

Canadian Human Rights Tribunal

**Tribunal canadien des droits de la
personne**

BETWEEN:

EMILIE MARINAKI

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HUMAN RESOURCES DEVELOPMENT CANADA

Respondent

REASONS FOR DECISION

T.D. 3/00

2000/06/29

PANEL: Anne Mactavish, Chairperson

Guy Chicoine, Member

Reva Devins, Member

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I. INTRODUCTION

[1] Emilie Marinaki is a longstanding employee of the Federal Government. She complains that her Manager, Domenic Scarizzi, sexually and ethnically harassed her. She further alleges that representatives of her employer, including her Director, André Thivierge, did not respond to her

complaints about Mr. Scarizzi in an appropriate fashion and retaliated against her for having complained about Mr. Scarizzi.

[2] Ms. Marinaki's complaint alleges that Mr. Scarizzi sexually harassed her by swearing at her in Italian, and that he harassed her on the basis of her national or ethnic origin by calling her a 'Goddamn Greek' on approximately 10 occasions. Ms. Marinaki's complaint states that there were several other incidents, but that they were more in the nature of personal harassment. The pre-hearing Statement of Issues served by counsel for the Canadian Human Rights Commission and for Ms. Marinaki make reference to additional acts identified as harassment or retaliation.

[3] The Tribunal must determine what happened in Ms. Marinaki's workplace, and whether what happened constitutes sexual or ethnic harassment. In addition, the issue of retaliation will have to be addressed. Questions of employer liability and remedy also arise if we find that Ms. Marinaki was sexually and/or ethnically harassed.

II. PRELIMINARY COMMENTS

[4] This hearing was held over a number of months, and took 30 days to complete. A number of factors contributed to the length and complexity of this hearing. These factors also give rise to very specific challenges for the Tribunal when we assess the evidence and apply the appropriate legal principles to the facts. Two of these factors require some comment at the outset of this decision:

i) Ms. Marinaki's Psychiatric Status

[5] While we will deal with the psychiatric evidence in greater detail further on in this decision, it should be noted that it is common ground that at the time she testified, Ms. Marinaki was suffering from a major depression. Although there was no suggestion that Ms. Marinaki was not competent to testify, the effects of Ms. Marinaki's psychiatric disability were evident during the six days that she spent on the witness stand. In an effort to accommodate Ms. Marinaki, and in consultation with counsel, the Tribunal took frequent recesses, and often adjourned the hearing when Ms. Marinaki required a break. Latitude was given to Ms. Marinaki's counsel with respect to leading questions and covering the same ground more than once, all in an effort to assist Ms. Marinaki in getting her evidence before the Tribunal. Despite these efforts, at times Ms. Marinaki's thinking appeared scattered, and her powers of concentration were clearly limited.

[6] We were mindful of the restrictions on Ms. Marinaki's ability to articulate, and concerned that, because of her disability, she may not have been able to fully recount what she understands to have occurred in her workplace. This concern was heightened when we reviewed the opening statements of counsel for Ms. Marinaki and the Canadian Human Rights Commission, in which they set out their theory of the case. In the circumstances, while we have certainly considered Ms. Marinaki's oral testimony at the hearing, we have also looked carefully at the

contemporaneous documentation produced in an effort to determine the true nature of Ms. Marinaki's concerns. In addition, we have taken Ms. Marinaki's disability into account when deciding whether to draw negative inferences where she has failed to recall things that one might have otherwise expected her to remember and where there are discrepancies between her earlier statements and her testimony at this hearing.

ii) The Failure to Identify the Complainant's Theory of the Case

[7] This case has been marked by a fundamental lack of precision in the identification of the theory of the complainant's case. For example, it was not until the complainant's final submissions that it became clear that it was not being alleged that André Thivierge himself sexually or ethnically harassed Ms. Marinaki. Instead, what was being alleged was that Mr. Thivierge failed to respond to Ms. Marinaki's complaints of harassment on the part of Domenic Scarizzi in an appropriate manner, and that Mr. Thivierge retaliated against Ms. Marinaki for making these complaints. As a result, days of hearing were taken up with a minute examination of issues that ultimately became collateral, and were said to go only to the credibility of Mr. Thivierge.

[8] Later in this decision we will deal with the fairness issues which we believe arise as a consequence of the fluid nature of the respondent's alleged liability in this case. At the outset, however, we observe that as we sifted through the evidence we found ourselves faced with at least two obstacles as a result of this lack of clarity. Firstly, as already noted, an enormous amount of evidence was heard on issues that subsequently became collateral to the central question of whether or not Ms. Marinaki was the victim of either sexual or ethnic harassment. If fully recited in this decision, this evidence is inevitably distracting in the determination of the central question. Mention is made of some of this evidence, however, where it is relevant to questions of credibility or where it serves to shed light on the nature of Ms. Marinaki's concerns about her workplace.

