive illness, which has been intermittently present since his early adult years. From the patient's description, his inter-episode functioning is good, but there are indications of some degree of inter-personality instability, and of depressive reactions to extraneous stresses, perhaps particularly to relationship break-ups. Treatment of the current episode of depression thus far has been minimal, with sub-therapeutic doses of a relatively ineffective anti-depressant, and without any formal psychotherapy. Although, in contrast to some of the documentation I reviewed, I would not consider the patient's recent activities as he described them to me very markedly out of keeping with his diagnosis and his absence from work, I do think that the patient's perception of the severity of his condition and of limitations in his functioning is distorted, and

that active rehabilitative steps should now be possible, particularly if more effective anti-depressant and psychotherapeutic treatment can be applied. (Note, however, that the patient's description of his recent union involvements indicate somewhat less activity than that described in Dr. Bartlett's note, which I have summarized above.)"

Dr. Rubens recommended much more vigorous treatment including increased medication, the implementation of specific goal-directed rehabilitative steps and specific psychotherapeutic interventions. Given such treatment Rubens thought Francis could return to work on a graduated basis within the next 8-12 weeks.

On June 2, 2002 Davidson, having reviewed Dr. Rubens' report, recommended payment of salary continuance benefits to August 1, 2002 and advised Francis accordingly. On June 4, 2002 the following note appears in the Canada Life file:

"I spoke with Mary Martel this afternoon with respect to Mr. Francis' Salary Continuance claim. We had an IME performed by Dr. Rubens who supported disability. However, since that time, Mr. Francis is in the process of gather[ing] support to run for presidency of all three locals of his Union in the NB area. Managed Care has put a call into Dr. Rubens to ask him for comments on this. They also have a meeting planned with Dr. Schulnburg who is Head of the Medical Society in NB. Mary said that they will be asking his opinion on whether or not this info should be presented to Mr. Francis' treating psych. Mary said that Mr. Francis' employer will not release further salary continuance benefits to him. She asked that we hold off on sending our letter until we are advised of Dr. Ruben's comments. Agreed to do so. Please follow up with Mary on Friday if we haven't heard anything by then."

On the following day the Canada Life file note reflects an attempt to solicit Dr. Rubens' opinion with respect to the additional information of Francis supposedly seeking the Presidency of three Union Locals and discussing the retention of a surveillance company. When Francis spoke to Sherry Haines - apparently a Claim Administrator with Canada Life, on June 10, 2002 he was told payment of benefits was being withheld to allow investigation of information that he was running for Union President across New Brunswick. Francis testified there was an attempt to consolidate the three NB typographical Unions but his involvement was solely to serve as a contact person in the Moncton area. There was no evidence to the contrary.

On June 10, 2002 Hogan emailed Mlodecki with names of persons to be interviewed by the surveillance company regarding Francis' union activities. This email was forwarded to Martel by Mlodecki and in turn to Haines at Canada Life. Haines inquired if the potential interviewees worked at the Times & Transcript and if so, were the investigators allowed to visit the workplace to obtain statements. Mlodecki responded in the affirmative. The investigators reported June 21, 2002 after interviewing 18 members of the Newsroom staff who briefly described their contact with Francis at Union meetings. The report did state that Francis held a book launch for his book entitled "No: Women are from Mars and Men have a Penis: The Truth About Why Men and Women Find It Difficult To Understand Each Other". When Francis was advised of the contents of this report he advised Canada Life of two errors: (1) he was not the President of Local 636 a consolidation of the Moncton, Fredericton and Saint John Locals but simply the President of the Moncton Local; and (2) there was no book launch. Further investigation was commissioned and was unable to confirm the earlier statement that there had in fact been a book launch. The investigators did not testify.

In the meantime, Canada Life again had the file reviewed by a Dr. E.W. Busse to address the concern that Francis' Union activities were inconsistent with his reported "abilities". Dr. Busse is apparently a medical counsellor to Canada Life - he did not testify. He concludes on July 23, 2002:

"To answer your specific question, if the claimant is more active, which seems to be the case, then the activities are not consistent with the diagnosis of a disabling psychiatric disease. If that is the case, then the claimant should return to work. I suspect that returning to work will be an extremely difficult task given the animosity between the claimant, as I read it, and his superiors. So, in regards to what recommendations I would make for further case management, if the claimant's activity level is significantly greater than what he described in the IME then there is no disability because the activity and the diagnosis are not congruous. If, on the other hand, the activity is very minimal as per the claim of the claimant, then RTW planning should begin ASAP as per instructions by Dr. Rubens."

It is interesting to note that despite Canada Life's knowledge that Francis was scheduled to attend Dr. Mahmud in April of 2002, no requests seem to have been made for his report. In fact Dr. Mahmud's letter of September 3, 2002 indicates that Francis was seen seven times by Dr. Mahmud between June 5, 2002 and August 26, 2002. The diagnosis was major depression. Dr. Mahmud stated:

"While Mr. Francis' is suffering from depression, his mood, energy, concentration, motivation and drive are all negatively impacted and he is unable to perform the duties of his occupation."

JURISDICTION

This grievance was originated by two letters written by the grievor Francis on October 30, 2001. Those letters read:

"Oct. 30, 2001

To Whom it may concern:

This letter is intended as official notice that Moncton Typographical Union No. 636 is grieving the company's recent action against union member Dave Francis, such action specifically entailing the reduction of Dave Francis' wages effective Oct. 7, 2001.

As evidenced by the pay stub received by Dave Francis on Oct. 25, for the pay period ending Oct. 20, 2001, the company reduced his

wages from the hourly rate of $25.56 to an hourly rate of $24.34.
It is the union's position that, according to past practice, a union member whose position within the newsroom is changed does not revert back to a former hourly paid rate, and as such the action taken by the company is a grievable action.
In accordance with Section 3 of the existing contract between Moncton Typographical Union No. 636 and Moncton Publishing, a division of Sumit Publishing Limited, this letter will serve as notice of said grievance.
In accordance with Section 3 of the said contract, this letter is being submitted to Dave Francis' immediate supervisor, Murray Guy, within 10 days of his receipt of the pay stub which served as official notice of the company's action in reducing his wages.

Signed:

Dave Francis,
Member,
Moncton Typographical Union No. 636"

"Oct. 30, 2001

To Whom it may concern:

This letter is intended as official notice that Moncton Typographical Union 636 is grieving a series of recent actions against union member Dave Francis which the union views as harassment and discrimination.
The actions referred to include such steps as stripping Dave Francis of his columns, stripping his name from the Police Beat logo, stripping his byline from articles written by Dave Francis which would have carried bylines had they been written by other reporters in the newsroom, and reducing his wages.
It is the union's position that such actions, all without notification of reason from the company, constitute a planned course of harassment, intimidation, and discrimination against Dave Francis and as such are grievable actions.
In accordance with section 3 of the existing contract between Moncton Typographical Union Local 636 and Moncton Publishing, a division of Summit Publishing Limited, this letter will serve as notice of said grievance.
In accordance with Section 3 of said contract, this letter is being submitted to Dave Francis' immediate supervisor, Murray Guy, within 10 days of the most recent action taken against Dave Francis, specifically the reduction of his wages and as such the latest in the series of actions in what the union views as a planned course of harassment, intimidation, and discrimination.

