MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: a complaint alleging a breach of section 14 of *The Human Rights Code*

AND IN THE MATTER OF: *The Human Rights Code*, CCSM 2013, cH175, as amended

BETWEEN

Linda Horrocks

Complainant

AND

Northern Regional Health Authority

Respondent

Panel: Sherri Walsh, adjudicator

Appearances:

The Complainant in person

For the Commission: Ms. Isha Khan

For the Respondent: Mr. William S. Gardner

Hearing Dates: March 23-27, 2015; May 11-12, 2015

BACKGROUND

1 On October 25, 2012 Linda Horrocks (the "Complainant") filed a complaint with the Manitoba Human Rights Commission ("the Commission") against her employer the Northern Regional Health Authority (the "Respondent"), in which she alleged that, contrary to clause 14 of *The Human Rights Code*, CCSM 2013, cH175 [*Code*] the Respondent discriminated against her in her employment on the basis of disability - alcohol addiction, and failed to reasonably accommodate her special needs associated with that disability ("the Complaint"). The Complainant further alleged that the discrimination was not based upon *bona fide* and reasonable requirements or qualifications for her employment or occupation.

2 On August 28, 2014, I was designated as a Board of Adjudication to hear and decide the Complaint in accordance with clauses 32(1) and (2) of the *Code*.

3 The hearing of the adjudication took place over the course of five days from March 23 to March 27, 2015, in Flin Flon Manitoba where both the Complainant and Respondent are located. A further two days of hearings took place in Winnipeg on May 11 and 12, 2015 to complete the evidence and to hear the parties' submissions on final argument. During those two days the Complainant and any member of the public who wished to participate from Flin Flon, could do so by video link.

4 By the end of the second day the Commission, which has carriage of the Complaint pursuant to clause 34(a) of the *Code*, completed its submission. The Complainant herself also made a brief submission. The Respondent, however, was not able to complete its submission in the time remaining and so for the sake of expedience and to accommodate the Complainant's desire not to take any more time off work to attend hearings, it was determined that the parties would complete the rest of their arguments by way of written submission. The Respondent submitted a written argument on May 19, 2015 and the Commission submitted a Reply on May 22, 2015, both in accordance with agreed upon deadlines.

5 The Commission called four witnesses to testify at the hearing: the Complainant, Linda Horrocks; the Complainant's addiction counsellor, Lori Stevens; the Complainant's former partner; and a representative from the Complainant's current employer.

6 The Respondent called seven witnesses to testify: Shawna Cupples who at the relevant time was the Respondent's Regional Manager of Long-term Care and is now its Director of Continuing and Long Term Care Services; Amie Peeters a health care aide who worked alongside the Complainant; Carrie Dubreuil who at the relevant time was employed by the Respondent as a payroll officer; Nancy Ewing who at the relevant time was employed by the Respondent as Nurse Manager for Long Term Care and is now the Respondent's Home Care Manager; Dr. Jeffrey Waldman a forensic psychiatrist; Crystal Grégoire a Human Resource Consultant employed by the Respondent; and Wanda Reader who at the relevant time was the Executive Director of the Nor-Man Regional Health Authority (as the Respondent was previously known) and is currently the Respondent's Vice President, Chief Human Resources Officer.

7 This decision follows from my consideration of the evidence and the submissions on final argument, both oral and written.

8 For the reasons set out below, I find that the Respondent discriminated against the Complainant on the basis of her disability. I find that the Respondent failed to establish that it had accommodated the Complainant's special needs associated with her disability or that its discrimination of the Complainant was based upon *bona fide* and reasonable requirements or qualifications for her employment, in accordance with the provisions of the *Code*.

9 I have set out the evidence which was adduced at the hearing in some detail because a determination of whether an employer has discriminated against an employee, in the manner alleged in a complaint under the *Code*, involves a careful assessment of the particular facts surrounding the interaction between the parties.

THE EVIDENCE

10 The Complainant worked as a health care aide at the Northern Lights Manor (the "Manor") which is a personal care home run by the Respondent in Flin Flon, Manitoba.

11 She started work in January 2009 and was originally employed on a casual basis. In June 2010, she was offered part-time employment and by November 2010 she was awarded a 0.61 FTE full-time equivalent position. In addition to working 0.61 part-time hours, the Complainant generally worked enough extra shifts to obtain a paycheque which paid her the equivalent of full-time hours.

12 During her employment, the Complainant was a member of the Canadian Union of Public Employees, Local 8600 ("CUPE") and as such was governed by a collective agreement signed by the Respondent and the Union.

13 The Complainant was 50 years old when she started working at the Manor. Prior to that she had worked in various jobs doing housekeeping for hotels and private homes.

14 As a health care aide, the Complainant worked shifts, either Day (D8) or Evening (E6). A D8 meant that she would be there for 8 hours, starting at 7:45 am and ending at 4:00 pm. An E6 meant that she started at 4:15 pm and worked until 10:30 pm.

15 The health care aide position was described by the parties as being a demanding job and both parties acknowledged that the residents of the personal care home are typically vulnerable and are entrusted to the health care aides to be taken care of in a safe and conscientious manner.

16 Nancy Ewing was the manager at the Manor at the time in question. She divided her time between the Manor and a second personal care home which the Respondent operated in Flin Flon, but she maintained her primary office at the Manor.

17 She testified that the Manor usually houses around thirty-five residents, most of whom are over the age of 80 and have significant personal care needs because of cognitive decline and frail physical health. Ms. Ewing testified that safety is a particular concern in caring for the

residents, for example, when having to transfer them from bed to chair or chair to bathtub and because of safety concerns, she testified, health care aides need to be alert.

18 In caring for the residents, health care aides typically work with partners. Sometimes, however, an aide will deliver care by herself if the resident she is assisting is fairly self-sufficient.

19 During the time the Complainant was employed by the Respondent the staff at the Manor came together as a group to report, twice during a day shift: in the morning at the beginning of the shift and then again in the early afternoon. The staff who attended those meetings included the night nurse, one or two day nurses and all the health care aides. The Manor's manager was sometimes there as well.

20 The morning meeting allowed the night nurse to give the aides a report as to whether there were any problems with the residents. It also allowed the health care aides to bring up any concerns of their own. When they met again in the afternoon staff members could discuss their morning care and any concerns they might have, about residents.

21 The size of the Manor was such that staff were able to interact and see each other during the course of the day including during their breaks.

The Complainant's Attendance Issues

22 On January 6, 2011, the Respondent met with the Complainant and her Union representative to discuss concerns about the Complainant's absenteeism.

23 At this meeting the Respondent asked the Complainant if her absences were related to alcohol abuse. She said they were not and that in fact she was not drinking because, she told the Respondent, she had been charged with driving under the influence and was under a court Order not to consume alcohol from May 2010 to May 2011.

24 The Complainant met with the Respondent again to discuss her attendance on May 26, 2011. By that time her attendance had improved but it was noted that between January 6, 2011 and May 26, 2011 she had still had 9 absences. She told the Respondent there were a number of reasons for those absences including illness and the need to support family members.

25 The minutes of the May 26, 2011 meeting confirm that the Complainant again advised the Respondent that she was on a court ordered probation and was required to abstain from alcohol until the end of May 2011. They also note that the Complainant told the Respondent that as a result of the probation she was required to attend regularly scheduled meetings at the Addiction Foundation of Manitoba ("AFM").

The Complainant's Counselling with AFM continues

26 Starting in May 2011 the Complainant began receiving ongoing counselling from AFM by enrolling in a program called Reducing the Risk. Her addiction counsellor was Lori Stevens.

27 At the beginning of the program Ms. Stevens recommended that the Complainant sign an agreement to abstain from alcohol for a three month period in order to help the Complainant deal with her personal issues and to learn to make healthier choices.

28 The Complainant testified that she asked Ms. Stevens if she could defer signing the agreement for one week because she wanted to be able to have a drink at an upcoming fundraising event in which she and her friends participated every year.

29 Ms. Stevens testified that she had no problem with this request. She felt that the Complainant understood the significance of signing the abstinence agreement and was happy with the Complainant's frankness. Accordingly, they agreed on May 27, 2011 that the Complainant would come back the following week to sign the abstinence agreement which the Complainant did on June 6, 2011.

Incident of June 3, 2011

30 Three days earlier, on June 3, 2011, one of the Complainant's co-workers, Amie Peeters, reported that she suspected the Complainant was under the influence of alcohol while at work.

31 The Respondent's Regional Manager Shawna Cupples responded to the report and went to the Manor to meet with the Complainant. She determined that the Complainant was under the influence of alcohol and immediately sent the Complainant home and suspended her from her job without pay.

32 Two days later, on June 5, 2011 the Respondent sent the Complainant a letter which confirmed that because she appeared to be intoxicated at work, she was suspended effective June 3, 2011, pending further investigation and discussion.

33 On June 7, 2011 the Respondent held a meeting with the Complainant and her Union representative.

34 The Minutes of that meeting reflect that the Complainant admitted to the Respondent that she had an alcohol addiction. In her testimony at the hearing the Complainant said that she was not sure that she would have called it an "addiction" but she said she was certainly struggling with alcohol at the time.

35 During the June 7, 2011 meeting the parties discussed the various steps the Complainant was already taking to address her alcohol issues. The parties also discussed further inquiries that each would make to determine other treatment options related to the Complainant's use of alcohol, including residential rehabilitation treatment options ("rehab").

36 The day after the meeting, on June 8, 2011, the Respondent received a report from the Complainant's addiction counsellor, Lori Stevens. The report confirmed that the Complainant had booked and attended three appointments, and had another appointment scheduled for June 20, 2011.

37 On June 21, 2011 the Respondent asked the Complainant and her Union representative to attend another meeting at which it presented the Complainant with an agreement. The Respondent told the Complainant that if she signed the agreement she could return to work.

38 The agreement, which was dated June 27, 2011 provided as follows:

> WHEREAS Ms. Horrocks is employed by the Employer as a Health Care Aide and is a member of a bargaining unit represented by the Union and subject to a Collective Agreement "the Collective Agreement" between the Employer and the Union.
>
> AND WHEREAS Ms. Horrocks most recently was working in the position of Health Care Aide at Northern Lites [sic] Manor.
>
> AND WHEREAS on June 3, 2011 Ms. Horrocks reported to work under the influence of alcohol. The Employer met with Ms. Horrocks and advised her that she was placed on unpaid suspension effective immediately pending further investigation and review.
>
> AND WHEREAS Ms. Horrocks advised the Employer that effective May 16, 2011 she commenced a court ordered six (6) month High Risk Program. She indicated this program includes education on life skills, healthy living, and regular meetings with Addictions Foundation of Manitoba (AFM). As part of this program Ms. Horrocks indicated she signed a three (3) month agreement to abstain from alcohol.
>
> AND WHEREAS the Employer after consideration of the representations of Ms. Horrocks. has decided to permit Ms. Horrocks to return to work on the following terms and conditions.
>
> NOW THEREFORE the parties hereto agree each with the other as follows:
>
> 1. Ms. Horrocks will serve an unpaid suspension from June 3, 2011 to June 27, 2011 (11.5 shifts).
>
> 2. Ms. Horrocks shall at all times abstain from consumption of alcohol and refrain from possession or use of narcotics and prescription medications for which she does not have a valid prescription.
>
> 3. Ms. Horrocks shall participate in weekly counselling sessions through AFM. Ms. Horrocks shall provide the Employer with monthly reports from AFM confirming attendance at these counselling sessions, until such time that AFM provides the Employer with written confirmation that these counselling sessions are no longer required.
>
> 4. Ms. Horrocks shall participate in group AA meetings or meet with an AA sponsor a minimum of once per week. The format of the meeting whether it be group-based or one-on-one will determined by AFM Counsellor. Ms. Horrocks must provide the recommendation by AFM Counsellor in writing by June 30, 2011.
>
> 5. Ms. Horrocks shall participate in counselling sessions with a Mental Health Clinician and/or other counselling program to assist in managing personal stressors. Ms. Horrocks shall provide the Employer with monthly reports from her counsellor confirming attendance at these counselling sessions, until such time that her counsellor

provides the Employer with written confirmation that these counselling sessions are no longer required.