[9] It is also difficult to understand how certain evidence was intended to relate to the submissions made by counsel. The shifting theory of Mr. Thivierge's alleged liability has previously been cited. By way of further illustration, a great deal of evidence was led in an effort to establish the existence of a poisoned work environment in Ms. Marinaki's workplace in the late 1980's. It was alleged that the poisoned environment carried on into the 1990's, creating the context in which Ms. Marinaki's subsequent experiences, and thus her complaint, must be understood. In contrast to this position, the pre-hearing Statement of Issues delivered by Ms. Marinaki indicates that the harassment and discrimination only began in the late summer or early fall of 1992. No mention is made of a continuing pattern of harassment or poisoned work environment. Inconsistencies such as this in the Commission and Ms. Marinaki's theory of the case are hard to reconcile, and pose significant challenges in determining whether or not Ms. Marinaki has met her burden.

[10] As a consequence of the significant volume of evidence adduced in this hearing, and in order to provide coherent reasons, we have outlined the evidence as it relates to each of the principal allegations referred to in Ms. Marinaki's complaint, and have also identified additional issues that arose in the course of the investigation and in the hearing itself. While each issue is

dealt with separately, we have considered each of the allegations in the context of the evidence as a whole, in an effort to determine whether there exists a discernible pattern of discriminatory conduct. ⁽¹⁾

III. BACKGROUND

[11] Ms. Marinaki was born in Tanzania to Greek parents, and came to Canada with her family in 1970. After completing high school and a course at Algonquin College, Ms. Marinaki began working in the private sector.

[12] Ms. Marinaki started working for the Federal Government in 1979. She worked in a series of term positions before obtaining an indeterminate position with the Department of National Defence in 1983. Performance appraisals from this period reveal that Ms. Marinaki worked hard in these positions, and did a good job. The record also reveals that Ms. Marinaki was very ambitious. ⁽²⁾

[13] In the late 1970's, Canada began entering into agreements with other countries to provide social security benefits for individuals from other countries now living in Canada, and to provide similar benefits to Canadians living abroad. The International Operations Directorate of the Income Security Programs Branch of Health Canada was set up to process applications for benefits under these agreements. ⁽³⁾

[14] In 1983, Ms. Marinaki won a competition for an indeterminate position as a CR-5 Adjudicator in the International Operations Directorate. Ms. Marinaki was hired as a special language adjudicator. Special language adjudicators had fluency in languages such as Greek or Italian, and assisted in the processing of benefit claims for individuals from these countries.

i) The Workplace Environment in the Early 1980's

[15] The International Operations Directorate was a new operation in the early 1980's. By all accounts, it was an exciting place to work during its early years. Although it was a production environment, International Operations was performing a new service and its employees were charting new territory.

[16] A number of the staff at International Operations were quite young, and the office atmosphere at this time was lively and congenial. The staff worked hard, but had fun doing it. There were many social functions for the employees, and work friendships developed.

[17] Ms. Marinaki did well in this environment. Her performance appraisals in the 1980's were uniformly positive. She was noted to be an energetic and productive worker who showed a lot of initiative and was willing to assume extra duties. Once again, her ambition is reflected in the record. ⁽⁴⁾

[18] We heard a great deal of testimony about Ms. Marinaki's personality. It is apparent that Ms. Marinaki had a very strong personality, and at times was argumentative, sometimes uncooperative and not at all afraid to challenge authority.⁽⁵⁾ At the same time, Ms. Marinaki also had many strengths: she was bright, hardworking and productive. Indeed, Ms. Marinaki was described in positive terms by many colleagues, including a number of co-workers called by the respondent.⁽⁶⁾

[19] Although a number of the performance appraisals from this period note that Ms. Marinaki worked well under pressure, it is apparent that Ms. Marinaki had some difficulties dealing with stress. Both Ms. Marinaki and Ms. McShane referred to an incident occurring in May of 1986 where Ms. Marinaki, unhappy with allocation of files among members of her unit, left the workplace in the middle of the workday sufficiently upset that she took to her bed for three days.⁽⁷⁾

[20] Ms. Marinaki acted as a back-up supervisor for a time in 1986-87. In 1988-89, she spent six months as a Verifier, where she was responsible for checking the work of other adjudicators. However, despite her professional ambitions, Ms. Marinaki did not progress into management.