Signed:

Dave Francis,
Member,
Moncton Typographical Union No 636

On February 19, 2002 the Union filed a complaint of unfair labour practice under the *Industrial Relations Act* alleging the employer's interference with the Union's ability to represent its members and more particularly insofar as Francis is concerned "i) ignoring the Union President when he attempted to represent bargaining unit members and/or process grievances; ii) barring the local President from the workplace of the bargaining unit; iii) arranging to have local President Francis removed from short term disability (S.T.D.) payment; and iv) the stalling of the grievance procedure, especially in the case of the grievance of Dave Francis." The complaint was deferred by the Labour and Employment Board to the arbitration process as a result the extent of this board's jurisdiction was determined by its Order of July 12, 2002 which reads in part:

IV. The question is the extent of the deferred jurisdiction of the arbitration panel. Clearly the allegations in the complaint at paragraphs 4, I, III, IV and V relate to Francis and are captured by the allegations contained in the grievance. The complaints in paragraphs (4, II, VI, VII, VIII, IX and X) relate to other grievances, one of which is settled and other grievances which have either been settled or are proceeding in the normal course. This arbitration panel will address those issues concerning the grievor Francis and all allegations of harassment, discrimination and intimidation relating to him up to the date of the hearing - as counsel for the employer conceded. If the grievance succeeds, the board will attempt to fashion a remedy appropriate to its determination following the representations of Counsel. Other matters contained in the complaint will be resolved in their particular context."

The employer does not argue that the Board lacks jurisdiction to address the grievance alleging harassment, discrimination and/or intimidation but rather denies the harassment, discrimination and/or intimidation and argues that the suffering of the grievor was a result of his own "poor judgment and lack of wisdom." The employer does argue that this arbitration board lacks jurisdiction to award damages.

The board's jurisdiction to determine the grievor's eligibility for STD benefits flows from the order of Ridout, J. of April 25, 2003. Again neither party argued that this board did not have the jurisdiction to adjudicate on the matter.

The fundamental dispute between the parties is captured in the following questions:

i) Did the employer's conduct from September 17, 2001 up to the commencement of this hearing constitute a harassment, discrimination or intimidation?
ii) If so, is the grievor entitled to damages and if so, in what amount?
iii) Is the grievor entitled to benefits under the S.T.D. plan available to Moncton *Times & Transcript* employees from January 14, 2002 to October 18, 2002?

The Position of the Parties

More particularly, the grievor alleges that the employer embarked upon a course of vicious, cruel and calculating conduct thereby "fraudulently preventing a man suffering from a psychiatric disability from obtaining benefits due him under the Collective Agreement or, alternatively, the employer's conduct constitutes the independent tort of intentional infliction of mental suffering." The grievor submits further that the medical evidence establishes disability within the benefit plan at least until October of 2002. By way of remedy, the grievor seeks 1) a declaration that the grievor was disabled between January 14, 2002 and October 19, 2002 and thereby entitled to short term disability benefits for that period; 2) a declaration of the employer's violation of the Industrial Relations Act; 3) punitive and/or aggravated damages with interest; and 4) other related damages.

The grievor relies upon the following authorities:

a) with respect to the adverse inference to be drawn from the fact that a number of potential witnesses for the employer did not testify:

Re Canadian Oil Sands Ltd., (1973), 3 LAC (2nd) 245

Re Canada Post Corp and CUPE (Seymour) (1992), 25 LAC (4th) 137

Re Walbar Canada 68 LAC (4th) 149

b) with respect to damages:

Wallace v. United Grain Growers [1997], 152 D.L.R. (4th) 1

Vorvis v. Insurance Corp. of British Columbia (1989), 58 DLR (4th) 193 (SCC)
Hill v. Church of Scientology of Toronto [1995] 2 S.C.R. 1130

Beaird v. Westinghouse Canada Inc. (1999) 43 O.R. (3rd) 581 (Ont. C.A.)

Re Ontario Hydro v. CUPE Local 1000 (1990) 16 LAC (4th) 264
Whiten v. Pilot Insurance Co. (1999) 42 OR (3d) 641

Re ABT Building Products (2000), 90 LAC (4th) 1

Re Clearbrook Grain and Milling Co. (2000), 93 L.A.C. (4th) 312

Re Tyee Village Hotel (1999), 81 L.A.C. (4th) 365

Re Board of School Trustee (1999), 88 L.A.C. (4th) 445

Weber v. Ontario Hydro, (1995), 125 D.L.R. (4th) 583

New Brunswick v. O'Leary, (1995) 125 D.L.R. (4th) 609, [1995] 2 S.C.R. 967 (S.C.C.)

Re Dunbord & Rainville Ins. And M.U.A. Local 7625, (1998), 7l L.A.C. (4th) 55
Re CVC Services and I.W.A. - Canada, Local 1-71 (Jackson), (1997), 65 L.A.C. (4th) 54
Francis v. Canada Life Assurance Co., [2003] N.B.J. No. 155, 2003 NBQB 165

Re Transit Windsor and A.T.U. Local 616 (orsi), (2003), 114 L.A.C. (4th) 385
F.T.U. Loc. 664 v. Brunswick News Inc., [2001] NBLEB 1R-111-98, 1R-OB-99

The employer argues that the evidence - when viewed in its totality - shows that Francis embarked on a "deliberate and conscious campaign" to obtain a buyout from his employer because of his financial situation and current dissatisfaction with his job as a reporter at the Moncton Times & Transcript. The employer submits that "first Mr. Francis persuades his family physician, Dr. Patricia Thomas, that he is suffering from a variety of symptoms of depression of sufficient severity to constitute a disabling medical condition, so that he could go off on "sick leave" while continuing to draw a full salary while on "short-term disability"; secondly, Francis obtains the office of Union President and seeks to use that office to harass the employer and to become a sufficient source of irritation to the Employer so as to persuade the Employer that it would be better off to give Mr. Francis the "buyout package" he wants, and be rid of him."

With respect to the eligibility for short-term disability benefits, the employer submits that the grievor's level of activities in his capacity as Union President demonstrates that the grievor was not, in fact, disabled.

The employer relies upon the following authorities: Hayles, Disability Insurance - Canadian Law and Business (Carswell 1998) chap. 21 and Re Seneca College and Ontario Public Service Employees Union (2001), 102 LAC (4th) 298 which the employer says supports its position that this board lacks jurisdiction to award "non disability benefit damages" to this grievor.

REASONS FOR DECISION

(A) Harassment, Intimidation, Discrimination

The grievances of October 30, 2001 alleging harassment, intimidation and discrimination through September and October 2001 and by agreement beyond October 30 and up to the date of the commencement of this hearing can be broken down into two fundamental components:

i) actions taken by the employer prior to October 30, 2001;
ii) the alleged misconduct of the employer relating to Francis' STD benefit entitlement.

i) The Employer's Conduct Prior To October 30, 2001

The grievor alleges that the cancellation of his two columns - The Moral Ombudsman and City Views, the removal of his name from the Police Beat logo, the stripping of his by-line from his articles and the reduction of his wages from Associate Editor to Reporter "constitute a planned course of harassment, intimidation and discrimination" against him. He argues that the "concatenation" of these events all occurring between September 19, 2001 and October 20, 2001 is too coincidental to reflect anything other than the employer's attempt to punish an uncooperative and difficult employee.