6. Ms. Horrocks shall participate in an Alcohol Rehabilitation Treatment Program. Ms. Horrocks shall provide the Employer with written confirmation of enrolment and an anticipated start date of admittance by July 31, 2011. Ms. Horrocks shall attend her physician's office prior to the commencement of said program to obtain a medical certificate and provide same to the Employer. Upon receipt of said medical certificate she will be placed on a medical leave of absence.

7. Ms. Horrocks shall submit random alcohol and/or drug testing at the discretion of the Employer at any time; this condition shall remain in effect for the duration of employment.

8. Ms. Horrocks shall maintain an acceptable attendance record and comply with the Attendance Support and Assistance Program (ASAP) of the Employer.

9. Ms. Horrocks shall participate in quarterly meetings with her manager, to discuss her progress. These meetings may be scheduled on a more frequent basis if required and at the request of Ms. Horrocks or her manager.

10. Should Ms. Horrocks breach any of the conditions as noted above, such breach, shall conclusively be deemed to constitute just cause for the termination of Ms. Horrocks's employment. The Union shall have the right to grieve any such discharge but only with respect to whether a breach or violation of this agreement has occurred.

11. Ms. Horrocks confirms that she understands the terms of this Agreement and she considers them to be satisfactory and complete and that the obligations of the Employer and the Union to her have been met and that she signs the Agreement freely and voluntarily.

12. This Agreement is without prejudice and without precedent and the parties agree not to refer to the terms hereof in any subsequent proceedings except proceedings to enforce the terms of the Agreement, or with respect to any action by the Employer regarding alleged breach of violation of this Agreement.

39 The Complainant testified that she had a number of concerns with this agreement.

40 Her main concern was with the far reaching extent of the abstinence clause which required her to abstain from alcohol both in and outside the workplace.

41 She testified she had no concerns about the requirement to participate in weekly counselling sessions through the AFM with which she was already involved.

42 Regarding the request to participate in group AA meetings or to meet with an AA sponsor, she said that she did not see the reasoning behind it, given that she was already in counselling at the AFM. She also testified she was very private and did not like group settings.

43 With respect to the clause requiring participation in counselling sessions with a mental health clinician she said again that she did not understand why she needed to see one more

person to do the exact thing that she was doing with her AFM counsellor - someone with whom she had already established a relationship of trust. She said she told the Respondent, however, that if they forced her to do that, she would.

44 With respect to the clause requiring participation in a rehab program, she said that although she did not want to go out of town for a 21 day treatment because she did not want to be away from her children, she and her counsellor did look into going up to the facility in Thompson and that a bed would be available if she chose to go there in October.

45 She testified she had no concerns with respect to submitting to random alcohol testing so long as it was done at the workplace. Nor did she have any concerns about maintaining an acceptable attendance record or participating in quarterly meetings with her manager to discuss her progress, as per clauses 7, 8 and 9 of the agreement.

46 She said her understanding as to the significance of paragraph 10 of the agreement was that once she signed it, if she breached any part of the agreement she would be terminated from her position and the Union would not be able to help her.

47 The Complainant and her Union representative met with the Respondent on July 14, 2011 to discuss the agreement. On the advice of the Union, the Complainant did not sign the agreement. She did give the Respondent a doctor's note which indicated she was to be off work seeking medical advice relating to ill health starting June 4, 2011 and a report from AFM which identified that the Complainant "… is currently working on the Reducing Risk Program together with community based counselling … tentative bed date is set for Oct. 2011 & will have more information mid-August".

48 The minutes of the July 14, 2011 meeting referenced CUPE's position as follows:

> … It is CUPE's position to not recommend Linda sign the agreement. If Linda signs it then she would be setting herself up to fail. This discriminates toward a person with a disability. Employees are not supposed to sign agreements outside the collective agreement. Linda has an illness and is not in the right frame of mind to sign anything. Agreement should be in place prior to coming back to work not before treatment.

49 Ms. Cupples testified that because the Complainant refused to sign the agreement she recommended to the Respondent's Executive Director, Ms. Reader, that they should proceed to terminate the Complainant's employment.

50 In her email to Ms. Reader where she provided this recommendation, Ms. Cupples stated:

> … we gave Linda plenty of opportunity to help herself and she doesn't want the help yet. If she was ready to commit to an alcohol free lifestyle she would jump at the chance to keep her job whatever the requirements, but she isn't and it is obvious by her actions. If someone was sober they wouldn't care if they were randomly tested for alcohol, they would want to go to AA …

51 Ms. Reader agreed with Ms. Cupples' recommendation and on July 20, 2011 the Respondent terminated the Complainant's employment, for cause. The letter of termination included the following statements:

> … Patient safety is of the upmost importance in health care. It is not possible to employ someone in your position without reasonable assurance that your alcohol addiction is under control and that you are serious regarding ongoing abstention. Consequently, the Employer, in an effort to accommodate your disability, proposed to continue your employment pursuant to terms and conditions contained in a rehabilitation agreement which would be signed by the Employer, yourself and the Union. This you and the Union refused to do.
>
> The duty of accommodation is not a one way street. Together with the obligation of the Employer, an employee has a duty to cooperate in the accommodation and a union must also cooperate in the accommodation.
>
> By reporting to work under the influence of alcohol you are considered to have committed a fundamental breach of the employment relationship such that you can no longer be trusted to perform your health care duties in a safe manner. Given your obvious failure thus far to bring your alcohol addiction under control and your refusal and that of the Union to enter into a rehabilitation agreement, there is no basis upon which the Employer can have any confidence that you can provide safe care in the future. Your relatively short duration of employment also is not in your favour.
>
> Accordingly, this is to inform you that your employment with NOR-MAN Regional Health Authority is hereby terminated effective immediately for cause…

52 On August 9, 2011, CUPE filed a grievance of the termination which the Respondent denied by letter dated August 11, 2011.

53 Pursuant to the grievance procedure, however, the parties continued to discuss the Complainant's employment and termination. On September 27, 2011, for example, the Respondent wrote to the Complainant's addiction counsellor asking for information about the Complainant's treatment and for Ms. Stevens' recommendation regarding same.

54 Ms. Stevens replied by letter dated October 6, 2011 confirming that the Complainant had been consistent in attending appointments, and had begun the "Reducing the Risk" program on June 6, 2011 which she was expected to complete in November 2011.

55 Ms. Stevens' letter went on to indicate as follows:

> … The goal of the Reducing the Risk is to provide a harm reduction program to Impaired Drivers to address their high-risk behaviour associated with alcohol/other drug use. It is imperative that clients indicate responsible attitudes and actions during their involvement in the High Risk Program. The Reducing the Risk program is a 6 month program and requires the client to sign an abstinence contract for the first 3 months at minimum. Ms. Horrocks has attended AFM the following dates: 16/05/11, 27/05/11, 20/06/11, 29/06/11, 14/07/11, 05/08/11, 15/08/11, 31/08/11, 22/09/11, 06/10/11.

> At Ms. Horrocks' request we have been scheduling community based appointments in addition to Reducing the Risk appointments with the intent of providing extra support. It is anticipated that Ms. Horrocks will complete the Reducing the Risk program in November and continue bi-monthly appointments for Community Based Counselling.
>
> If you have any questions or concerns, please feel free to contact me at …

56 The Respondent wrote back to Ms. Stevens asking for more information. In particular it asked for more information about the Community Based Counselling and whether the Reducing the Risk Program and Community Based Counselling were recommended treatment programs or whether Ms. Stevens, in her assessment, determined that Residential Rehabilitation or another treatment program was recommended.

57 Ms. Stevens responded by letter dated October 19, 2011 saying that Community Based Counselling was a service provided to individuals who needed or wanted to access support with alcohol issues, and that the Complainant had requested this additional support.

58 She went on to say:

> … To clarify, the Reducing the Risk program typically runs for a 6 month period and together Ms. Horrocks and I have decided to continue with community based counselling once the Reducing the Risk program is completed in November 2011. Currently there is no end date for the community based counselling as the appointments are ongoing until the client/counsellor deems treatment is complete.
>
> It is my recommendation that Ms. Horrocks continue with the community based program once completed the Reducing the Risk program, without detriment to her, as this is a recognized and viable treatment option. … [emphasis added]

59 At the hearing Ms. Stevens testified about the number of steps the Complainant had taken to address her issues with alcohol addiction.

60 She described AFM as having a client centered philosophy where treatment is tailored to meet individual clients' needs. She said that the AFM counsellors do not promote abstinence as the only method of treatment because while abstinence based treatment is valuable for some people, it is not for all clients because, she testified, everyone is an individual.

61 Her evidence was that one of the goals of the Reducing the Risk Program is for clients to become self-aware about their drinking habits and to plan how to use alcohol responsibly.

62 Ms. Stevens' notes for August and October 2011 documented that the Complainant appeared to be self-motivated, was putting a lot of effort into her program and had been able to remain abstinent. On December 2, 2011, Ms. Stevens wrote:

> … writer acknowledged the amount of time & effort [client] has put into the assignments & especially liked this statement made by [client] "not saying I'm to be perfect, but at least more responsible when it comes to having a drink, and more aware of the choices I will make." …

63 Ms. Stevens said that she chose to include this in her file because it told her that the Complainant really cared about the program and took it seriously. She testified that she remembered writing that quote down because that was not something that she did very often.

64 She testified that in the context of the Reducing the Risk Program if a person does not plan on being abstinent forever, it is best to reintroduce responsible drinking while still in contact with a counsellor so that the counsellor is there should issues arise and that this is precisely what the Complainant did.

65 Ms. Stevens said she had no concerns about whether the Complainant was committed to doing what it took to get back to work. She also remembered that one of the main things she discussed with the Complainant during their sessions was the financial stress the Complainant was experiencing, following her suspension and termination.

66 Ms. Reader testified that after receiving Ms. Stevens' letter of October 19, 2011, she discussed her treatment recommendations for the Complainant with Shawna Cupples and Crystal Grégoire and that together they did not believe that the Reducing the Risk Program was a treatment program for alcohol addiction but was rather more of a counselling session on harm reduction.