[21] Ms. Marinaki left International Operations in 1989 to go to the GST section at Revenue Canada on a 'DAP' assignment. DAP's are assignments under the Departmental Assignment Program, which allow employees to take temporary assignments in other areas of the Government, in order to expose them to different environments and assist their career development.

ii) The Poisoning of the Work Environment in the late 1980's

[22] Ms. Marinaki testified that she decided to leave International Operations because her work environment had been poisoned by Domenic Scarizzi, a fellow adjudicator. Counsel for the respondent objected to the receipt of evidence with respect to Mr. Scarizzi's conduct in the 1980's, as Ms. Marinaki's human rights complaint deals only with the period starting in 1992. Counsel for the Canadian Human Rights Commission and for Ms. Marinaki urged us to consider the evidence for the sole purpose of understanding the context of Ms. Marinaki's subsequent complaints. The Tribunal ruled that this evidence would be admitted for that limited purpose.

[23] Domenic Scarizzi joined International Operations around the same time as Ms. Marinaki, and a friendship developed between them. Ms. Marinaki stated that she enjoyed Mr. Scarizzi's sense of humour, and we heard testimony of the two laughing and kidding around in the workplace. Ms. Marinaki and Mr. Scarizzi also socialized outside of the office, indeed, Mr. Scarizzi was one of the co-workers who attended Ms. Marinaki's wedding in Montreal in May of 1984.

[24] According to Ms. Marinaki, sometime after 1985, things with Mr. Scarizzi 'started to get out of hand'. Mr. Scarizzi would say things such as 'Hi, sexy!' when Ms. Marinaki went by. If Ms. Marinaki went to the bathroom, he would ask her if she was having her period. Ms. Marinaki stated that Mr. Scarizzi commented on her clothes and her body. Ms. Marinaki testified that Mr. Scarizzi talked about her sex life, saying that she needed 'a good fuck'.

[25] Ms. Marinaki states that Domenic Scarizzi also made jokes and comments about various ethnic groups. For example, Mr. Scarizzi told Ms. Marinaki that 'Greek women liked to have sex from the back'. Mr. Scarizzi and others commented that 'Greeks have a lot of money'.

[26] According to Ms. Marinaki, Mr. Scarizzi made inappropriate comments on a daily basis during this period. She states that she was angry and hurt by his actions. When Mr. Scarizzi said these things, she would get mad and tell him to leave her office.

[27] Ms. Marinaki stated that she did not laugh at Mr. Scarizzi's jokes and comments, nor did she use a similar type of humour in the workplace. She did acknowledge that she had been spoken to by her own supervisor about her use of profanity in the workplace.

[28] Ms. Marinaki does not recall if she complained to anyone about Mr. Scarizzi's behaviour, but believes that 'everyone' knew about it as some of Mr. Scarizzi's comments were made in the middle of the workplace, in the presence of co-workers. Ms. Marinaki also believes that people knew that she was upset from her attitude. She said that during this period she was 'closing into [her]self'; she became defensive and would not socialize with her co-workers.

[29] Several of Ms. Marinaki's co-workers, including Eugenia McShane, Neera Singh and Maria de Sousa, observed changes in Ms. Marinaki's demeanour, but not until the 1990's. No one noticed the changes described by Ms. Marinaki in the 1980's.

[30] Ms. Marinaki says that sometime after 1986, Domenic Scarizzi began leaving cartoons and jokes on her desk. A package of documents was identified by Ms. Marinaki as a collection of the jokes and cartoons that she received during the late 1980's ('the cartoon collection'). Suffice it to say that most of the documents are sexual in nature, and many are highly offensive.

[31] Ms. Marinaki testified that she told Mr. Scarizzi that she did not appreciate receiving these items. She stated that she put the documents in her purse and took them home to show her father.

[32] Mr. Scarizzi confirmed that he liked to laugh and joke at work, but denied ever making any inappropriate sexual or racist comments to Ms. Marinaki or anyone else. Mr. Scarizzi denied ever being spoken to about his language in the workplace. He vehemently denied leaving any of the cartoons or jokes in the cartoon collection on Ms. Marinaki's desk.

[33] We heard from a number of other individuals who worked with Domenic Scarizzi, some called by the Commission and others called by the respondent. It was common ground that Mr. Scarizzi was a lively, energetic and hardworking individual, one who always attempted to inject levity into the workday. A number of witnesses (including at least one called by the respondent) heard Mr. Scarizzi make jokes and comments of a sexual nature in the workplace. Several witnesses recalled Mr. Scarizzi making jokes or comments of a racist nature. Neera Singh testified that Mr. Scarizzi called her a Paki. She also heard him make a disparaging remark about Greek clients in Ms. Marinaki's presence. Although Ms. Singh did not say when this occurred, when all of her evidence is viewed as a whole it appears that it was likely in the late 1980's. No one confirmed hearing any of the specific comments attributed to Mr. Scarizzi by Ms. Marinaki.