There is no doubt on the evidence from the grievor and the employer's witnesses - Hogan, Guy and Scott-Wallace, that the events which took place between September 17 and 19, 2001 gave rise to a bitterness between these individuals which continues to this day. Francis believes he was unfairly dealt with and Hogan, his Managing Editor, was, as Guy told Francis, "pissed" at him no doubt because of what Hogan perceived as an uncooperative attitude and contrary to the understanding Hogan thought the two men had reached. According to Francis, it was Hogan's displeasure with him that resulted in the loss of his columns, by-lines and wages. That may indeed have played a part in the employer's decision-making process but, on the other hand, Francis had openly declared his intention to leave the paper. While he did not spell out his departure date, he knew that he was being taken seriously - particularly following his attempt to obtain a "buyout" at the end of August, 2001 when the Court Reporter was released. It therefore seems reasonable that the management of the paper should begin making plans for Francis' eventual loss. For example, Francis was aware of and in fact supported the idea to train Scott-Wallace for the Associate Editor position in mid-August, 2001. She took the position again in mid-September. Francis was no longer discharging that responsibility other than providing practical and moral support. As Hogan testified that change brought about the corresponding change in Francis' wages as the Associate Editor premium was withdrawn - a reasonable business decision in the circumstances.

Francis however argues that this reduction of his wages was inconsistent with past practice where other Editors were reduced to reporter status without wage reduction. The employer's evidence on this issue from Hogan is straightforward. In the two instances of a reporter being promoted to Editor and then returned to reporter once again (eg. Allen and Foster), Hogan was bound by the Collective Agreement as the editorial position they occupied fell within Section 4. Section 5.02 allows the employer to return the employee to his former position "if they are not in the Employer's judgment qualified for the higher position". The employer was faced with treating the case as a disciplinary demotion. It chose to negotiate the return of the employees to reporter status allowing them to retain the editorial premium. Tingley, a reporter, was promoted to Sports Editor and subsequently relieved of that responsibility. He was returned to reporter status with the corresponding wage reduction. There is then no past practice bearing on this context; and perhaps more importantly, the position which Francis occupied as Associate Editor was not a position captured by the Collective Agreement. Accordingly, the employer's decision to reduce Francis' wage cannot be faulted and any benefit entitlement must be calculated based on the reporter wage rate, i.e. $24.34/hr.

The weekly columns regularly written by Francis were not written on Friday, September 21, 2001 nor the following Tuesday. The decision to stop the Moral Ombudsman column and to find another reporter to replace Francis for the Tuesday's City Views column was made prior to September 24, 2001. This decision was consistent with sound planning and initiated by Francis' expressed intention to leave the paper. The Police Logo by-line loss is again explained comprehensively by the employer. The column was branded for the subsequently released reporter with a photo and a by-line. When he left and Francis replaced him, Francis' by-line was used initially but subsequently removed as management was uncertain of Francis' permanent replacement. Currently the column bears no by-line. The employer's response is understandable and reasonable.

Francis claims that his by-line was not used to the same extent as other reporters subsequent to September 24, 2001 and only appears in connection with the Gunningsville Bridge stories. Guy denies any instruction to reduce the use of Francis' by-line. John Wishart, the Night News Editor, was responsible for the front page stories in the news section of the paper, the writing of headlines, and the use of by-lines. He explained the merit policy concerning the use of by-lines and he explained that policy to Francis in October when confronted with Francis' complaint. He denied being told to withhold Francis' by-line. Consequently the evidence does not indicate anything other than an application of the usual policy for by-lines during the September 24 - October 30, 2001 period.

In summary the steps taken by the employer between September 19 and October 30, 2001 are more likely the result of responsible

business planning by the employer in light of Francis' announced impending departure than any harassment, intimidation or discrimination as perceived by Francis. The atmosphere in the newsroom with respect to Francis during that period was unpleasant and the lack of mature communication on both sides was unfortunate, as was the timing of the decisions taken; however, it cannot be said that they constitute a course of conduct intended to harm the grievor.

ii) The Employer's Conduct After October 30, 2001

Francis went out on sick leave on October 19, 2001. He was not however totally unable to function. He delivered two letters to the employer on October 30, 2001 complaining of harassment, intimidation and discrimination. Between that date and November 6, 2001 he wrote three further letters to the employer concerning the grievances and met with the employer about them on November 7, 2001. This did not sit well with Murray Guy, his immediate supervisor, who emailed Tingley, the Shop Steward, on November 16, 2001 complaining about Francis. That email reads in part:

"Dave Francis was in again today. He left behind another document summarizing what he still apparently believes to be grievances....

Another issue here is Dave's insistence in continuing to personally deliver these weekly argument updates to various people in the newsroom who are then suppose [sic] to pass them on to me....

... Dave is suppose [sic] to be sick and on leave, yet appears bent on making these visits to the newsroom to drop documents in someone else's lap who are then required to pass them on to me....

... I am not sure where you and your union executive stand on all of this Dwayne, but to me, Dave's weekly visits to the News Room to drop letters on my co-workers desks to be passed on to me is starting to take on the appearance of some form of passive harassment. I am not really comfortable with that... "

This document may well have set the tone for the employer's subsequent behaviour.

On December 4, 2001 Francis spent the day at a television studio participating in a Charity Telethon by reading pledge cards for approximately ten minutes. The employer responded on December 6, 2001 with the first of a number of communications which Francis characterizes as misleading and calculated to wrongly deprive him of his STD benefit entitlement. On that date Martel called Davidson advising that "she had been told that this claimant had taken part in a Xmas Daddies Show last weekend as an Announcer. Based on his present condition, the employer finds it difficult to understand how David Francis could manage to play this part with his present condition." Martel expressly relies upon Francis' appearance on the Telethon to indicate that to the benefit plan administrator that Francis was not disabled. As Martel did not testify, there was no evidence as to the extent of her knowledge. Clearly the employer, as a source of funding for the STD benefit plan, has an interest in the appropriate administration and implementation of that plan. It is for that reason that the agreement with Canada Life obligates the employer to furnish information to the administrator in order that the plan may be administered but the information must be "reasonable", i.e. based on reason. To suggest that a 10-minute appearance in a Charity Telethon somehow indicates that the grievor is not disabled is not reasonable - as the administrator ultimately determined. If Martel did not know the extent of Francis' participation at the time, then it would be unreasonable and irresponsible for her to suggest to the administrator that the Telethon appearance was indicative of an absence of disability.

On December 14, 2001 Francis issued the Press Release complaining of the employer's handling of the grievances. The employer responded on December 17, 2001: Robb, the Assistant Managing Editor in the News Room, apparently in response to a request, detailed what she thought would be involved in the preparation of the Press Release. The information is copied to Hogan, sent to Blomsma and forwarded to Martel. The contents of the email indicate the need for research, analysis and distribution. Robb estimates that it would require at least three hours of time and that the skill and concentration required "are precisely the same level of skill and concentration needed to do Dave's job as a Newspaper Reporter." Again the expressed purpose of Robb's description of the effort involved is an attempt to convince the plan administrator that Francis is not disabled and therefore not entitled to benefits. Robb did not testify and the basis for her evaluation was not explained. Francis did testify. He said the press release required 30 minutes and a phone call. Robb made no attempt to contact Francis. The information she forwarded to the insurer was misleading at best.