67 She said this conclusion was based on what they knew about the program and from knowing people that had gone through the program. She testified that she and Shawna Cupples had had family members that had gone through the Reducing the Risk Program and because of that they had a little bit of knowledge about it. She testified that they had no knowledge of the Community Based Program. She said they did not, however, consider writing back to Ms. Stevens to gather more information about either program.

68 The Complainant successfully completed the Reducing the Risk Program on December 2, 2011 and then continued to attend AFM for the Community Based Counselling sessions. Ms. Stevens reported the Complainant's progress to the Respondent in a letter dated January 11, 2012. The Complainant remained unemployed and pursuant to the grievance procedure, an arbitrator was appointed by the parties on January 3, 2012. The matter did not proceed to arbitration, however, because the parties reached an agreement.

Memorandum of Agreement signed April 5, 2012

69 On April 5, 2012, the Complainant, the Respondent and the Complainant's Union signed a Memorandum of Agreement.

70 Many of the terms of that agreement were identical to the agreement which had been presented to the Complainant on June 21, 2011.

71 There were some changes, however. The first paragraph extended the period during which the Complainant would serve an unpaid suspension from June 27, 2011 to November 27, 2011. Thereafter she was to be placed on an unpaid medical leave of absence. The Complainant testified there was no explanation as to why the period of unpaid suspension was extended.

72 The abstinence clause remained the same. The clause requiring attendance at rehab had been removed as had the requirement to attend AA meetings. The requirement to participate in mental health counselling remained unchanged as did the provisions requiring random alcohol or drug testing and attending quarterly meetings with the manager.

73 Clause 10 of the agreement was changed. The original agreement said that if the Complainant breached any condition such breach would conclusively be deemed to constitute just cause. The Memorandum of Agreement signed April 5, 2012 was worded slightly differently:

> 10. Should Ms. Horrocks, at any time within two (2) years of the date of her return to work pursuant to this Agreement, breach any of the conditions as noted in paragraph 3, 4, 5, 6, 7, 8, and 9 above, such breach shall be considered by the Employer to constitute just cause for the termination of Ms. Horrocks' employment, subject to the right of the Union and Ms. Horrocks to challenge any decision of the Employer through the grievance and arbitration procedure set forth in the Collective Agreement. After the two (2) year period mentioned above, the consequences of a breach may involve a decision by the Employer other than termination, subject to the grievance and arbitration procedure.

74 The agreement concluded by stating:

> 11. Ms. Horrocks confirms that she understands the terms of this Agreement and she considers them to be satisfactory and complete and that all obligations of the Employer and the Union to her (including the Duty to Accommodate) have been met and that she signs this Agreement freely and voluntarily.

75 In discussing the circumstances surrounding the signing of the Memorandum of Agreement, the Complainant testified that although the agreement still required permanent abstinence she agreed to its terms because her financial situation was getting desperate.

76 With respect to the requirement to attend counselling sessions with a mental health clinician, she testified that although she was prepared to do that, she had told the Respondent that she was having difficulty finding such a counsellor because the Employer's Assistance Program to which the Respondent had referred her, had told her it could not help her because she was not an active employee.

77 The Complainant testified that notwithstanding her Union representative's advice not to sign the Memorandum of Agreement, both she and the Union signed the document on April 5, 2012, and then waited for the Respondent to reintegrate her into the workplace.

78 On April 30, 2012, the Respondent called the Complainant and her Union representative to a meeting where the Respondent told the Complainant it had received two reports that she had been drinking since signing the agreement. One report was from someone who said they observed her smelling of alcohol in a grocery store and another report was from Ms. Ewing who said that she believed the Complainant was intoxicated when Ms. Ewing phoned her at her home on April 18, 2012.

79 The Complainant testified that the Respondent did not give her the name of the person who had reported seeing her drunk at the store nor the date on which that was alleged to have occurred, until after the April 30 meeting.

80 At the meeting, the Complainant denied that the two reports that she had been drinking were true. She maintained that denial even when the Respondent gave her an opportunity to be alone with her Union representative to reconsider her answer.

81 The Respondent fired the Complainant the next day. It sent her a letter dated May 1, 2012 which read in part as follows:

> … Your response with respect to whether you had participated in counselling sessions with the Mental Health Clinician or other counselling program as provided in paragraph 5 of the Agreement was that you have not been able to access EAP as you are not currently an active employee.
>
> As you know, your employment was terminated by letter dated July 20, 2011 in consequence of you being found to be under the influence of alcohol while on duty. Eventually your employment was reinstated after you, your Union and the Employer signed the Memorandum of Agreement dated April 5, 2012 which outlined the conditions upon which you would be allowed to return to work.
>
> Since the signing of the Memorandum of Agreement, the Employer has received two reports which are cause for concern. The first is that on or about April 8, 2012, you were observed at a local grocery store discussing your return to work in some detail. The individual giving the report stated that you smelled quite strongly of alcohol. When this information was given to you at the meeting of April 30, you responded that you can have private discussions, you were asked a question and you answered. You adamantly denied that you had been drinking and stated that you have not had a drink since signing the Memorandum of Agreement.
>
> The second report came from your Manager, Nancy Ewing, regarding a telephone conversation she had with you on or about April 18, 2012. Your Manager related that, throughout the telephone conversation, you sounded as if you had been drinking. She noted that your speech was slurred at times, that you were laughing inappropriately and telling stories of different things that had happened in your life, repeating yourself on several of the stories. Ms. Ewing reported that she directly confronted you during the conversation regarding whether you had been drinking which you repeatedly denied. These denials were maintained by you during the meeting of April 30.
>
> It is noted that you were given several opportunities to reconsider the position that you were taking at the meeting and that you were given time alone with your Union representative; however you continued to maintain that you had not been drinking.
>
> Your denials are not believed and the Employer has concluded that you are in breach of a number of your commitments under the Memorandum of Agreement, most importantly, your commitment to abstain from consumption of alcohol.

> Based on the conclusion that you have relapsed and faced with your sustained denial of same, the Employer is left with no reasonable alternative except to terminate your employment. Consequently, you were informed on April 30, and this letter will confirm, that your employment with NOR-MAN Regional Health Authority has been terminated effective April 30, 2012 for cause.
>
> We regret that this action has been necessary and we would like to express our best wishes for your eventual recovery.

82 The Complainant testified that she did not know how to prove that she had not been drinking on the two reported occasions, other than to give her word. She gave the Respondent a letter from her doctor that said she was seen in the office on May 31, 2012 and was found to be in good mental and physical health as a means of somehow proving, she said, that she was clean and healthy.

83 Ms. Reader testified that she had not gone into the April 30, 2012 meeting believing that the Complainant's termination was inevitable but in the absence of the Complainant acknowledging she had experienced a relapse it was felt that there was no alternative but to fire her.

84 Ms. Reader said that both she and Ms. Cupples believed the Complainant was resistant to treatment options that were recommended to her and that she had breached a number of the conditions of the Memorandum of Agreement. They concluded that the Complainant was not being truthful with them, the trust in the relationship was broken and there was no potential to rehabilitate the Complainant from her addiction. Therefore, Ms. Reader said, they felt they had to terminate the employment relationship.

85 Ms. Stevens' evidence was that by April 2012 she felt the Complainant had strategies and mechanisms in place to enable her to drink responsibly. Her notes specifically indicated that the Complainant did not appear to be struggling with "use or triggers", that she was feeling well and was glad to be getting back to work. However, both Ms. Reader and Ms. Cupples testified they did not consider talking to Ms. Stevens or to the Complaint's physician prior to terminating the Complainant's employment on May 1, 2012.

86 In response to questioning by counsel for the Commission, Ms. Reader testified that the Respondent never thought there were viable alternatives to termination such as, for example, as suggested by Commission counsel, offering the Complainant back her job and then working out the details as to treatment.

87 The Complainant testified she understood that her Union could no longer help her and she therefore filed the Complaint with the Human Rights Commission which led to these proceedings.

ISSUES

1. Whether an adjudicator designated under the *Code* has jurisdiction to hear this matter.

2. Assuming the answer to # 1 is affirmative, whether the Complainant has established a *prima facie* case of discrimination on the basis of disability by proving that she:

   a. had a disability within the meaning of the *Code*;

   b. had special needs associated with that disability that required accommodation by the Respondent; and

   c. was adversely treated by the Respondent in connection with that disability.

3. If the answer to #2 is affirmative, whether the Respondent has established that its actions were justified because:

   a. it made reasonable efforts to accommodate the Complainant to the point of undue hardship; and/or

   b. the conditions it imposed were *bona fide* occupational requirements.

4. If the answer to #3 is negative, what remedy should be ordered.

THE PARTIES' POSITIONS

The Respondent's Position

88 The Respondent's threshold argument was that a human rights adjudication is not the appropriate forum for the consideration of this matter which should, it submitted, be dealt with by an arbitrator appointed under the collective bargaining process.

89 It argued that based on the combined effect of the Supreme Court of Canada's decision in *Weber v Ontario Hydro*, [1995] 2 SCR 929, 24 OR (3d) 358 [*Weber*] which held that arbitrators appointed under collective agreements have exclusive jurisdiction to deal with matters arising out of those agreements, and the Court's decision in *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, 2 SCR 157, 67 OR (3d) 256 [*Parry Sound*], which held that human rights legislation is incorporated by reference into all collective agreements, the arbitration process is where this dispute must be resolved.

90 In the alternative, the Respondent argued that it is well accepted that an employee may choose the grievance and arbitration process as a means of addressing an alleged breach of their human rights and that given the choice made by the Complainant and her Union to file a Grievance in response to her July 20, 2011 termination, refer that Grievance to arbitration and then take the proceedings to a conclusion in the form of the Memorandum of Agreement which was negotiated and signed by the parties on April 5, 2012, the Complainant had elected to use the grievance process and should now be prevented from proceeding under the *Code*.

91 In making that argument the Respondent pointed to paragraph 10 of the Memorandum of Agreement which allowed for "… the right of the Union and the Complainant to challenge any decision of the Employer through the grievance and arbitration procedure set forth in the Collective Agreement".

92 The Respondent's further alternative argument was that if I determined that I have the jurisdiction to examine the Memorandum of Agreement, I should uphold its validity and uphold the Respondent's decision to fire the Complainant on May 1, 2012.

93 In that regard, the Respondent specifically argued that the Memorandum of Agreement should be upheld because:

a. it was negotiated between the parties;

b. the Complainant had benefit of Union representation throughout; and

c. the Complainant received consideration, namely she got her job back, in return for the commitment that she made.

94 The Respondent argued that it is in the interest of Manitobans to encourage the process of collective bargaining as a means of ensuring harmonious relations. Upholding this agreement, it submitted, will further that process and will further the process of a fair and balanced approach to accommodation. The Respondent submitted, as well, that there is a benefit to upholding settlements that have been reached between parties.

95 The Respondent also argued that if I assumed jurisdiction I should find that the terms of the Memorandum of Agreement demonstrated that it had made reasonable efforts to accommodate the Complainant and/or represented *bona fide* occupational requirements. It pointed out that by way of accommodation, it had made changes to the agreement to take into account the individual needs and desires of the Complainant. For example, it had removed the requirements to attend group AA meetings and rehab. Finally, the Respondent submitted that in light of its obligations to maintain a safe environment for its clients and staff, requiring it to employ the Complainant if she did not comply with all the terms of the Memorandum of Agreement, including the abstinence condition, would expose it to undue hardship.