[34] We were told that a number of people were offended by Mr. Scarizzi's behaviour and told him to stop. The jokes and comments would cease for a while, and then would start again.

[35] International Operations management was clearly aware of the problem. Ms. McShane stated that she had to speak to Mr. Scarizzi a couple of times about inappropriate comments during the time that she supervised him in the 1980's.

[36] With respect to Ms. Marinaki's general allegations of inappropriate racial and sexual comments made by Mr. Scarizzi in the 1980's, we prefer the evidence of Ms. Sangiorgi, Ms. Singh, Ms. McShane, and Mr. Gratton to that of Mr. Scarizzi, who we did not find to be a credible witness.⁽⁸⁾

[37] We find that Mr. Scarizzi did use sexual and racial humour in the workplace on a regular basis in the 1980's, and that this behaviour was offensive to some. As is perhaps not surprising, Mr. Scarizzi did not act this way with everyone, but rather chose his audience. Accordingly, the evidence of many of the respondent's witnesses that they had never heard Mr. Scarizzi using this type of language does not detract from this finding. However, we cannot find that Mr. Scarizzi made the specific comments attributed to him by Ms. Marinaki. For reasons set out further on in this decision, we have grave concerns about the reliability of Ms. Marinaki's evidence. No one confirmed hearing the comments attributed to Mr. Scarizzi, despite Ms. Marinaki's testimony that some of these comments were made in the presence of others. None of the documentation prepared by Ms. Marinaki in connection with her internal harassment complaint, her grievance or her human rights complaint makes any mention of these comments, nor were they referred to in either Ms. Marinaki's or the Commission's pre-hearing disclosure. Indeed, the issue of Mr. Scarizzi's behavior in the 1980's appears to have been raised for the first time at this hearing.

[38] It must be recalled that the evidence with respect to Domenic Scarizzi's actions in the 1980's was adduced only to establish a context for the dealings between Ms. Marinaki and Mr. Scarizzi after her return to International Operations in the fall of 1992. On a view of all of the evidence, we do not find Mr. Scarizzi's conduct in the 1980's to be particularly helpful in understanding his interaction with Ms. Marinaki in the 1990's for the following reasons:

a) Although Ms. Marinaki states that she was very upset by Mr. Scarizzi's behaviour, her actions do not bear this out as she did not complain to her supervisor, her co-workers or her union. Nor is there any evidence that she complained to anyone else outside of International Operations, not to her family, friends, or physician, or to her new colleagues at Revenue Canada. We recognize that victims of harassment are often reluctant to come forward with complaints, and that failure to complain in a timely fashion may not be fatal to a subsequent complaint. In this case, however, Ms. Marinaki's failure to complain about Mr. Scarizzi's conduct at the time that it occurred must be considered in light of the fact that throughout her career with the respondent, Ms. Marinaki was more than ready to challenge authority, and to assert her right to complain about what she perceived to be unfair or inappropriate treatment in the workplace.⁽⁹⁾ In addition to evidence of a number of confrontations with co-workers when Ms. Marinaki felt that she had been badly treated, we have evidence of a number

of grievances, two Public Service Appeal Board Appeals, an internal harassment complaint, a civil lawsuit and this human rights complaint, all initiated by Ms. Marinaki. Particularly noteworthy is the fact that Ms. Marinaki was ready, willing and able to initiate several actions against Mr. Scarizzi in the 1990's - when he was in a position of authority over her - yet according to her, she remained silent about alleged serious misconduct on Mr. Scarizzi's part in the 1980's, when he was still her peer.

b) There was evidence of discussions that Ms. Marinaki had with Steve Shipley, the Acting Unit Manager of Staff Relations and Compensation in the Income Securities Branch and with Mr. Thivierge, the Acting Director of International Operations in early 1992 with respect to her upcoming return to the Branch. There is no suggestion that Ms. Marinaki ever mentioned any concern about Mr. Scarizzi's conduct to either Mr. Shipley or Mr. Thivierge.

c) Ms. Marinaki testified that when she returned to International Operations from her DAP assignment in 1992, she was told that she would be reporting to Mr. Scarizzi, who was by this time acting in a supervisory position. Ms. Marinaki stated that she 'had no problem with that'. This reaction is inconsistent with the position now being advanced.

d) When Ms. Marinaki finally did complain about Mr. Scarizzi's behaviour, her complaints related to his use of abusive language directed at her in anger, as opposed to sexist and racist comments and humour.

e) There was a significant temporal break between the behaviour attributed to Mr. Scarizzi in the 1980's and that covered by Ms. Marinaki's complaint. Ms. Marinaki left International Operations in November 1989, and did not return until September of 1992, a period of almost 3 years.