On December 8, 2001 Francis reluctantly accepted the position of Union President as no one else volunteered for the job - apparently not an uncommon circumstance for this Union. His evidence on this point was unchallenged. The employer's response is found in Robb's memo of December 17, 2001 in answer to a request for more information. She sets out what she considers the normal process involved in seeking the Office of Union President and assumes that happened here: campaigning, agreeing to nomination, making a speech, soliciting support, and once elected making a speech "laying out the mandate of the president and detailing a plan of action." These assumptions are intended to indicate to the insurer the level of the grievor's activities while on sick leave and to suggest that the grievor is not disabled. The evidence of Francis expressly contradicts these assumptions. The administrator is again being furnished with false information. Moreover, the assumptions become "certainties" in Robb's follow-up memo of December 18, 2001 where she notes in the opening sentence:

"We know for sure the active campaigning has been happening for three weeks."

This information is false. Francis testified that he became the Union President temporarily because no one else indicated an interest -

the evidence was not contradicted and no explanation for the contents of Robb's email was offered.

In the final paragraph of the December 17, 2001 email to Blomsma, Robb says:

"We are further informed that on Dec. 29, when other members of Local 636 plan to challenge the legality of Dave's presidency, he has served notice he plans to attend to defend it. It would be our contention that such a meeting would certainly be as stressful, if not more so, than a routine day on the job, which this employee maintains he is too ill to do."

The only evidence on this issue is from Francis. The meeting took place January 26, 2002 and Francis learned of the "challenge" two days beforehand. He did not "serve notice" of anything by December 17, 2001 - the date of Robb's email, or at any other time. Robb's information forwarded to the insurer is wrong and yet it is provided by the employer in what can only be seen at this time as an attempt to have the grievor's STD benefits terminated. This effort appears to have been successful - while participation in the Telethon was rejected by the administrator as a reason to stop the benefits, the benefits were in fact stopped effective January 13, 2002. Apart from Dr. Thomas' statements indicating disability, the only other information Davidson had on file was the misinformation from Martel and Robb. The degree to which Davidson relied upon that "misinformation" is reflected in her letter of February 1, 2002 to Dr. Thomas where she says:

"Subsequently, we have received *information that demonstrates that Mr. Francis is participating, on a regular basis, in activities* that would be consistent with those required in the course of his employment." [Emphasis added]

This misinformation provided by Robb which, in the absence of Davidson's testimony, may be inferred to be the determining factor in the decision to terminate Francis' entitlement. It may be that Davidson became frustrated with Dr. Thomas' delay in responding to her letter of December 24, 2001 until January 23, 2002, but any doubt in Davidson's mind about Francis' disability and the feasibility of a graduated return to work plan ought to have alleviated when Dr. Thomas' letter was received. Certainly and importantly the misinformation created by Robb, forwarded by Martel and utilized by Davidson resurfaces again in Dr. Bartlett's report and Dr. Rubens' report when it becomes the basis for the suggestion of disentitlement: if the employer's description of his activities is accurate, then Francis is likely not disabled.

This approach to the treatment of Francis' claim and Francis himself is illustrated when he was ignored at the Union Management meeting with respect to the Perry grievance - a fact acknowledged by Guy in his evidence, and further reinforced when Francis was rebuffed by Mlodecki in his attempt to meet with him in his capacity as new Union President. It is further evidenced on January 16, 2002 when Mlodecki and Francis met by chance in the Times & Transcript building. Francis recalled the conversation this way:

"Mlodecki:
Are you Dave Francis?

Francis:
Yes. (Offering his hand)

Mlodecki:
(Did not shake hand) *You're off on some mental thing, right?*

Francis:
I'm off on medical leave, yes.

Mlodecki:
Then you do not need to be in this office.

Francis:
I'm the Union President and I need to deliver grievance letters from time to time.

Mlodecki:
You can mail them.

Francis:
Due to the timely nature of the grievance letters, that is not satisfactory.

Mlodecki:
You're not welcome in the building. If you need to come in, phone first for an appointment with me."

Mlodecki did not testify. Francis' evidence stands uncontradicted.

Despite the conflicting information available to Dr. Rubens concerning the extent of Francis' activities, but based on Francis' description Dr. Rubens recommends treatment changes, rehabilitation and a gradual return-to-work after 8 to 12 weeks. The insurer made the decision to reinstate Francis' benefits up to August 1, 2002 and Davidson advised Francis by telephone accordingly on June 2, 2002. On June 4, 2002 Martel advised Canada Life that Francis is "in the process of gathering support to run for Presidency of all three Locals of his Union in New Brunswick." As a result the employer "will not release further salary continuance benefits to him". The only evidence in support of this contention is the merger notice wherein Francis is listed as the contact person in Moncton for

anyone interested in seeking office as President or Treasurer. Francis denied any intent to seek this office. He had informed Canada Life to that affect. There is no evidence to the contrary. The communication of this misinformation resulted in the continued withholding of the benefits from Francis.

Despite Francis' denial of any attempt to seek provincial office with the Union, the employer on June 5, 2002 suggested an investigation by a surveillance company. The investigators carried out the investigation and identified Francis as "the President of the Communications Workers of America Local 636 Union (a consolidation of the three local unions which had represented the Times & Transcript, the Telegraph Journal and the Daily Gleaner)". This was a false finding as was the statement that Francis held an official book launch at the Moncton Press Club. The other activities noted in the investigators' reports were essentially those described by Francis in his evidence.

With respect to the harassment, intimidation and discrimination grievance subsequent to October 30, 2001, the grievor expressly accuses the employer of deliberately providing false information in a concerted effort to deprive the grievor of benefits to which he was entitled under the terms of the Collective Agreement. In support of that accusation, he points to Martel who initially suggested that participation in the Telethon reflected activities inconsistent with disability and then later, on June 6, 2002, two days following the administrator's decision to reinstate the STD benefits, advised that payments would be withheld as Francis was campaigning for the Union Presidency of a consolidated province-wide union; Robb provided information regarding the effort required to write the press release of December 14, 2002, the serving of the notice of intent to defend the presidency and three weeks of active campaigning; Davidson made the January 13, 2002 termination decision apparently based on the information provided by Martel and Robb; Blomsma was involved in the communication of this information and Mlodecki demonstrated animosity to Francis on at least two occasions. None of these witnesses testified at this hearing and no explanation was offered for their absence.

The consequence of failing to call witnesses who might reasonably be expected to have information bearing on the issue before the tribunal is addressed in Murray v. City of Saskatoon, [1952] 2 DLR 499 (Sask. C.A.) where Martin J.A. said:

"During the course of the argument considerable attention was devoted to the question of the effect which should be given to the action of a party in not calling a witness who could give evidence which it was in his power to give and by which the facts might be elucidated. Reference was made to the remarks of Lord Mansfield in Blatch v. Archer (1774), 1 Cowp. 63 at p. 65, 98 E.R. 969 where he is reported as follows: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

The absence of evidence from the motorman Maxfield "is not without significance" to use the words of Davis J. in the Supreme Court of Canada in Royal Trust v. T.T.C., [1935], 3 D.L.R. 420 at p. 422, S.C.R. 671 at p. 675, 44 C.R.C. 90 at p. 93. Vide also Winnipeg Elec. R. Co. v. Schwartz (1913), 16 D.L.R. 681 at p. 685, 17 C.R.C. 1 at p. 5, 49 S.C.R. 80 at p. 87.