The Commission's Position

96 The Commission argued that this Complaint falls squarely within the jurisdiction of a Manitoba Human Rights Adjudication Panel and as such I do have jurisdiction to determine if the *Code* has been contravened in the manner alleged in the Complaint.

97 It submitted that the present dispute is not one which arises out of the application, violation or interpretation of the collective agreement but is one of discrimination under the *Code*.

98 It also argued that the authorities are clear that tribunals and courts can have concurrent jurisdiction to apply human rights legislation. The Commission submitted that while the Supreme Court in *Parry Sound* confirmed that labour arbitrators may apply human rights legislation, it did not go so far as to give labour arbitrators exclusive jurisdiction over human rights matters which arise in a unionized employment setting.

99 The Commission also submitted that by entering into a Memorandum of Agreement with or without the Union, the Complainant and Respondent cannot effectively contract out of the *Code*. And more importantly, the Commission submitted, by entering into that agreement the parties cannot avoid an assessment as to whether the employer has contravened the statutory prohibition against discrimination in employment.

100 Next, the Commission submitted that the Complainant has clearly set out a *prima facie* case of discrimination by establishing that she had:

a. a disability, namely, an alcohol addiction;

b. special needs associated with that disability, including the need to be accommodated while she sought treatment; and

c. been adversely treated by the Respondent by virtue of being terminated from her job; her disability being a factor in that termination.

101 It argued that once a *prima facie* case of discrimination was made out, pursuant to clause 52(1) of the *Code*, the onus shifted to the Respondent to prove that it had made reasonable efforts to accommodate the Complainant to the point of undue hardship or that the requirements it imposed on the Complainant were *bona fide* and reasonable occupational requirements. The Commission submitted that the Respondent had failed to discharge this onus.

102 The Commission argued that the underlying principle of the *Code* is that an individual's needs based on any characteristic but in this case disability, ought to be individually assessed by an employer in order for the employer to make reasonable efforts of accommodation.

103 Its position was that the Respondent did not adequately engage in a process to determine what kind of accommodation was best suited to the Complainant's needs and did not afford the Complainant accommodation, in fact.

104 Accordingly, the Commission sought a remedy which included reinstatement of the Complainant, financial loss compensation and an award of general damages for her. It also requested that the Respondent be ordered to put an accommodation policy in place.

105 With respect to the remedy of reinstatement, the Respondent submitted that its managers no longer have confidence in the Complainant's ability to function safely in the workplace and that its trust is gone due to what it viewed was the Complainant's dishonesty and desire to renege on the commitment she had made in the Memorandum of Agreement, in return for getting her job back. Further, without having the Complainant's commitment to abstinence the Respondent said it believed that the Complainant poses a safety risk such that taking her back would not be viable.

ANALYSIS

Issue 1: Whether an adjudicator designated under the *Code* has jurisdiction to hear this matter.

106 I find that this complaint does fall within the jurisdiction of an adjudicator designated under the *Code* and as such I have the jurisdiction to determine whether the *Code* has been contravened in the manner alleged in the Complaint.

107 The Respondent argued that because of the combined effect of the Supreme Court of Canada's decisions in *Weber* and *Parry Sound* an arbitrator has exclusive jurisdiction to determine issues between the parties including whether the Respondent discriminated against the Complainant.

108 I disagree.

109 As the Supreme Court in *Weber* articulated, the task of a decision-maker in determining the appropriate forum for proceedings which involve parties to a collective agreement, centers on whether the dispute or difference between the parties arises out of the collective agreement. The court stated:

> 57. In considering the dispute, the decision-maker must attempt to define its 'essential character,' … the fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement … The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration, or violation of the collective agreement.
>
> *Weber*, *supra* at para 57

110 In this case, having regard to the evidence as a whole, I find the essential character of this dispute arises from an alleged violation of the Complainant's human rights and not out of the "interpretation, application, administration or violation of the collective agreement".

111 As the Ontario Court of Appeal in considering a similar issue in *Ontario (Human Rights Commission) v Naraine* (2001), [2001] OJ 4937 at para 57, 209 DLR (4th) 465 [*Ford Motor Co.*] (available on CanLII), citing the Saskatchewan Court of Appeal in *Cadillac Fairview Corp v Saskatchewan (Human Rights Code Board of Inquiry)* (1999), 173 DLR (4th) 609, 1999 CanLII 12358 (SaskCA) stated:

> … In my opinion the ambit of the collective agreement does not affect the finding that the essential nature of the dispute is a human rights violation and not one which only involves a dispute by the parties concerning the application, violation or interpretation of the collective agreement. This is particularly evident when one takes into account the public interest component of the complaint as well and the wide powers granted under the Code to redress a violation of the rights guaranteed under the Code, and further to award

> damages or otherwise resolve the question of compensation for the violation of the guaranteed right.
>
> as cited in *Price v Fredericton (City) Police* [2003] NBHRBID 2 at para 17, 2003 Carswell NB 684 [*Price*]

112 The fact that the dispute arises within the context of an employment relationship which is governed by a collective agreement does not alter my finding. Although the Supreme Court recognized in *Parry Sound* that arbitrators may resolve legal issues incidental to their function of interpreting and applying the collective agreement including issues relating to human rights legislation, the court did not give arbitrators exclusive jurisdiction in that regard.

113 Further, because of the fundamental nature of human rights legislation parties are not free to contract out of its provisions. (*Price, supra* at para 20.)

114 I agree with the Commission's submission that by entering into a Memorandum of Agreement with or without the Union, the Complainant and Respondent cannot effectively contract out of the *Code*. Nor can the Respondent avoid an assessment as to whether it contravened the statutory prohibition against discrimination in employment. (*New Flyer Industries Ltd. v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-CANADA) Local 3003* [2010] MGAD 43 at para 55, 203 LAC (4th) 129 [*New Flyer*] and *Toronto Transit Commission v Amalgamated Transit Union, Local 113* [1998] OLAA 733 at para 43, 75 LAC (4th) 180 [*Toronto Transit*].)

115 The Commission also pointed me to a recent decision of The British Columbia Collective Agreement Arbitration: *Seaspan ULC v International Longshore and Warehouse Union, Local 400* [2014] BCCAAA 108 at para 68, 247 LAC (4th) 1 [*Seaspan*] where the tribunal, relying on both court decisions and arbitral awards, held that parties are not free to contract out of human rights legislation even through the vehicle of what are described as "Last Chance Agreements". In that case the arbitrator held that notwithstanding the automatic termination provisions contained in Last Chance Agreements, there is always a statutory obligation to examine the employer's duty to accommodate to the point of undue hardship.

116 The Commission submitted that I must still, therefore, determine whether the terms contained in the Memorandum of Agreement were discriminatory and more broadly whether the Respondent's actions as a whole, including the approach it took in order to assess the question of accommodation, demonstrated that the Respondent had made reasonable efforts to accommodate the Complainant's disability within the meaning of the *Code*.

117 I agree. I find that I have the jurisdiction to determine whether the Complainant experienced discrimination in the manner alleged in the Complaint and that in doing so I must examine not only the terms of the Memorandum of Agreement but also the totality of the interactions between the parties.

118 Further, I do not find, as the Respondent submitted, that by signing the Memorandum of Agreement the Complainant was precluded from filing a complaint under the *Code*. On this last point, the Respondent argued that because the Complainant used the arbitration process to grieve her first termination of July 20, 2011 and then settled that process by signing the Memorandum

of Agreement on April 5, 2012, she had made an election as to which forum would govern the resolution of her dispute with the Respondent.

119 I do not agree. The Respondent did not point me to any authority in support of this position but even if I were to accept this argument, I find that the Complainant's second termination on May 1, 2012 provided her with a fresh opportunity to elect the forum for resolving her dispute with her employer in which case she chose to pursue protection of her rights under the *Code*.

120 Finally, a few words about the timing of the resolution of this issue. The Respondent originally indicated it would ask to have the jurisdiction issue determined by way of a preliminary motion. Ultimately it decided not to proceed in that fashion and instead indicated it would make its arguments about jurisdiction at the end of the hearing, as part of its final submission. The Commission made no objection to that manner of proceeding.

121 Prior to the commencement of these proceedings I had asked the parties to consider the effect of leaving this issue to be resolved at the end of a long hearing, particularly in the event that I determined I did not have jurisdiction to determine the matter, in fact.

122 In its final argument, therefore, the Commission submitted that if I determined I did not have jurisdiction to hear this matter after all, I should make an award of costs, payable to the Complainant.

123 The Respondent's position was that the standard way of dealing with jurisdictional issues during arbitrations is to have all matters determined at once.

124 In my view, because an adjudication under the *Code* involves not only the interests of private parties but also the interests of the public, wherever possible an issue such as that of jurisdiction should be determined on a preliminary basis, before putting the parties through the time and expense, both emotional and financial, of proceeding through a hearing which, depending on the determination of the issue, ultimately should not have taken place.

Issue 2: Assuming the answer to # 1 is affirmative, whether the Complainant has established a *prima facie* case of discrimination on the basis of disability by proving that she:

a. had a disability within the meaning of the *Code*;

b. had special needs associated with that disability that required accommodation by the Respondent; and

c. was adversely treated by the Respondent in connection with that disability.

125 Discrimination in employment is prohibited under clause 14(1) of the Code, which reads as follows:

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

126 The phrase "any aspect of an employment or occupation", as it appears in subsection 14(1), is defined in subsection 14(2):

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

127 "Discrimination" is defined in clause 9(1) of the *Code*, to include:

> …
>
> (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
>
> …
>
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

128 One of the applicable characteristics for the purposes of clause 9(1), as identified in clause 9(2) of the *Code*, is "physical or mental disability or related characteristics or circumstances".

129 The onus of proof in a proceeding under the *Code* is set out in clause 52, which reads:

> 52 In any proceeding under this *Code*, the onus of proving that a provision of this *Code* has been contravened lies on the person alleging the contravention, but the onus of proving
>
> (a) the existence of a bona fide and reasonable cause for discrimination; or that a requirement or qualification for an employment or occupation is bona fide and reasonable; or
>
> (b) that reasonable accommodation has been made or is not possible in the circumstances; or

> (c) the applicability of any other exception to the prohibitions enacted by this *Code*;
>
> lies on the person alleging that matter.

130 The Complainant has the onus, therefore, of establishing a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, would be complete and sufficient to justify a decision in favour of the Complainant, absent an answer from the Respondent. (*Ontario (Human Rights Commission) v Simpsons-Sears Ltd.* [1985] 2 SCR 536 at para 28, 52 OR (2d) 799) (available on CanLII) [*Simpsons-Sears*].)

131 In this case, as adjudicator Harrison stated in *KK v GS, (cob Hair Passion)* [2013] MHRBAD 102 at para 147, 2013 CanLII 3982 [*Hair Passion*]:

> To establish a prima facie case of discrimination, the Complainant must prove, on a balance of probabilities, that she had a disability at the relevant time, that her employment was adversely affected in some way, and that her disability was one of the factors which motivated the decision or action that adversely affected her employment. Her disability need not be the sole or even the primary reason that her employment was adversely affected; it is sufficient if her disability was one of the factors that influenced the decision or action.