[39] While we are in no way condoning Mr. Scarizzi's sexist and racist comments and jokes, we cannot conclude that his conduct during the 1980's had any influence or effect on the interaction between Ms. Marinaki and Mr. Scarizzi in the 1990's.

[40] With respect to the jokes and cartoons allegedly distributed by Mr. Scarizzi, one witness confirmed seeing the jokes and cartoons of the type in the cartoon collection in the workplace. Chantal Daigle said that sometime in or around 1991, a co-worker named Michel Stocker showed her a file with this material in it and told her that she could make copies if she wanted to. Ms. Daigle did not complain to anyone, and the conduct stopped.

[41] It is clear that the written material identified by Ms. Marinaki and Ms. Daigle as being present in the workplace is of a nature that could well have poisoned the work environment, regardless of whether the material originated with Mr. Scarizzi or Mr. Stocker. It must be recalled, however, that in this case, this material was admitted for the limited purpose of establishing a context for the subsequent interaction between Ms. Marinaki and Mr. Scarizzi. In

these circumstances, it becomes necessary to determine whether Ms. Marinaki has established that she was given the material by Mr. Scarizzi.

[42] We cannot conclude on the basis of the evidence before us, that Mr. Scarizzi did indeed give Ms. Marinaki the jokes and cartoons as she has alleged. In addition to the reasons previously cited with respect to Mr. Scarizzi's racist and sexist comments, there are additional reasons for coming to this conclusion:

a) On her own evidence, Ms. Marinaki felt that the documents were sufficiently important that she took them home and saved them for many years. However, she did not mention the existence of the documents in the course of her internal harassment complaint, her grievance relating to her allegations of harassment or her human rights complaint, all of which relate directly to allegations of inappropriate behaviour on the part of Mr. Scarizzi. Indeed, although Ms. Marinaki has had lawyers acting for her in connection with these matters for years, she only gave the documents to her counsel the day before this hearing was to commence. Ms. Marinaki did not provide a credible explanation for her failure to produce the documents sooner. ⁽¹⁰⁾

b) Ms. Marinaki states that she put the offending documents in her purse and brought them home. We examined the original documents. The documents are in remarkably good condition after all these years. Their appearance is not consistent with having been carried home in a purse.

[43] As a result, we do not believe that the jokes and cartoons were given to Ms. Marinaki by Mr. Scarizzi.

iii) Ms. Marinaki's Departure from and Return to International Operations

[44] Ms. Marinaki's DAP assignment in the GST section of Revenue Canada began in 1989. While at Revenue Canada, Ms. Marinaki worked as a Business Analyst at the AS-2 level, a higher and more remunerative position than her substantive CR-5 position. Ms. Marinaki's job involved working with Departmental computer systems, including the construction of user profiles, client testing and systems development. She was involved in the testing of computer programs and in ensuring that GST employees had access to the appropriate levels of secure information.

[45] Ms. Marinaki performed well in this position, receiving positive evaluations in two performance appraisals conducted during her stay. She was noted to be creative and hard working, and to relate well to her co-workers. Ms. Marinaki clearly enjoyed her work at Revenue Canada, and did well in that environment.

[46] Ms. Marinaki's assignment at Revenue Canada was initially to run from November of 1989 to March of 1991. By agreement, Ms. Marinaki's term was extended twice, to the end of March, 1992, at which time she was scheduled to return to International Operations.

[47] At some points in her testimony Ms. Marinaki insisted that she had no problems with going back to her substantive position in International Operations.⁽¹¹⁾ On other occasions, however, she acknowledged that she had worked as an adjudicator for many years, that she had learned all that she could from the job, and that she was not pleased to be returning. Ms. Marinaki's own family doctor noted in a June, 1993 letter that Ms. Marinaki had been unhappy about returning to International Operations. On a review of all of the evidence we are satisfied that Ms. Marinaki had outgrown her old job in International Operations and did not want to go back for this reason.

[48] Steve Shipley testified that he met with Ms. Marinaki in early 1992, at her request. Ms. Marinaki advised Mr. Shipley that her term at Revenue Canada was coming to an end, and that she did not wish to return to International Operations as she found her job there boring. Ms. Marinaki indicated that she was interested in going on another assignment. Mr. Shipley advised Ms. Marinaki that she would have to discuss the matter with André Thivierge, who was now the Acting Director of International Operations. According to Mr. Shipley, at no time during this discussion did Ms. Marinaki mention any concerns about ethnic or sexual harassment in International Operations or regarding the existence of a poisoned work environment.

[49] Ms. Marinaki does not recall this meeting, although she did not dispute Mr. Shipley's version of events.