In R. v. Burdett (1820), 4 B. & Ald. 95 at pp. 122-3, 106 E.R. 873, Best J. is reported as follows: "If the opposite party has it in his power to rebut it by evidence and yet offers none . . . then we have something like an admission that the presumption is just . . . The law does not impose impossibilities on parties; it expects, that a man who has the means of knowing who may be witnesses, shall call them."

In Taylor v. Willans (1831), 2 B. & Ad. 845, 109 E.R. 1357, an action for malicious prosecution, the prosecutor's failure to testify at the prosecution was held not inapt "under the very peculiar circumstances of this case [to] raise an inference that his motive was a consciousness, that he had no probable cause for instituting the prosecution". [p. 857]

In the Province of Alberta in Batt v. Batt (1916), 27 D.L.R. 718, an action for alimony where the plaintiff was present in Court and failed to testify to the acts of desertion, etc., it was held by Hyndman J. that this failure "militated strongly against her".

The subject is dealt with at length by the learned author in Wigmore on Evidence, 3rd ed., vol. II, pp. 162 et sequ. On p. 162 it is stated in part: – "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."

The party affected by the inference may, of course, explain it away by showing circumstances which prevent the production of the witness; but where the failure to produce the witness is not explained, the inference may be drawn that the unproduced evidence would be contrary to the party's case or at least would not support it. In the pages in Wigmore on Evidence following the above quotation many authorities are referred to which indicates that in the Courts of the United States the rule is of wide application."

This principle was applied in *Re Great Canadian Oil Sands (supra)* where the failure of the grievor to testify was seen as an acknowledgment of the employer's position. In *Re Canada Post Corporation (supra)* the failure of the employer to call a known identification witness where the identity of the accused was the issue allowed the board to draw the inference "that the calling of [the witness] would have exposed facts which were unfavourable to the corporation" (p. 442). In the 1997 *Re Walbar (supra)* decision the employer alleged acts of insubordination justifying the grievor's dismissal. Two witnesses were identified as being present at the relevant time and who, on the grievor's testimony, would support his version of the lack of insubordinate conduct. The grievor's failure to call those witnesses allowed the board "to conclude that their testimony would not have supported the grievor's version of events".

Here the employer *argues* that there was no unfair attempt to deprive Francis of his STD benefits, yet all of the witnesses accused of providing misleading information going to the issue of Francis' disability did not testify. In that circumstance the board is driven to

conclude that their evidence would not have supported the denial advanced in the argument by counsel on behalf of the employer. As a result the grievor's allegation of employer misconduct is the only direct evidence on the issue. It is certainly supported by the misinformation contained in the communications among Robb, Blomsma, Davidson and Martel. The immediacy of the employer's negative response to the administrative decision to reinstate Francis' benefits on June 2, 2002 can only be viewed as sinister at best. The employer knew that Francis was suffering from depression and the employer knew that his financial position was precarious yet it embarked upon a course of conduct that included creating and distributing false and misleading information as to his activities to the plan administrator who, with the exception of the Telethon, appeared to accept it at face value. Furthermore, this misinformation in effect poisoned the subsequent medical opinions obtained from Doctors Bartlett, Rubens and Busse upon which the insurer made decisions to terminate and not to reinstate Francis' benefits. Absent any kind of explanation of the employer's conduct in this regard, the board is compelled to conclude that the employer did indeed pursue a course of conduct deliberately intended to wrongly deprive Francis of his STD entitlement. That conduct constitutes harassment.

It also meets the criteria for the tort of intentional infliction of mental suffering.

Those criteria, derived from *Wilkinson v. Downton*, (1897) 2 QBD 57 and applied in an employer/employer context in *Re CVC Services and IWA - Canada (supra)* are:

i) flagrant and extreme conduct;

Here the deliberate or reckless fabrication of Francis' activities directed to the sole purpose of terminating his STD benefit entitlement certainly meets the test of flagrant and extreme conduct;

ii) it is reasonably foreseeable that the conduct would cause distress or suffering;

The employer knew that Francis was depressed (Mlodecki: "You're off on some mental thing, right?") and both Hogan and Guy were well acquainted with Francis' financial difficulties. It was then readily foreseeable by the employer that seeking to put an end to his sole source of revenue would indeed cause him harm;

iii) the conduct must have caused actual harm;

It seems simply a matter of common sense that the exacerbation of Francis' financial predicament with the termination of his benefit entitlement would increase his already depressed state. This is indeed confirmed in the medical evidence of Dr. Thomas in her report of September 12, 2002 to Human Resource Development Canada in which she writes:

"This gentleman has had two assessments from psychiatrists documenting his depression. Despite this his disability insurer Canada Life has refused to pay him. This has resulted in huge financial strains that have contributed to his stress."

Dr. Mahmud is in agreement as indicated in his chart notes of June 5, 2002 where he identifies "financial stress" and "stress at work" as two of the three triggers for Francis' depression. On September 2, 2002 Dr. Mahmud writes:

"Mr. David Francis continues to be plagued with financial worries and concerns, apparently he has had no income since October 2001."

Further on April 2, 2003 Dr. Mahmud makes this entry in the claim form submitted to Canada Life:

"This patient is embroiled in litigation with the employer, in Court and then the Labour Board, these need to be resolved before further progress is going to be made."

Even the report of Dr. Rubens echoes the difficulty as he indicates the need to smooth out any hostility at work before Francis can return. And ultimately Dr. Busse notes:

"I suspect that returning to work will be an extremely difficult task given the animosity between the claimant, as I read it, and his superiors."

Francis' "suffering" is not confined to his medically diagnosed depression but his financial status/credit rating has been severely damaged. He has been unable to support himself since January of 2002 other than by increased borrowing on his credit cards and lines of credit which he has ultimately been unable to repay. The grievance is therefore upheld.

iii) Jurisdiction to Award Damages

The grievance alleges harassment, intimidation and discrimination. The unfair labour practice complaint makes similar allegations. The Labour and Employment Board deferred consideration of the complaint to the ongoing arbitration process for fear of duplication. The parties agreed to this arbitration board's consideration of the harassment, intimidation and discrimination grievance filed October 30, 2001 with its expanded time frame up to the commencement of this hearing - see Board Order of July 19, 2002. The Board has found

that the employer's conduct relating to the STD benefit entitlement constituted harassment and the intentional infliction of mental suffering. However, the employer takes the position that the board is without jurisdiction to award aggravated and/or punitive damages by way of remedy and relies upon the majority Award written by arbitrator Picher in Re Seneca College and OPSEU (Olivo) (2001), 102 LAC (4^{th}) 298.