132 An addiction to alcohol constitutes an illness and falls within the meaning of disability under the *Code*. (*CR v Canadian Mental Health Assn* [2013] MHRBAD 101 at para 128 [*CR*]; *New Flyer, supra* at para 55.)

133 Clear and cogent medical evidence is generally required in order to establish that a person has an illness or disability. (*CR v Canadian Mental Health Assn*, *supra* at para 129.) However, the concept of disability under the *Code* must be interpreted in a broad and flexible manner. (*CR v Canadian Mental Health Assn, supra* para 133 citing *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal* 2000 SCC 27 at para 79, 1 SCR 665, 225 DLR (4th) 143, (available in CanLII) [*Québec (Commission des droits de la personne et des droits de la jeunesse) v Montreal*].)

134 The Commission did not adduce evidence from a medical professional to establish that the Complainant had an addiction and the evidence about the exact extent and nature of her addiction was somewhat limited. However, in the Complaint she filed with the Commission on October 25, 2012, the Complainant stated she had a disability – "alcohol addiction". Certainly the evidence of the Complainant herself, and of Ms. Stevens, demonstrated that the Complainant had struggled with overuse of alcohol such that it interfered with her functioning and activities of daily life.

135 Under human rights law it is well-recognized that in determining whether discrimination on the basis of disability has occurred, the focus is on obstacles to full participation in society, rather than on the specific condition of the individual. Discrimination based on disability may be based as much on perceptions and stereotypes as on the existence of actual functional limitations. As Justice L'Heureux-Dubé identified, a disability:

> … may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors…

> Courts will, therefore, have to consider not only an individual's biomedical condition, but also the circumstances in which a distinction is made. In examining the context in which the impugned act occurred, courts must determine, *inter alia*, whether an actual or perceived ailment causes the individual to experience "the loss or limitation of opportunities to take part in the life of the community on an equal level with others…
>
> *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal, supra* at para 79 & 80

136 The Respondent did not dispute that the Complainant had a disability relating to alcohol addiction. Ms. Reader testified that there was never a doubt in her mind that the Complainant had an addiction to alcohol after the parties met on June 7, 2011 and I find that the interaction between the parties from that time on demonstrates the Respondent perceived the Complainant to have an addiction to alcohol.

137 I find, therefore, on the evidence, that the Complainant had a disability, either real or perceived, relating to alcohol addiction, within the meaning of the *Code*.

138 As to whether the Complainant had special needs associated with that disability that required accommodation in the workplace, I find that the Complainant did have such needs, including, for example, a need for time away from the workplace to receive treatment or to develop the means to make healthy lifestyle choices, and that the Respondent was made aware of these needs as early as June 7, 2011.

139 Finally, the evidence is undisputed that the Respondent suspended the Complainant without pay on June 3, 2011 because it believed she was under the influence of alcohol at work. Although by June 7, 2011 the Respondent understood the Complainant to have an alcohol related disability, it proceeded to fire her on July 20, 2011 and never effectively returned her to work. In so doing, the Respondent caused the Complainant to experience what Justice L'Heureux-Dubé described as a limitation of opportunity to "take part in the life of the community on an equal level with others", namely, to participate in meaningful employment.

140 There was no evidence of any other performance issues relating to the Complainant's conduct in the workplace. In my view it is clear from the evidence that the Complainant's addiction to alcohol was the reason for her termination.

141 I conclude, therefore, that the Complainant was treated adversely by the Respondent and that her disability was a factor in that adverse treatment.

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

143 The onus then shifts to the Respondent to prove the reasonableness of its actions, in its defence.

Issue 3: If the answer to #2 is affirmative, whether the Respondent has established that its actions were justified because:

a. it made reasonable efforts to accommodate the Complainant to the point of undue hardship; and/or

b. the conditions it imposed were *bona fide* occupational requirements.

144 In submitting that it had satisfied its duty to accommodate, the Respondent focused its arguments on the Memorandum of Agreement the parties signed on April 5, 2012 which, it submitted represented its reasonable efforts to accommodate the Complainant. To return the Complainant to employment without having that agreement in place it argued, would expose its clients and staff to a safety risk that would constitute undue hardship.

145 Although essentially saying the same thing, the Respondent also argued that the terms of the Memorandum of Agreement and in particular the abstinence clause contained in that agreement were *bona fide* occupational requirements.

146 In deciding whether the Respondent has discharged its onus to show that it made reasonable efforts to accommodate the Complainant or that the requirements it imposed as preconditions to reinstating her constituted *bona fide* occupational requirements, I have not confined my consideration to the terms of the Memorandum of Agreement. Instead, I have considered the Memorandum of Agreement in the context of the entire interaction between the parties, starting with the date the Respondent suspended the Complainant on June 3, 2011 and ending with the date it terminated the Complainant for a second time, on May 1, 2012.

147 Looking at the totality of that interaction, I find that the Respondent has not demonstrated that it accommodated the Complainant to the point of undue hardship or that the requirements it imposed as pre-conditions to rehiring the Complainant represented *bona fide* occupational requirements.

148 In conducting my analysis, I have followed the approach suggested by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)* [1999] 3 SCR 3, 66 BCLR (3d) 253 [*Meiorin*] where the court stated at para 66:

> Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the *procedure*, if any, which was adopted to assess the issue of accommodation and, second, the *substantive content* of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard…

Procedural Perspective Analysis

149 Analyzing the Respondent's efforts to accommodate from a procedural perspective, I find that the Respondent did not adequately engage in the necessary process to determine what kind of accommodation was best suited to the Complainant's needs.

150 From a procedural perspective, one of the most significant aspects of the duty to accommodate is the requirement to assess an employee's needs on an individual basis. How can an employer say it has made all reasonable efforts to accommodate the special needs of an employee without having based those efforts on an individualized assessment which identifies what her special needs are, in fact?

151 As the cases consistently identify:

> Accommodation must be individualized to the needs of each employee in the context of the surrounding facts, including the nature of the employee's disability and the nature of the workplace, such that each case must be decided on its own facts.
>
> See for example: *Ontario Nurses Association v Revera Long Term Care* (2014) OLAA 227 at para 27, 2014 CanLII 33919 (ONLA).

152 The Respondent terminated the Complainant on July 20, 2011 because she would not sign the agreement it presented to her on June 21, 2011. There was no evidence that the Respondent prepared that agreement by making any type of individualized assessment of the Complainant's needs, for example, by seeking advice from the Complainant's addictions counsellor.

153 Following that termination and after the Union filed a grievance, the Respondent did send a letter to Ms. Stevens asking for her recommendations regarding the Complainant's treatment plan. Although this effort was not made until after the Respondent had fired the Complainant on July 20, 2011, if the Respondent had acted upon Ms. Stevens' response appropriately that might have led to its reasonable accommodation of the Complainant.

154 It was clear from the evidence, however, that the Respondent was not satisfied with Ms. Stevens' recommendation and believed that the Complainant needed to do something different, in the search for accommodation.

155 It would have been open to the Respondent at that point to ask for an independent assessment and send the Complainant to another counsellor or physician for an opinion.

156 If the Respondent was not satisfied with the information it received from the Complainant's counsellor or believed it did not have sufficient information upon which to guide its efforts to accommodate the Complainant, the Respondent had an obligation to seek such information and advice from another qualified source.

157 It did not do that.

158 Instead, I find that the members of the Respondent's staff relied on their experiences in dealing with other staff who had required accommodation relating to addiction and on their own personal experiences.

159 For example, Ms. Reader testified that the requirement to seek mental health counselling was based on her personal experiences and on those of Ms. Cupples in dealing with other

individuals they had known who had issues with alcohol. Ms. Cupples confirmed she had no qualifications or education related to the area of addiction but said that she had personal experience with addiction.

160 Information of that sort is precisely the type of information that cannot be relied on as the basis for accommodating an employee. Each individual is entitled to an accommodation which is based on an individualized assessment of his or her specific needs.

161 I acknowledge that at the Complainant's request the Respondent removed some of the terms it had originally included in the first agreement it presented to the Complainant on June 21, 2011, such as, for example, the requirement to attend rehab and group AA meetings.

162 However, the Respondent continued to require conditions which the Complainant had previously resisted and which were not based on an individualized assessment of her needs, such as, for example, the condition requiring total abstinence for an unlimited period of time both in and outside the workplace and the requirement to seek mental health counselling.

163 The Commission's argument was that without having engaged in a process to obtain and consider information about an employee's individualized needs, an employer has no authority, whether stemming from a genuine desire to assist its employee or not, to engage in opining about the appropriate treatment of an employee's disability related needs.

164 By way of illustration, the Commission queried whether, if the Complainant's special needs had been based on an illness such as cancer, for example, rather than an addiction, the Respondent would have been giving evidence about what it believed was the best treatment plan for the Complainant, in the face of evidence from the Complainant's own qualified addiction counsellor? The Commission submitted that one of the reasons individuals with addictions remain stigmatized in society and suffer discrimination is because members of the public often have some experience with addictions themselves. This experience leads them to believe they can make assumptions about the needs of others whom they identify as having an addiction.

165 I agree. It is important to recognize that it constitutes discrimination for an employer to rely on personal experiences and common place assumptions or stereotypes rather than on objective assessments when determining an accommodation plan for an employee who has a disability. Unfortunately I find such discrimination occurred in this case.

166 The Commission also made it clear that in bringing forward this Complaint, it was not suggesting that abstinence should never form part of an individual's treatment plan or that total abstinence should never be a condition imposed on an employee before they can return to work. It submitted, however, that this proceeding is not the forum to determine the best treatment options for the Complainant. Further, it submitted that what was significant in this case was that an independent expert was not retained by the Respondent at the time it considered the terms on which it would allow the Complainant to return to the workplace.

167 I agree.

168 The Respondent called Dr. Waldman to testify at the hearing about the science of addiction and to establish that its accommodation efforts were reasonable, having particular regard to the abstinence clause in the Memorandum of Agreement.

169 Dr. Waldman prepared a report dated March 10, 2015, in response to a written request from the Respondent's counsel dated February 19, 2015.

170 In his report Dr. Waldman confirmed that he was not provided with an opportunity to meet with the Complainant and as such his opinion was based entirely on the documents that had been given to him by the Respondent's counsel, including the AFM file which contained Ms. Stevens' notes of her counselling sessions with the Complainant.

171 Although the Commission did not challenge Dr. Waldman's qualifications as a psychiatrist *per se*, it submitted that it was not convinced that Dr. Waldman was a specialist in the area of addictions.

172 It also questioned whether Dr. Waldman's opinion was necessary for these proceedings given that it was not disputing the science of addiction.

173 Ultimately I was not asked to qualify Dr. Waldman to give opinion evidence nor was I asked by the Commission to exclude Dr. Waldman's testimony. The Commission submitted, however, that I should give little weight to Dr. Waldman's opinion both because he had not been qualified as a specialist in the area of addictions and because many of his conclusions were based on facts which were in dispute.