[50] Ms. Marinaki also met with Mr. Thivierge sometime in March of 1992. There is some disagreement between Ms. Marinaki and Mr. Thivierge as to how the meeting came about, and exactly what was said. Ms. Marinaki recalls it as a chance encounter during which Mr. Thivierge advised her that he would not be extending her DAP assignment, although she later stated that she did not know who would have made the decision not to further extend her term⁽¹²⁾.

[51] Mr. Thivierge testified that the meeting was more formal in nature, and that it took place at Ms. Marinaki's request. According to Mr. Thivierge, in the course of the meeting Ms. Marinaki advised him that she had no desire to return to International Operations as the work offered her no challenge, and that if she was required to go back to International Operations, she would go 'fucking brain dead'. Ms. Marinaki wanted Mr. Thivierge to help her find another job. Mr. Thivierge stated that he made various suggestions as to how Ms. Marinaki might go about finding another position.

[52] Ms. Marinaki acknowledges that she used the term 'brain dead' to describe the work in International Operations in discussions with her co-workers and supervisors. It is uncontradicted that she told Mr. Thivierge that she would go 'fucking brain dead' if she was compelled to return to International Operations after the expiry of her term at Revenue Canada.

[53] Notwithstanding the conflicts in the evidence with respect to what transpired in the course of this meeting, it is clear that Ms. Marinaki was not happy at the prospect of returning to International Operations, and was interested in finding an alternative position. There is also no suggestion that Ms. Marinaki mentioned any concerns that she may have had about ethnic or sexual harassment by Domenic Scarizzi.

[54] On March 19, 1992, Mr. Thivierge approved Ms. Marinaki's application for another DAP assignment, 'subject to operational requirements'. Mr. Thivierge states that he puts this qualification on every DAP application that he approves. Although Ms. Marinaki seems to view this as evidence of bad faith on the part of Mr. Thivierge in that it gave him an excuse to refuse permission to allow an employee to go on DAP assignment, it should be understood that what Mr. Thivierge was doing was giving agreement, *in principle*, for an employee to participate in the DAP program. When such approval was given, Mr. Thivierge would not know if the employee would in fact be going, when they would go, where or for how long. Similarly, Mr. Thivierge would have no way of knowing what the situation in International Operations would be when the DAP assignment offer actually came through. Under these circumstances, the inclusion of such a qualification in the approval seems eminently reasonable.

[55] It appears that this DAP application did not result in another assignment for Ms. Marinaki.

[56] Ms. Marinaki took two weeks off before her scheduled return to International Operations. On April 10, 1992, her father died. Ms. Marinaki evidently had a close relationship with her father, and was very upset by his death.

[57] Following the death of her father, Ms. Marinaki went on sick leave from April to September of 1992. Ms. Marinaki initially claimed that she was off of work in order to help her mother with the grieving process, and to teach her mother to perform many of the tasks that had previously been performed by Ms. Marinaki's father. We find Ms. Marinaki's initial testimony on this issue to have been less than candid.

[58] Quite apart from any questions that her initial description of the reason for her absence might raise as to whether this would be an appropriate use of sick leave, it became apparent through the cross-examination of Ms. Marinaki and medical certificates subsequently produced, that the reason for Ms. Marinaki's absence was because she herself was ill. In particular, Dr. Morris Resnick (Ms. Marinaki's family physician) indicated in a letter dated July 29, 1992, that Ms. Marinaki could return to work on September 1, 1992, but that "... in view of the death of her father and the tremendous emotional impact that this had on her, [she] should be under as little stress at work as possible".

iv) Findings Regarding the Context of Ms. Marinaki's Return to International Operations

[59] We conclude from all of this that Ms. Marinaki was an ambitious and talented employee, who had become bored performing the repetitious tasks associated with her position in International Operations and frustrated by her inability to move into management. She had been trying to find a more challenging position outside of International Operations long before she alleges that Mr. Scarizzi's inappropriate behaviour started.

[60] We find that although Domenic Scarizzi had engaged in inappropriate conduct in the workplace prior to Ms. Marinaki's departure, her reason for taking the DAP assignment in 1989 had everything to do with her desire to advance her career, and nothing to do with Mr. Scarizzi's behaviour.

[61] Ms. Marinaki found her work at Revenue Canada both stimulating and exciting. Regrettably, it did not turn into a permanent position, and Ms. Marinaki was left with no alternative but to return to International Operations, much to her evident displeasure.

[62] The intervening death of her father clearly caused Ms. Marinaki tremendous emotional distress, necessitating her absence from the workplace for some four and a half months. It is clear from Dr. Resnick's July 29 letter that he did not anticipate that Ms. Marinaki's emotional difficulties would have fully resolved prior to her return to work in September, and that she would continue to be somewhat emotionally fragile thereafter.