The tension surrounding the jurisdictional interface between arbitration boards and courts has been the subject of considerable litigation (viz. Weber, Vorsis, Wallace (supra)) and it would seem that the issues remain substantially unresolved (viz. Seneca College, Transit Windsor (supra)). In this case the facts reflect the difficulties: the grievor filed a grievance and commenced a civil action with respect to his STD entitlement inter alia. The court found that it was without jurisdiction to entertain the STD benefit claim as it arose out of the collective agreement and therefore fell within the exclusive jurisdiction of the arbitration board in response to a motion seeking that relief brought by the employer; yet the employer in this arbitration now argues that while the board has jurisdiction to address the substantive issue, it lacks the remedial damage jurisdiction. While it would seem that the employer is then seeking the best of both worlds and, from a practical perspective, ought not to be able to do so, the jurisprudence and in particular Seneca College gives some support to the argument.

The facts in this case parallel the facts in Weber where the issue was initially the grievor's entitlement to disability benefits under a plan incorporated into the collective agreement. The collective agreement provision extended the grievance procedure to "[a]ny allegation an employee has been subjected to unfair treatment or any dispute arising out of the content of this agreement . . .". And here, while the plan was administered by Canada Life, the administration agreement expressly provides for the employer "to determine a claimant's eligibility for benefits under the plan." The grievor's eligibility for benefits under the plan was the dispute between the parties and it was in this context that the employer's misconduct arose. Section 55(1) of the Industrial Relations Act provides:

"**55(1)** Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise, without stoppage of work, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable."

Section 3.01 of the Collective Agreement supplements the minimal requirements of Section 55(1) by providing:

"3.01 In case any difference should arise between the interested parties at any time during the currency of this Agreement as to the direct intent or meaning of any matter of thing covered by it and which cannot be settled between the Employer and the employee(s) concerned to the satisfaction of both parties, then the grievance procedure shall be as follows: . . ."

It is apparent that the misconduct was directly related to the "administration" of the benefit plan forming part of the collective agreement as found in Article 13.01. The "essential character" of the dispute arises therefore from the collective agreement and thereby clothes this board with jurisdiction - see *Weber* where McLachlin J. (as she then was) said in paragraph 67:

"I conclude that mandatory arbitration clauses such as Section 45(1) of the *Ontario Labour Relations Act* [which parallels the Section 55(1) of the New Brunswick legislation] generally confers exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement."

The subsequent issue is whether the board has jurisdiction to award aggravated and/or punitive damages. In Weber the alleged wrongdoings of the employer in bringing in a private investigator to scrutinize the activities of the grievor in an attempt to show that he was a malingerer were labelled as the torts of trespass, deceit, nuisance and invasion of privacy. The grievor also alleged Charter violations. At page 608 the court held:

"The arbitrator has exclusive jurisdiction to consider the dispute between the parties, provided that the dispute falls under the collective agreement under test enunciated above. That the facts may be capable of being characterized as a tort or a constitutional breach may be taken into account by the tribunal, which must apply the law as it stands. Having heard the claim, the tribunal awards such relief as it may properly due, having regard to the powers which the legislature has conferred on it."

The court went on to say that the arbitration board had jurisdiction to award Charter remedies which would include a declaration and a claim for damages. In *O'Leary (supra)* the Supreme Court of Canada held that the employer's action for damages caused by the employee's negligence was a dispute arising out of the collective agreement and therefore lay within the exclusive jurisdiction of the arbitration board and, as a result, it struck out the employer's civil action. It follows then that this board has jurisdiction over this dispute and the appropriate remedy.

The grievor claims aggravated and punitive damages: these claims are distinct. In Vorvis (supra) at page 201-2 McIntyre J. speaking for the majority said:

"Before dealing with the question of punitive damages, it will be well to make clear the distinction between punitive and aggravated damages, for in the argument before us and in some of the materials filed there appeared some confusion as to the distinction. Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will

frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory. The distinction is clearly set out in Waddams, The Law of Damages, 2nd ed. (1983), at p. 562, para. 979, in these words:

> An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose, not of compensating the plaintiff, but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. "Exemplary" was preferred by the House of Lords in Cassell & Co. Ltd. v. Broome, but "punitive" has been used in many Canadian courts including the Supreme *[page 202]* Court of Canada in H.L. Weiss Forwarding Ltd. v. Omnus. The expression "aggravated damages", though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour.
>
> The expressions vindictive, penal and retributory have dropped out of common use.

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to assessment of damages. Aggravated damages are compensatory in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment."

The evidence in support of a compensatory aggravated damage claim related to the exacerbation of the depression described in paragraph 61 and the financial consequences of the termination of the benefit entitlement on January 13, 2002. There can be little doubt that the withdrawal of the grievor's sole source of income would have had a substantial impact on his financial well being.

As a result an award of $5,000 for aggravated damages is appropriate in the circumstances.

Punitive damages are intended to deter the wrongdoer from repeating his misconduct.

In this case that misconduct began in December 2001 with Martel's Telethon complaint and continued through the retention of private investigators in June of 2002. In addition to Martel, Blomsma, Robb and Mlodecki were intimately involved in the campaign to wrongfully deprive Francis of his benefits together with the Claims Supervisor Davidson. The suggestion that the conduct of the employer was motivated by an anti-union animus or related in any way to Francis' activities on behalf of the Union is not substantiated by the evidence. The employer was focused on the fact that Francis was active, not the nature of that activity.

The difficulty in this case is not whether punitive damages ought to be awarded: clearly the employer acted inappropriately and irresponsibly in propagating misinformation about the grievor with respect to his STD entitlement. The real question is the quantum. The employer Brunswick News Inc. publishes a number of daily and weekly newspapers in this province. There was no evidence as to the net worth of Brunswick News, nor was there any submission made as to quantum. The authorities to which the board was referred reflect a broad range of punitive damage awards from a low of $400 in Re Tyee Village Hotel (supra) to a high $800,000 in Hill v. Church of Scientology of Toronto (supra) and see also Ribero v. CIBC (1992), 13 OR (3d) 278 (Ont CA), Whitten v. Pilot Insurance Company (supra) and Re Clearbrook (supra).

In this instance the action taken on the employer's behalf by Martel, Robb, Blomsa and Mlodecki directed against Francis was either deliberate or reckless. It began with the exaggeration of Francis' participation in the Telethon in December of 2001, continued with the misstatements concerning the grievor's degree of involvement in the preparation of the press release of December 14, 2001, the "campaign" for the Union Presidency and its defence, and the running for the so-called province wide Union Presidency in the Spring of 2002, the refusal to reinstate the benefit entitlement following the receipt of the independent medical examination in May of 2002 and the futile pursuit of further investigation in June of 2002 in the hope of generating evidence to continue the denial of benefits to which the grievor was entitled under the terms of the collective agreement. The employer was aware in the Fall of 2001 that Francis had to sell his house because of precarious financial position and yet it set out to put an end to his sole source of revenue through his STD benefits by supplying the plan administrator with false and misleading information. That false information found its way into the medical diagnoses of Doctors Bartlett, Rubens and Busse effectively skewing a fair assessment of the grievor's depression, a mental illness clearly and emphatically laid out by Dr. Thomas in October 2001 and subsequently by Dr. Mahmud from which the grievor has yet to recover. This conduct may readily be characterized as outrageous in the circumstances and deserving of condemnation by way of a punitive damage award which is assessed in the sum of $20,000.