174 In my view, Dr. Waldman's evidence does not cure what I have identified as the Respondent's failure to make reasonable efforts to accommodate the Complainant as analyzed from a procedural perspective.

175 Counsel for the Respondent stated that Dr. Waldman was retained well after the Complainant's employment was terminated. Dr. Waldman was never asked by the Respondent to interview or assess the Complainant at the time that she was seeking accommodation nor was he ever consulted by the Respondent at any time during its dealings with the Complainant prior to terminating her employment. Further, the AFM file material upon which Dr. Waldman based much of his opinion was not in the Respondent's possession until shortly before this hearing.

176 Indeed, Dr. Waldman commented in his report that "if further information is available or Ms. Horrocks is available for an assessment interview the opinions contained in this report regarding her specific case may change."

177 Accordingly, I put little or no weight on Dr. Waldman's evidence in making my determination in these proceedings. In so finding I stress that this is not in any way a comment on Dr. Waldman's professionalism or professional abilities.

178 My conclusion is based on the fact that an employer cannot justify the reasonableness of its actions by pointing to information it did not rely on at the time it carried out its efforts of accommodation. This was recently acknowledged by the Human Rights Tribunal of Alberta in

Horvath v Rocky View School Division No 41 (2015) AHRC 5, where the tribunal chair identified:

> In assessing whether the employer has met the duty, the employer's efforts must be assessed at the time of the alleged discrimination. An employer may not use after-acquired evidence to support its view that an employee could not be accommodated. After-acquired information is only relevant to remedy…
>
> at para 56, citing from *ADGA Group Consultants Inc v Lane* [2008] 91 OR (4th) 425 at para 108, 295 DLR (4th) 425.

179 The importance of an employer's duty to formulate an accommodation plan on the basis of an individualized assessment of its employee cannot be overstated. Such an individualized assessment goes to the heart of the fundamental principles which underlie the *Code*.

180 The preamble of the *Code* states that:

> … Manitobans recognize the individual worth and dignity of every member of the human family ...
>
> (a) implicit in the above principle is the right of all individuals to be treated in all matters solely on the basis of their personal merits, and to be accorded equality of opportunity with all other individuals; …

181 From a procedural perspective, therefore, I find the Respondent has not discharged its obligation to accommodate the Complainant within the meaning of the *Code*. Nor do I find that the Respondent has demonstrated that it made reasonable efforts to accommodate the Complainant looking at the substantive content of those efforts.

Substantive Perspective Analysis

182 According to Dr. Waldman's evidence, relapse is a recognized part of alcohol use disorder. Dr. Waldman also testified that the risk of relapse is not eliminated even if one commits to abstinence.

183 Despite this evidence I find that neither the terms of the Memorandum of Agreement nor any of the Respondent's interactions with the Complainant accommodated for the possibility of relapse. Accordingly, on this basis alone, from the perspective of the substantive content of the Respondent's efforts towards accommodation, I find the Respondent has not demonstrated that it made reasonable efforts to accommodate the Complainant's disability and associated special needs.

184 As well, once the Respondent learned of the Complainant's disability, instead of supporting her need to obtain treatment, it fired her and with the exception of a brief three week period in April 2012, left her unemployed. This had the effect of compounding the Complainant's disadvantage.

185 Termination is the ultimate disciplinary step an employer can impose on an employee.

186 In this case I find the fact that the majority of the parties' search for accommodation was carried out while the Complainant was terminated is another example of the Respondent's failure to make reasonable efforts towards accommodating the Complainant's disability and associated needs.

187 For example, the Respondent did not lead any evidence to suggest that accommodating the Complainant by placing her on a medical leave of absence in June 2011 instead of firing her, was not a viable alternative or would have resulted in undue hardship.

188 In my view, doing that would have allowed the Complainant to feel more secure in pursuing a course of treatment and would have put her in a better position to discuss the terms on which she could return to the workplace.

189 The Respondent did include offers to place the Complainant on medical leave for varying time periods in the two agreements it drafted, however, those offers were only made in the context of the Complainant agreeing to all the other terms and conditions contained in the two agreements.

190 They were not presented to the Complainant as options in the first instance as part of a plan that would have allowed her to seek treatment safe in the knowledge of having job security and the support of her employer. As such, those offers to be placed on medical leave retroactively do not go towards satisfying the Respondent's obligation to demonstrate that it made reasonable efforts to accommodate the Complainant.

Safety – Undue Hardship

191 The Respondent submitted that because of its statutory safety obligations it could not have made any other efforts towards accommodating the Complainant without experiencing undue hardship.

192 In support of this position, the Respondent relied on the Supreme Court of Canada's decision in *Ontario (Human Rights Commission) v Etobicoke (Borough)* [1982] 1 SCR 202, 132 DLR (3d) 14, CHRR 781, as cited by the Court in the following passage from *Central Alberta Dairy Pool* v *Alberta (Human Rights Commission)* [1990] 2 SCR 489 at para 62, 11 AR 241, 76 AltaLR (3d) 97:

> "I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar – financial cost, disruption of a collective agreement, problems of moral of other employees, interchangeability of workforce and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue for the ease with which the workforce and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

193 I recognize that safety is an important consideration for the Respondent in operating the Manor and I acknowledge that in that regard it has to satisfy statutory obligations under the *The Protection for Persons in Care Act*, CCSM cP144 and *The Workplace Safety and Health Act*, CCSM cWT10.

194 However, as the Supreme Court has stated:

> More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.
>
> *Renaud v Central Okanagan School District No 23*
> [1992] 2 SCR 970 at para 26, 71 BCLR (2d) 145.

195 The Commission submitted that the Respondent did not provide sufficient evidence to establish it would have been an undue hardship to put in place processes or procedures to accommodate the needs of the Complainant while also ensuring the safety of co-workers and patients.

196 I agree.

197 I find the Respondent provided no evidence that it took any proactive measures to minimize safety risks associated with returning the Complainant to the workplace. As Dr. Waldman's evidence indicated, a commitment to abstinence is not a guarantee of sobriety in the workplace. Returning an employee to the workplace on the basis of signing an abstinence clause, as the Respondent says it has done in the past, or as it said it would have done in this case, would still, therefore, not have relieved the Respondent from a duty to take positive measures to meet its statutory safety obligations.

198 A good discussion of the type of evidence which must be presented to demonstrate that a risk to safety constitutes undue hardship is found in *Re Shuswap Lake General Hospital and BCNU (Lockie),* (2002) CarswellBC 3994, [2002] BCCAAA 21, 67 CLAS 264 [*Shuswap*]. In that case, the employee was a registered nurse with a bi-polar disorder who experienced episodes of mania at the workplace which resulted in errors in patient medication. Following treatment the employer was unwilling to allow her to return to work and encouraged her to apply for disability insurance instead. The employer's concern was that patient safety could be jeopardized because further relapses of the nurse's disability were not predictable. The arbitrator found that the employer had not demonstrated that it was unable to accommodate her without undue hardship and stated:

> In terms of the type of evidence that must be presented where a risk to safety is in issue, it is clear that impressionistic evidence will not satisfy the stringent test and will not therefore support a finding of undue hardship. Mere assertions of danger or excessive cost will not suffice. The evidence must clearly identify the risks and demonstrate why

> those risks cannot be reduced to an acceptable level through accommodative measures. In terms of the impossibility of reducing risks to an acceptable level, an employer must present evidence that it has considered and rejected all viable forms of accommodation. …
>
> *Shuswap*, *supra* at para 114.

199 Similarly in this case, but for the expressed belief of the Respondent's managers Ms. Cupples, Ms. Ewing and Ms. Reader, that it would not have been possible to put measures in place to protect against any risk associated with returning the Complainant to the workplace, there was no concrete evidence presented to demonstrate that the Respondent considered other measures such as, for example, alerting the Complainant's co-workers or teammates, ensuring the nurse manager was on alert, or implementing a check-in or other means of monitoring the Complainant's return to the workplace.

200 Ms. Cupples did admit that they could put a practice in place whereby it would be made known to the staff that if anyone in the workplace is impaired by alcohol that should be reported immediately but she said that it would be very challenging to put that into practice. She did not elaborate as to why.

201 I find that the Respondent's evidence in this regard does not satisfy me that it had accommodated the Complainant to the point of undue hardship.

202 In *Shuswap,* the arbitrator found that there were reasonable accommodation measures that would make it possible to reduce risk to patients to acceptable levels. For example, he noted that the nature of the workplace provided implicit safeguards against any escalation of risk to patient's health and safety because the nurse's duties were performed in a professional, supervised, team-based context.

203 Similarly, in this case, although the Respondent testified that supervision and detection of impairment were not possible, I find the evidence to be otherwise. The entire team of staff including health care aides and nurses meet twice daily during day shifts, once in the morning and once in the afternoon. In many cases the employees are working in teams in caring for the patients. Employees take breaks together and have the opportunity to see each other through their shift. Accordingly, I find there are ample opportunities for observation and monitoring in the Complainant's workplace. Further, there was no evidence that it would have been an undue hardship to enhance such supervision.

204 In *Shuswap* the arbitrator also found that the griever's particular indicator of relapse had in the past been readily observed by her co-workers and reported to supervisory or management staff.

205 Similarly, in this case, I find that there was no shortage of individuals who were willing and able to report concerns about the Complainant, to management.

206 One word of caution regarding supervision and monitoring, however. In its final submission the Respondent argued that one of the reasons it required the abstinence clause was to create "multiple rings of defence" which would allow members of the community to identify

that the Complainant had been drinking, before she got to the workplace and posed a safety risk. This argument was not supported by any testimony so I will not address it other than to say that employers must be careful when designing accommodation measures, to avoid making unnecessary violations of their employee's privacy.

207 In *Meiorin, supra* at para 64 & 65, the Supreme Court directed employers, courts and tribunals to be "innovative yet practical" when considering whether there is a less discriminatory way to ensure the employer's legitimate business purposes are accomplished.

208 In this case, in addition to the opportunities for monitoring including random blood testing and personal supervision, there may have been other measures the Respondent could have implemented to fulfil its safety obligations while accommodating the Complainant's return to the workplace. The Respondent simply failed in its efforts to explore whether such measures existed and were viable.

Accommodation is a multi-party responsibility

209 The Respondent submitted that accommodation in the workplace is a multi-party responsibility and that the Complainant had not fulfilled her responsibilities in that regard. In making this argument, it relied on *Renaud, supra* at paras 50-51, where the court stated:

> The search for accommodation is a multi-party inquiry. Along with the employer and the union there is also a duty on the complainant to securing an appropriate accommodation. ... To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered.

210 I note the court immediately went on to say:

> This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal.

211 Applying these statements to the facts of this case, I find that there was no obligation on the Complainant to come up with the necessary solution within the workplace as to how she would be accommodated. It was up to the Respondent to consider various options and measures that could be put in place to allow the Complainant to return to the workplace without sacrificing or compromising its safety obligations. As set out in these reasons, I find the evidence does not demonstrate the Respondent made sufficient efforts in this regard.