IV. EVENTS DURING MS. MARINAKI'S TIME IN INTERNATIONAL OPERATIONS - SEPTEMBER, 1992 TO AUGUST, 1993

[63] Things had changed in International Operations during the time that Ms. Marinaki was at Revenue Canada. Pat Iannitti had been replaced as Director by André Thivierge and Domenic Scarizzi was acting in a managerial position. Agreements had been signed with more countries, which meant more work for International Operations and more pressure on staff.

[64] When it became apparent that Ms. Marinaki would be returning to International Operations in September of 1992, Branch management had to decide where she should be placed. There were two units processing claims under the Greek agreement, one of which was managed by Domenic Scarizzi. Mr. Scarizzi testified that he offered to have Ms. Marinaki in his unit as he believed that they had a good relationship, and that they would work well together.

[65] Mr. Scarizzi was aware that Ms. Marinaki had been away on sick leave over the summer of 1992, but did not know the reason for her absence. He was never provided with a copy of Dr. Resnick's July 29 letter, and was unaware of Ms. Marinaki's ongoing emotional fragility and her need to be under as little stress as possible.

[66] On her return to International Operations, Ms. Marinaki met with André Thivierge, who advised her that she would be working under Domenic Scarizzi. Ms. Marinaki testified that she 'had no problems with that'. Within the first couple of days Ms. Marinaki had a meeting with Messrs. Scarizzi and Thivierge during the course of which Ms. Marinaki described the experience that she had at Revenue Canada and expressed an interest in pursuing a career in Systems. Mr. Thivierge and Mr. Scarizzi encouraged Ms. Marinaki to pursue this goal. Ms. Marinaki was very pleased with the outcome of the meeting, believing that she would be able to find herself another position. Ms. Marinaki applied for a number of jobs in the Fall of 1992, without success.

[67] Ms. Marinaki stated that shortly after this meeting, Domenic Scarizzi came by her office and asked her to go for a drink after work. She declined. Ms. Marinaki does not know if Mr. Scarizzi was inviting her to go to an office social event, or if others from the office would be going along. Mr. Scarizzi denies ever inviting Ms. Marinaki to go for a drink after work. Given Ms. Marinaki's uncertainty as to the nature of the invitation, we are not prepared to read anything

into either her statement that the invitation was made or Mr. Scarizzi's denial that it occurred. Mr. Scarizzi could well have attempted to include Ms. Marinaki in an office activity shortly after her return to International Operations, and would have no reason to recall this eight years after the fact.

[68] Ms. Marinaki was provided with refresher training with respect to International Operations' current practices and procedures. The training was provided by Maria De Sousa, International Operations' Training Officer. Ms. De Sousa testified that Ms. Marinaki seemed frustrated and unhappy to be back in International Operations, and seemed to blame Mr. Thivierge for forcing her to return. According to Ms. De Sousa, while Ms. Marinaki complained about her frustration with the work, at no time did she mention any concern with respect to racism or sexism within International Operations, or inappropriate conduct on the part of Domenic Scarizzi.

[69] Ms. De Sousa stated that Ms. Marinaki acted as if she was 'too good' for a CR-5 position, showing absolutely no interest in the refresher course. Ms. Marinaki missed several days of training, and was a negative influence on the other trainees when she was there. Ms. De Sousa stated that Ms. Marinaki's language was very rough, and that she swore frequently.

[70] Ms. Marinaki recalled taking the refresher course, but very little else about it. She did not dispute Ms. De Sousa's description of her conduct.

[71] Chantal Daigle testified about her first encounter with Ms. Marinaki. Ms. Daigle met Ms. Marinaki in the washroom at work. Ms. Marinaki asked Ms. Daigle's name, and where she had worked before coming to International Operations. According to Ms. Daigle, Ms. Marinaki then told her that she should go back where she came from, because International Operations was Hell. Ms. Marinaki did not deny Ms. Daigle's description of their encounter.

i) The CS-2 Position with Pierre LaFrance

[72] According to Ms. Marinaki, everything was fine until an incident involving Pierre LaFrance. Ms. Marinaki had been trying to find a new position from the moment she returned to International Operations. She states that she met with Mr. LaFrance on October 6, 1992, and that in the course of the meeting Mr. LaFrance offered her an indeterminate CS-2 position in the Systems Department. Ms. Marinaki stated that she did not write an examination, nor was she involved in any other kind of competitive process for the position, apart from the interview. She was never provided with a notice of competition, statement of qualifications, job description or eligibility list in relation to the job.

[73] According to Ms. Marinaki, after Mr. LaFrance offered her the position, he asked her if he could speak to Mr. Thivierge to ensure that this arrangement met with his approval.