(B) <u>STD Benefit Entitlement</u>

Section 13 of the Collective Agreement provides:

"**13.01** The Employer will pay 100% of Core Benefits of the Flexible Benefits Plan for full-time employees by way of contributing a fixed amount of $91.83 (family) or $38.16 (single) plus an amount equal to 2.29 per cent of gross earnings (regular time at the day rate and excluding lump sum payments) in the previous 12 months towards a Flexible Spending Account (FSA). Full details of the plan are set out in Appendix A of this agreement and in the Employee Handbook."

Section 8 of the Weekly Indemnity Plan reads:

"**8.01** If an Individual becomes Disabled while his coverage under this Plan is in force, the Employer will pay to the Individual for each day that the Disability continues one-seventh of the Weekly Indemnity Benefit applicable to the Individual under this Plan at commencement of the Disability."

And Section 1.03 provides the definition of "disabled":
"**1.03** Disabled" and "Disability" mean, with respect to an Individual, a state of incapacity arising from bodily injury, disease or pregnancy which prevents him from performing the duties of his occupation, provided that he does not engage in any work for remuneration or profit. However, the Individual will be deemed not to be disabled if he engages in any gainful occupation."

Francis obtained a note from Dr. Patricia Thomas on September 19, 2001 indicating that he is "off work indefinitely". In fact Francis continued to work until October 19, 2001. STD benefits were paid to him until January 13, 2002. The dispute in this context is whether Francis continued to be disabled and for how long. The resolution of this issue requires an analysis of the medical opinions provided and consideration of Francis' ongoing activities in his capacity as Union President.

As of January 13, 2002 Canada Life, the Plan Administrator, had two claim forms on its file to which the "Attending Physician Statement for Short-Term Disability Benefits" were attached. The November 1, 2001 statement provides a diagnosis of "recurrent major depression with melancholia" and indicates that Francis' condition prevents him from returning to work. The physician's statement dated December 12, 2001 repeats the diagnosis of recurrent depression and indicates that Francis is awaiting a psychiatric assessment. When the insurer's letter dated December 24, 2001 (but apparently faxed January 10, 2002) requesting further medical information from the family physician and subsequent follow-ups by phone and fax went unanswered, Davidson on behalf of Canada Life determined on January 18, 2002 to terminate the salary continuance benefits effective January 13, 2002. Dr. Thomas' subsequent letter dated January 21, 2002 makes it clear that Francis continues to suffer from depression:

"Depression is a clinical diagnosis, not a laboratory diagnosis. He has the disease."

Dr. Thomas expressly rejects the return-to-work program and notes twice in her report that Francis has been referred to a psychiatrist who had helped him in the past. Apart from Davidson's frustration with Dr. Thomas' delay in responding to her letter of December 24, 2001 when Dr. Thomas' letter was received on January 23, 2002, there was nothing in the Canada Life file to indicate that Francis' disability had resolved. Certainly, with Dr. Thomas' letter of January 21, 2002, any doubt in the mind of Canada Life must have been alleviated. On January 28, 200[2] Dr. Robert Bartlett provided the insurer with a report. He had not examined Francis. He relied on the medical information from Dr. Thomas to date, the information in the December 17, 2001 email from Robb to Blomsma noting Francis' new position as Union President and the activities associated therewith as related by Robb, and evidence of the filing of five grievances. He concludes that Francis is "likely capable of resuming his usual job" as the reported activities were, in his opinion, inconsistent with a "significant refractory depression." The difficulty, of course, (apart from the fact that Dr. Bartlett did not see Francis), lies in the inaccuracy of the information concerning Francis' activities *i.e.* the Telethon appearance lasted 10 minutes, the press release took 30 minutes, not 3 hours to prepare, there was no campaign to obtain or defend the union presidency. Dr. Thomas advised the insurer again on February 27, 2002 that while Francis' condition had not deteriorated, he had not improved and for that reason a return to work was not a valid option. An "Independent Medical Examination" (IME) was arranged by the insurer with Dr. Rubens, who examined Francis on April 5, 2002. Dr. Rubens' summary of his findings is set out at paragraph 30. The issue for the employer and Canada Life was whether Francis was engaging in activities which, in effect, would deny his claim to be disabled. The extent of those activities was the issue when Dr. Rubens examined Francis and reviewed his life style with him. Accepting Francis' description of his recent activities, Rubens concluded:

"I would not consider the patient's recent activities as he described them to me very markedly out of keeping with his diagnosis."

As a result the insurer recommended a continuance of the STD benefits through August 1, 2002.

Dr. Busse provides the next medical opinion on July 23, 2002. His report is equivocal:

"If Francis' activities are as described by the employer, then Francis is not disabled; if they are as described by Francis, then Dr. Rubens' opinion should be followed and return-to-work planning should begin."

Francis was seen on seven occasions by his own psychiatrist, Dr. Mahmud, between June 5 and August 26, 2002. There was no explanation put forward by the employer or administrator at this hearing for its failure to obtain a report from Dr. Mahmud, who would by virtue of the ongoing visits be in a better position to assess Francis' condition. In his report of September 3, 2002 he confirms that Francis continues to suffer from depression and that he is unable to work as a result.

The employer argues that the grievor's participation in Union business since he acquired the Union Presidency indicates that he was not disabled. To that affect, the employer catalogues 31 communications - largely brief letters or emails authored by Francis, and details ten meetings or hearings attended by Francis between November 2001 and the end of July 2002. Consequently the employer submits that the extent of this activity goes beyond anything communicated to the physicians involved and impliedly supports the views of Drs. Bartlett and Busse that Francis was indeed not disabled. These "activities", and particularly the documents written by Francis, advance a number of grievances at various steps in the grievance process. Francis addressed each in his evidence testifying that the effort involved was minimal in comparison to that required of a newspaper man investigating and reporting on a daily basis. With the exception of Francis' extensive analysis of the proposed changes to the benefit plan, the communications and participation in Union matters seem to me to be reactive and passive as opposed to the pro-active and creative energies required in his regular

occupation as a reporter. In this respect Dr. Rubens observed:

"If the patient's description of his participation is accurate (I cannot say whether or not it is), this has involved very little actual work on his part, and the amount of work and types of activities he describes would not be inconsistent with clinically significant depression, even of a moderate degree."

There is nothing then inconsistent between the nature and level of Francis' activity and the depression diagnosed. Consequently the extent to which those activities may or may not have been described to the physicians is of no meaningful significance.

The employer submits that Francis is a manipulating malingerer in that he portrayed himself as a recluse to both his treating physicians and particularly to Dr. Mahmud. By way of illustration the employer points to Mahmud's chart entry of July 29, 2002 indicating that Francis told the doctor that he "got out once, went to a barbecue". Without any evidence from the doctors, one should be slow to infer that the extent of their interviews with their patients is reflected in their entirety in the patient's chart or that the doctors are naive. In any event the totality of the grievor's activity is before the board and the nature of that activity contradicts the employer's submission.