212 I agree with the Respondent's submission that the Complainant had a role to play in the accommodation process and that she had a duty to take steps to facilitate a lasting recovery and

minimize risk in the workplace. I find on the evidence, that the Complainant complied with this duty.

213 While the evidence showed that the Complainant was resistant to some of the suggestions dictated to her by the Respondent there is no evidence that she was resistant to following the advice and recommendations of the counsellor with whom she had established a therapeutic relationship.

214 I find it was clear from Ms. Stevens' evidence that the Complainant was making significant efforts towards recovery and was not resistant to treatment.

215 Further, the Respondent's witnesses acknowledged that within weeks of learning of her disability, they were aware that the Complainant had taken steps towards treatment and was prepared to lessen the potential for relapse.

216 I do not agree with the Respondent's submission that the fact that the Complainant was reluctant to agree to the breadth of the abstinence clause indicated a failure on her part to participate or fulfill her role in the accommodation process.

217 I find it was not reasonable for the Respondent to equate the Complainant's reluctance or refusal to sign an agreement, the terms and conditions of which were not based on an individualized assessment of her needs, with a failure to commit to fulfilling her obligation to play a role in the accommodation process.

218 I find, therefore, having regard to the totality of the evidence, analyzing its accommodation efforts from the perspective of the substantive content of those efforts, that the Respondent has not demonstrated it accommodated the Complainant to the point of undue hardship.

The Respondent's Authorities - Last Chance Agreements and Abstinence Clauses

219 In support of its argument that I should uphold its termination of the Complainant, the Respondent submitted that arbitrators generally give respect to agreements such as the one signed by the parties in this case, unless there are compelling circumstances that make enforcement of the agreement unfair or unless there is a legal principle that renders the agreement illegal. In making this submission, the Respondent relied on Brown and Beatty *Canadian Labour Arbitration* 4th ed Canada Law Book at para 7:6122:

> At some point prior to the termination of a disabled employee, it is not uncommon for employers to try to salvage the situation by confronting the person with an ultimatum of an absolute and unconditional list of things they must do or else lose their jobs. 'Last-chance agreements, as they are widely known, are recognized as a legitimate and appropriate part of an employer's efforts to meet its duty to accommodate the needs of its disabled workers. As a general rule, arbitrators are inclined to respect and give effect to agreements of this kind unless there are compelling circumstances that make their enforcement unfair, or some law or legal principle renders them illegal and/or enforceable. Arbitrators reason that if they fail to enforce such agreements as they are written, employers will be unwilling to enter into them and an opportunity for the parties

> to reach compromises that will benefit everyone will have been lost. When a last-chance agreement has been negotiated in good faith, most arbitrators are inclined to the view that "a deal is a deal".

220 I note that the passage goes on to indicate that:

> Last-chance agreements with disabled employees are, however, much more problematic and will not be enforced if they are found to derogate from an employer's obligations under human rights legislation and in particular its duty to accommodate. For example, many arbitrators have ruled that last-chance agreements that purport to deny disabled employees the opportunity to challenge the reasonableness of the employer's decision to terminate them before an arbitrator … or were developed without the involvement of the union, are inconsistent with human rights and labour legislation and so are unlawful.

221 The Respondent argued that the Memorandum of Agreement was not a true "last chance agreement" because its terms did not automatically require the Complainant to be fired if she breached any of its conditions. Nonetheless Respondent's counsel provided a sixty-one page written submission which referred to a number of authorities where last chance agreements had been upheld including:

- *Re Kimberly-Clark Forest Products Inc and Paper, Allied-Industrial, Chemical & Energy Workers International Union, Local 7-0665* (2003**),** 115 LAC (4th) 344, 2003 CarswellOnt 3537, 2003 OLAA 49, 72 CLAS 254.
- *Kootenay Boundary Regional Hospital v BCNU* (2006) BCCA 57, 54 BCLR (4th) 113, 264 DLR (4th) 478.
- *Telus v Telecommunications Workers Union* (2007) CLAD 289, 91 CLAS 67.
- *Re Kingston General Hospital and Ontario Nurses' Association* (2010), 195 LAC (4th) 57.
- *Re IMP Aerostructures and USW, Local 4883 (B(W)),* (2013), 117 CLAS 68, [2013] CarswellNat 4734.
- *Thunder Bay (City) v ATU, Local 966,* (2011) CarswellOnt 11935, 212 LAC (4th) 414.

222 Other authorities referenced in the Respondent's written submission involved cases where the arbitrator upheld the imposition of abstinence conditions as a pre-requisite for reinstatement:

- *Fearman's Pork Inc v United Food & Commercial Workers International Union, Local 175,* [2011] OLAA 388 (available on Westlaw).
- *Uniroyal Goodrich Canada Inc v USWA, Local 677* (1999) 79 LAC (4th) 129, OLAA 278.
- *Re Canada Post Corp (Sulik)* (2010), 199 LAC (4th) 300.
- *Handfield v North Thompson School District No 26 (1995) BCCHRD 4, 25 CHRR 452.*
- *Re Premier Horticulture Ltd and UFCW, Local 831* (2001), 63 CLAS 348, 2001 CarswellMan 902.

and cases where the arbitrator found that the employer had discharged its duty to accommodate an employee with an addiction related disability:

- *New Flyer Industries, supra*.

223 I have read these authorities. I do not think it beneficial to address each and every one of them because each one turns on its individual facts but I will make some general observations.

224 First, I note that in many of the cases, the arbitrator specifically found on the facts that the employer had accommodated its employee on numerous occasions sometimes spanning the course of many years, prior to finally determining that it could not do so any further and therefore terminating the employee. See, for example the decisions in: *Uniroyal; Kootenay; Telus; Thunder Bay;* and *New Flyer, supra*.

225 In those cases, employers gave their employees a first chance, a second chance and sometimes a third chance before terminating their employment.

226 In the instant case, regardless of whether one calls the Memorandum of Agreement a "last chance agreement" I find that the Complainant, having been suspended on June 3, 2011 and never being allowed to return to work, was not given even a first chance let alone a "last chance" before having her employment terminated.

227 Many of the cases cited by the Respondent also involved repeated workplace performance issues on the part of the employee before the employee was fired.

228 In this case, the only evidence the Respondent had of the Complainant reporting to work under the influence of alcohol was the one time on June 3, 2011. Beyond that, as Ms. Ewing testified, there were no performance issues or concerns regarding the Complainant's ability to perform her duties in the workplace.

229 The above cited authorities do not persuade me, therefore, that the Respondent's treatment of the Complainant was justified under the *Code*.

Bona Fide Occupational Requirement "BFOR"

230 The Respondent also argued that the terms of the Memorandum of Agreement were *bona fide* occupational requirements and in particular it focused on the abstinence clause contained in that agreement.

231 The *bona fide* occupational requirement defence is well-established in human rights law and is used when a standard or requirement has been shown to have an adverse effect on an individual or group protected by human rights legislation.

232 In *Meiorin* the court held that an employer may justify an impugned standard or requirement by establishing:

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;

> 2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> 3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the Claimant without imposing undue hardship upon the employer.
>
> *Meiorin, supra* at para 54.

233 In applying the test set out in *Meiorin*, the Respondent submitted:

> 1. the standard that an employee must not come to work under the influence of alcohol is obviously related to the job of a health care aide at the Northern Lights Manor;
>
> 2. good faith on the part of the Respondent was beyond doubt given the statutory duties of the employer to provide safe patient care and ensure a safe workplace; and
>
> 3. requiring abstinence as a term of the Memorandum of Agreement was reasonably necessary to the accomplishment of the purpose of providing safe patient care and ensuring a safe workplace, given the fact that the Complainant had come to work under the influence of alcohol and admitted that she has an addiction to alcohol which diagnosis was confirmed by Dr. Waldman.

234 Having regard to these arguments, I find that the Respondent satisfied the first step of the test to demonstrate that there was a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job. The Respondent's general purpose in imposing the terms of the Memorandum of Agreement was to satisfy its obligation to maintain a safe workplace.

235 Regarding the second step of the test, I find that in imposing the terms of the Memorandum of Agreement, the Respondent believed that those terms were reasonably necessary and that it was not motivated by anything other than an honest and good faith belief that this was so.

236 The third and final hurdle is to demonstrate that the impugned requirement is reasonably necessary for the employer to accomplish its purpose. In doing this the Supreme Court held that the employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. For the reasons set out above regarding the Respondent's failure to make reasonable efforts to accommodate the Complainant, I find the Respondent has not satisfied the third part of this test and has not, therefore, demonstrated that the requirements it imposed on the Complainant were *bona fide* occupational requirements.

The Respondent's Other Arguments

237 The Respondent also submitted that even if I had jurisdiction to determine this Complaint, I had no authority to review the Respondent's termination of the Complainant on May 1, 2012. It argued that because that termination arose out of a validly constituted agreement only an arbitrator appointed under the grievance process could review the Respondent's actions in that regard.

238 In support of its position regarding the validity of the Memorandum of Agreement, the Respondent pointed to the fact that the Union was involved in reaching the agreement and the fact that the agreement itself articulated at clause 11 that the Complainant considered that the duty to accommodate her had been met.

239 I do not find that the Union's involvement in this matter affects my determination that the Respondent failed to accommodate the Complainant. There was nothing in the evidence to support such a finding. I agree with the Respondent's submission that settlements between parties to a collective agreement should generally be upheld but not when such settlements are part of a process which violates an individual's rights under the *Code*.

240 Further, as the arbitrator in *Kimberly-Clark Forest Products* stated, even where the parties specifically stipulate in an agreement that the employee has been accommodated that does not end the decision maker's inquiry. A decision maker, whether an arbitrator or a human rights adjudicator, must still look at the dealings between the parties to determine whether an employer has in fact complied with its obligations under human rights legislation. (*Kimberly-Clark, supra* at para 20.)

241 In the further alternative, the Respondent submitted that if I decided I could review whether the Memorandum of Agreement had been breached, I should apply the principles relating to credibility assessments in *Faryna v Chorny* [1952] 2 DLR 354, [1951] BCJ 152, to determine that the Complainant breached the agreement and the Respondent's actions in terminating her were, therefore, reasonable. In making this argument it urged me to give weight to the testimony of Carrie Dubrueil. She was the person who reported to the Respondent that she saw the Complainant in a grocery store on April 8, 2012 smelling quite strongly of alcohol.

242 The Commission submitted that a determination as to whether the Complainant was in fact drinking on April 8 or April 18, 2012, is not determinative of this complaint.

243 I agree. In my view this proceeding is not about whether the Memorandum of Agreement is a valid contract. Nor is it about whether the Complainant breached the agreement in fact. Rather, it is about whether the Respondent violated the Complainant's rights under clause 14 of the *Code*.

244 Accordingly, I do not need to make findings of credibility about the witnesses whose reports were relied upon by the Respondent when it terminated the Complainant on May 1, 2012. The issue for determination in this matter is not whether the Complainant was drinking on a given day but rather whether the Respondent made reasonable efforts to accommodate the

Complainant as soon as it was aware that she had a disability and special needs associated with that disability.

Conclusion

245 For the reasons stated above and based on the totality of the evidence, I find the Respondent did not make reasonable efforts to accommodate the Complainant's disability. I find, therefore that the Complainant was discriminated against in the manner alleged in the Complaint and that she is entitled to an Order which remedies that discrimination.