The employer says that the grievor's depression in 2001 and 2002 is similar to earlier depressions and in particular to the depression he suffered in 1998. Yet on that occasion Francis continued to work without a day's absence and produced 122 stories on the tolling of the Trans Canada Highway. The employer notes that Dr. Thomas diagnosed Francis with major depression on October 20, 1998 and referred him at that time to Dr. Mahmud. The employer says then that the depressive episodes are of equal severity and that Francis is overstating the 2001, 2002 depression in pursuit of his attempt to obtain a buyout from the employer. The employer points to the doctor's explanation that "a rapid weight loss" in 2001 indicates a depression of greater severity than that experienced by the grievor in 1998. Yet the employer notes that Dr. Thomas' 1998 chart indicates "significant weight loss" at that time. What Dr. Thomas says in her January 21, 2002 letter in its entirety is:

"Regarding point 3 of your letter, I would judge Mr. Francis' depression at this time as more severe than previously. Primarily but not exclusively on the basis of rapid weight loss and his level of anxiety this time is higher."

In other words Dr. Thomas' judgment is based partially on the weight loss and the increased level of his anxiety. Without seeing the doctor testify, the board should be hesitant to reject her opinion as to the relative severity of the depressions particularly when taken with Dr. Mahmud's report of September 3, 2002 which reads in part:

"In my opinion Mr. David Francis suffers from a Major Depression, he has signs and symptoms of a Major Depression, he has suffered episodes of Depression in the past.

While Mr. Francis is suffering from Depression, his mood, energy, concentration, motivation and drive are all negatively impacted, and he is unable to perform is duties of his occupation."

Finally, the employer argues that even if the board finds Francis disabled, the benefits should cease on August 1, 2002 in accordance with the reduction provisions in the Plan (which is consistent with the limitation provisions in the Handbook) to the effect that no benefit/payment will be made for a medical condition unless the employee is receiving the appropriate medical treatment. The Reduction/Limitation provision continues:

"The appropriateness of such treatment must be agreed upon by the employer and the individual's treating physician. If there is a difference in opinion between the employer and the individual's treating physician, the employer reserves the right to seek and accept an independent medical opinion from a physician who is specialized in the treating of the medical condition(s)."

As the employer's suggestion of a return-to-work regime was rejected by Francis' treating physician, Dr. Thomas, the employer sought an independent medical opinion from Dr. Rubens. Dr. Rubens categorically disagreed with Dr. Thomas on the benefit of a gradual return to work for Francis. Dr. Rubens suggested a "prescribed" period of rehabilitation involving specific steps over 8 to 12 weeks following which Francis could return to work gradually. Dr. Rubens deliberately chose the word "prescribed" saying that the steps should be prescribed "in the same way that medications of any form of treatment might be, not merely 'suggested' as things which the patient might 'try' to do, if he feels like it." Rubens then goes on to identify the specific steps to be prescribed. The Canada Life corresponding note reads:

"Based on this information, we recommend the updating of the claimant's salary continuance benefits to August 1, 2002. It is expected at this time, David Francis will be able to return to the workplace on a graduated return-to-work plan."

That is, Canada Life was prepared to extend the benefits for 12 weeks following the communication of Dr. Rubens' report to allow for rehabilitation in advance of the implementation of the gradual return-to-work plan. The employer argues that Francis failed to comply with this suggested treatment and therefore his benefits should terminate as of August 1, 2002. The difficulty with this argument lies in the fact that the rehabilitative steps leading to a gradual return to work are to be *prescribed* by Francis' treating physician. Dr. Rubens had no further contact with Francis other than the one visit on April 5, 2002 resulting in his report which appears to be faxed to Canada Life on May 26, 2002. A Canada Life file note of March 8, 2002 reads in part:

"On receipt of Dr. Ruebens' report, we will copy the claimant's specialist."

This is reinforced in the Canada Life file note of June 2, 2002 which reads in part:

3.) “Please copy the results of the IME to his family physician, Dr. Thomas and his treating psychiatrist, Dr. Mahmud.”

4.) With the copy to Dr. Mahmud, please write a letter asking, after next week’s appointment with David would he please comment and would he be implementing any of these recommendations given by Dr. Rubens.”

However on June 4, 2002 Canada Life had received information from Martel that JDI Managed Health Care was seeking an opinion as to whether this “info” (it is unclear from the file note if “info” applies to Rubens’ report or the additional information that Francis was supposedly running for the Presidency of a consolidated union) should be disclosed to the treating psychiatrist. In any event Rubens’ report along with Francis’ complete Canada Life file was ultimately sent to Francis’ solicitor upon his demand dated June 27, 2002. The employer acknowledges in its argument that Francis’ physicians would have had the material no later than July 25, 2002. If one affords the doctor then an 8-12 week period in which to prescribe the specific rehabilitative steps suggested by Dr. Rubens in advance of a graduated return to work, the time period thus expands into October and beyond the one-year STD period. It therefore seems to me that any merit in the employer’s argument concerning a graduated return-to-work is lost by the employer’s delay in making the IME available to Francis’ treating physicians in order that they might consider “prescribing” Dr. Rubens’ rehabilitative steps. Consequently, the “invitations” to return to work in August and September of 2002 are not relevant.

The employer argues where medical opinion conflicts, which is arguably the case here, the trier of fact need not defer to that opinion but may assess the condition of the claimant based on observation and a common sense appreciation of the claimant’s capabilities. (See Hayles at pp. 331-333). It seems to me that the trier of fact should be hesitant indeed, except in the most obvious of cases, to reject a medical opinion untested by cross-examination particularly in instances of mental illness. Of course the trier of fact must scrutinize or test the competing written opinions in the traditional manner: opportunities to observe, qualifications, internal and external consistencies etc. and weight their evidentiary value accordingly. There was nothing in the board’s observations of Francis during the course of this lengthy hearing or in the relatively passive activities he undertook on behalf of the Union that was glaringly inconsistent with the depression diagnosed by his family doctor, his psychiatrist and the independent medical examiner.

In the result the board is left with the opinion of the treating physicians that Francis was disabled which was confirmed by Dr. Rubens. The only evidence to the contrary is provided by two physicians who did not examine Francis and who relied on questionable material. Consequently, the board is satisfied that Francis was disabled within the meaning of the Weekly Indemnity Plan through October 18, 2002 and entitled to be paid his benefits accordingly. Further the grievor is entitled to interest on those benefits from January 14, 2002 until October 18, 2002 in accordance with the formula articulated in Re Hallowell House Limited and SEIU Loc. 183, [1980] OLRB Rep. 35: ie, the total benefit owing shall be calculated, divided in half to which the Bank of Canada rate as of January 14, 2002 shall be applied.

CONCLUSION

In summary;

i) the grievance is allowed;
ii) the grievor is awarded aggravated damages in the sum of $5,000;
iii) the grievor is awarded punitive damages in the sum of $20,000;
iv) the grievor is entitled to STD benefits from January 14, 2002 until October 18, 2002 based upon the hourly rate of $24.34 together with interest thereon in accordance with paragraph 81.

The Board retains jurisdiction for implementation purposes.

DATED at Fredericton, NB this 19th day of December, 2003.

_____
G.L.Bladon, Chair

I agree/disagree

_____
Greg Murphy
Union Nominee

I agree/disagree

_____
Leo Morehouse
Employer Nominee