Issue 4: If the answer to #3 is negative, what remedy should be ordered?

Remedy

246 In determining a just and appropriate remedy, I have considered each of the remedial headings set out in clause 43(2) of the *Code*, as follows.

Clause 43(2)(a): do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention

247 The Commission submitted that the Respondent would benefit from developing and implementing a reasonable accommodation policy. I agree that such a policy would help to define the rights and responsibilities of both the Respondent and its employees. Accordingly, I order that:

> ***The Respondent develop and implement a reasonable accommodation policy in consultation with its counsel and with the Manitoba Human Rights Commission. That policy must be put in place within three months of the date of this decision and must clearly outline the rights and responsibilities of both the employer and its employees.***

248 Next, with respect to the Complainant's request to be reinstated, the Code provides a tribunal with broad remedial authority to do what is necessary to ensure compliance with its provisions. As the Ontario Superior Court set out in a recent decision involving allegations of discrimination on the basis of disability in the workplace:

> It is fair to say that while reinstatement is unusual, there is no barrier or obstacle to this remedy in law."
>
> *Hamilton-Wentworth District School Board v Fair* 2014 ONSC 2411 at para 42, OJ 4586, 2014 CarswellOnt 13509.

249 Remedies under human rights legislation are intended to put the complainant in the position she would have been in but for the discrimination. (*Piazza Airport Taxicab (Malton) Assn* (1989), 69 OR (2d) 281, 60 DLR (4^{th}) 759) as cited in *Moffat v Kinark Child and Family Services* (1999) OHRBID 15, 36 CHRR 346 (OHRC).)

250 Human rights legislation aims at the removal of discrimination. Its main approach "is not to punish the discriminator, but rather to provide relief for the victims of discrimination." (*Simpsons-Sears, supra* at para 12.) These statements were relied on by the tribunal in *Harrison v University of British Columbia* [1990] BCCHRD 21, 12 CHRR D./303 where, in making an order of reinstatement the tribunal held that reinstatement is a primary remedy in situations involving discrimination in employment settings.

251 The Respondent forcefully argued that reinstatement would not be viable in this case and should not be ordered.

252 In making that argument, it relied on the decision of *Moffat v Kinark Child and Family Services, supra* where the Tribunal found that reinstatement would not be viable because it found that the employer's manager did not have an open mind about the employee's suitability for re-employment.

253 The Respondent argued that reinstating the Complainant as a health care aide in this case would not be viable because the Respondent's managers do not have confidence in her ability to function safely in the workplace. Further, it submitted, the staff no longer trust the Complainant. In making that submission, the Respondent relied on the information contained in the AFM file which it obtained while preparing for this hearing, where Ms. Stevens noted that as of April, 2012 the Complainant was having an occasional drink. In her note for April 25, 2012 she wrote: "Clt indicated no issues and no struggles. Clt states that she had been practicing responsible use." The Respondent's position was that this showed the Complainant could not be trusted because she had in fact been drinking in April 2012 in violation of the Memorandum of Agreement she signed on April 5, 2012.

254 Ms. Cupples also testified that there would be trust issues among all the employees if the Complainant were returned to the workplace.

255 With respect to this last point, I find the evidence does not support an argument that the Complainant's co-workers had concerns about her return to the workplace.

256 In fact Ms. Peeters testified that she had no concerns about the Complainant returning to work nor did she think that any of the other staff would have any concerns, so long as she was sober. She also noted that she had worked with the Complainant since January 2009 and that the June 3, 2011 incident was the first time she had known the Complainant to come to work under the influence of alcohol.

257 Ms. Reader testified that the Respondent did not think reinstatement was viable because she did not think that the Complainant had addressed her addiction issue.

258 I find that the evidence does not support this view. The Complainant testified she has been consistently employed since January 2013 without experiencing any performance issues in the workplace. The evidence from her current employer for whom she has worked since September 2014 was that since her employment began the Complainant has had neither performance issues nor attendance issues.

259 I have considered the Respondent's evidence that it does not trust the Complainant. In my view, if the Respondent had proceeded on the basis of affording the Complainant proper accommodation, the interaction and the relationship between the parties and in particular the Respondent's perceptions of the Complainant, might well have looked very different.

260 I find that the Respondent did not create a supportive environment that encouraged and fostered trust between the parties.

261 Having found that the Respondent violated the Complainant's rights under the *Code* by unfairly depriving her of an opportunity to participate in the workplace, I find that the most appropriate remedy is to require the Respondent to give the Complainant that opportunity now.

262 The community in which the Complainant lives is a small community with limited opportunities to find comparable employment.

263 The remedy which will put the Complainant in the position she would have been in had she been afforded the appropriate accommodation by the Respondent is, therefore, reinstatement.

264 By reinstating the Complainant on the terms set out below, the Respondent will effectively be doing what it should have done in the first place once it learned of the Complainant's disability and associated special needs. Of course, more than four years have elapsed since that time. Based on the evidence adduced at the hearing regarding the Complainant's current state of health and ability to perform in the workplace any efforts of accommodation may look quite different from how they would have looked in 2011.

265 As the *Code* provides, a finding of discrimination can be made regardless of whether the person responsible for the act or omission intended to discriminate. (*Code* clause 9(1.1)). I am confident that the Respondent will read this decision carefully and in consultation with its legal counsel will work with the Complainant in a professional and fair manner to afford her the opportunity that she ought to have received, to participate in the workplace. Accordingly, I order that:

The Respondent reinstate the Complainant on the following terms:

a) She be reinstated to a position as a 0.61 FTE Health Care Aide;

b) She be provided a fair and reasonable opportunity to pick up available surplus shifts so as to earn wages comparable to those she was earning prior to June 3, 2011;

c) Her seniority be calculated based on her date of hire and the average number of hours she would have worked had she continued to be employed from June 3, 2011 until the date of this Order, based on her average hours of work in the three months preceding June 3, 2011;

d) She be placed in the appropriate place on the wage scale in accordance with that seniority; and

e) Prior to reinstatement, the Complainant be assessed by a mutually agreed upon professional with expertise in treating individuals with alcohol addiction to determine whether the Complainant currently has any special needs associated with a disability that require accommodation. In the event that accommodation is considered to be necessary, both parties must recognize their responsibilities to make reasonable efforts in that regard.

Clause 43(2)(b): compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate

266 Commission counsel requested that the Respondent compensate the Complainant for lost wages incurred between June 3, 2011 and the date of the hearing, accounting for any wages she earned and any other financial benefits associated with the loss of employment she received since that time. In the alternative, it requested that compensation be made for lost wages starting December 2, 2011 on the same basis.

267 Remedies under clause 43(2)(b) are intended to compensate the affected party for financial losses sustained by reason of the contravention of the *Code* in order to put the Complainant in the position that she would have been in so far as is reasonably possible or appropriate, if the discrimination had not occurred. (See *Hair Passion, supra* at para 226.)

268 I find that if the Complainant had not experienced discrimination she would have been placed on medical leave for the period June 3, 2011 to December 2, 2011 to allow her time to complete the Reducing the Risk program. During that period she would have received the benefits to which she was entitled, if any, in accordance with the terms of the Collective Agreement.

269 The Complainant testified that following that period, as of January 2012, she was doing much better and was actively seeking employment. She was still seeing Ms. Stevens for counselling but there is no evidence that she could not have returned to work while participating in that counselling. Certainly, by April 5, 2012 the Respondent was prepared to return the Complainant to the workplace on the basis of a 0.61 FTE Health Care Aide and the Complainant's physician had provided a letter dated May 31, 2012 saying that she was healthy.

270 The Complainant testified she made extensive efforts to look for work after being terminated in May 2012 but because opportunities in Flin Flon are limited she was not successful in those efforts until January 2013. Since that time she has been able to consistently remain in the workforce.

271 I acknowledge Dr. Waldman's opinion that the Complainant had sustained a relapse after December 2011. He based that opinion on the fact that the AFM notes indicated the Complainant had missed some appointments through 2012 and then stopped attending appointments in July of 2012. In his view, the notes also endorsed that she was having emotional problems, panic attacks and relationship problems.

272 Ms. Stevens' evidence was that her notes of counselling sessions contained in the AFM file were not verbatim notes but rather were made for her own use. They were not prepared with a view to being shown to third parties or for any purpose other than for treating the Complainant. Significantly, the content of the notes was never put to the Complainant during her testimony at the hearing. I therefore place little weight on them in determining the period during which the Complainant was able to return to the workplace.

273 Further, Dr. Waldman acknowledged quite fairly, that the information he reviewed covered a time period that ended in or about July of 2012 when the AFM notes concluded. He conceded that the impact of the Complainant's alcohol use disorder on her life might look very different in 2015; that it is possible that she is in a period of remission and may be managing her symptoms effectively. He said he simply had no information one way or the other.

274 Based on all of the evidence, I see no reason to dispute the Complainant's testimony that she has been able and willing to participate fully in the workplace starting in January of 2012. Accordingly, I order that:

> ***The Respondent compensate the Complainant for lost wages for the period June 3, 2011 to the date of this Order taking into consideration the fact that the Complainant would have been on medical leave between June 3, 2011 and December 2, 2011 and accounting for any wages the Complainant earned during employment with subsequent employers in that period as well as any other financial benefits in lieu of employment income the Complainant received during that period.***

Clause 43(2)(c): pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect

275 The Commission requested an order under clause 43(2)(c) of the Code compensating the Complainant for injury to her dignity, feelings or self-respect, in the amount of $10,000.00.

276 The importance of an individual's employment to her self-esteem and sense of identity was articulated by Adjudicator Harrison in *Hair Passion*, *supra* at para 220, referring to the often cited passage by Chief Justice Dickson (writing in dissent):

> Work is one of the most fundamental aspects in a person's life, providing the individual with the means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotion well-being.
>
> *Re Public Service Employee Relations Act (Alberta)* (1987) 1 SCR 313 at p.368, 78 AR 1, 51 AltaLR (2d) 97.

277 In this case I am satisfied on the evidence that the termination of the Complainant's employment and her ongoing interaction with the Respondent in trying to secure re-employment had a significant negative impact on her identity, self-worth and emotional well-being. The community in which the Complainant lives is a small community. The Complainant testified repeatedly about how much she valued her privacy and about the negative effect she felt in

believing that everyone was aware of her employment difficulties. Ms. Stevens testified that the stress the Complainant was experiencing because of her dealings with the Respondent was the focus of many of their sessions. I find on the evidence that as a result of her dealings with the Respondent the Complainant experienced a significant injury to her dignity, feelings and self-respect. Accordingly, I order that:

> ***The Respondent pay the Complainant the amount of $10,000.00 for the injury to her dignity, feelings and self-respect.***

278 I will remain seized of this matter in the event the parties need to seek my direction in carrying out the terms of this Order.

279 This case raised many interesting and important issues about an employer's duty to accommodate an employee who has an addiction-related disability both generally and in the context of an employment relationship which is governed by a collective agreement.

280 I thank the parties and their counsel for their thorough and respectful participation in these proceedings.