[74] Ms. Marinaki testified that she informed Mr. Thivierge that she had been offered an indeterminate position, and that Mr. Thivierge refused to let her go. When she did not hear further from Mr. LaFrance, she followed up with him and asked him what had happened. Ms. Marinaki says that Mr. LaFrance told her that he had spoken to Mr. Thivierge, although he

refused to tell her what Mr. Thivierge had said. Ms. Marinaki never went to work in the Systems Department.

[75] Mr. LaFrance confirms meeting with Ms. Marinaki, but contradicts many aspects of Ms. Marinaki's version of events. In particular, he denies ever offering her a CS-2 position, indeterminate or otherwise.

[76] Mr. Thivierge denies that Ms. Marinaki ever told him that she had the offer of an indeterminate position in Systems, or that he ever spoke to Mr. LaFrance for any reason related to Ms. Marinaki. He notes that he could not refuse to allow an employee to take a new, indeterminate position.

[77] Ms. Marinaki's version of events is internally inconsistent. She is adamant that Mr. LaFrance offered her an indeterminate CS-2 position on October 6, 1992. Unlike a DAP assignment which would require the approval of the home supervisor, an indeterminate job offer does not require the approval of the current supervisor. As a consequence, there would be no need to obtain Mr. Thivierge's approval before Ms. Marinaki could take the position in Systems. Further, Ms. Marinaki's evidence that she was offered an indeterminate position without a competition, that she never wrote an examination, or saw a notice of competition, statement of qualifications, job description or eligibility list is all inconsistent with established Public Service staffing practices. Her evidence is also inconsistent with that of Mr. LaFrance himself as well as that of Mr. Thivierge, both of whose evidence we prefer to that of Ms. Marinaki.

[78] Although this issue is not even mentioned in Ms. Marinaki's human rights complaint, a great deal of time was taken up with it during the hearing. The issue was obviously of considerable importance to Ms. Marinaki, who has been of the unwavering view since October of 1992 that she was wrongfully denied a CS-2 position. In his final submissions, Mr. Lister argued that Mr. Thivierge breached the *Canadian Human Rights Act* by failing to deal with Ms. Marinaki's complaints about Mr. Scarizzi in an appropriate fashion and by retaliating against Ms. Marinaki for having complained about Mr. Scarizzi. When it was pointed out that Ms. Marinaki's first complaint about Mr. Scarizzi's conduct was not made until December of 1992 - some two months after the discussions between Ms. Marinaki and Mr. LaFrance - Mr. Lister stated that the CS-2 job issue was not being put forward as a basis for liability under the *Canadian Human Rights Act*, but went to Mr. Thivierge's credibility. In our view, the entire CS-2 issue goes instead to Ms. Marinaki's credibility. While we accept that Ms. Marinaki may well sincerely believe that she was offered an indeterminate CS-2 position by Mr. LaFrance in October of 1992, we cannot conclude on a balance of probabilities that this ever happened. Ms. Marinaki desperately wanted to get a job in the Systems area, and somehow translated a general discussion with Mr. LaFrance into a concrete job offer. Her mistaken interpretation of these discussions also causes concern as to the reliability of Ms. Marinaki's perception of events generally.

[79] The CS-2 issue is significant for another reason. Ms. Marinaki already believed that Mr. Thivierge was somehow responsible for the fact that her DAP assignment at Revenue Canada was not extended beyond March of 1992, although her counsel acknowledged that there was no evidence to support this belief. It is clear that Ms. Marinaki was extremely angry at what she perceived to be further unwarranted interference by Mr. Thivierge with her career ambitions,

and that her relationship with Mr. Thivierge from October of 1992 onwards was negatively affected by this perception.

ii) Domenic Scarrizzi's Relationship with Marie Thibeault

[80] We heard a great deal of evidence about a personal relationship that developed between Domenic Scarizzi and an International Operations adjudicator by the name of Marie Thibeault. Ms. Marinaki testified about various concerns that she had with respect to the relationship, the negative effect that she perceived that it had on the workplace, and favouritism that she believed was being shown to Ms. Thibeault by Mr. Scarizzi as a result of the relationship—⁽¹³⁾. Ms. Marinaki's counsel made it clear in his final submissions, however, that it was not being alleged that Mr. Scarizzi's relationship with Ms. Thibeault constituted either sexual or ethnic harassment of Ms. Marinaki, but went instead to Mr. Scarizzi's credibility and judgment. Similarly, counsel did not attempt to rely on this evidence to allege differential treatment as part of this complaint.

[81] Both Mr. Scarizzi and Ms. Thibeault acknowledge that they were close friends during this period. There is no suggestion that the relationship was anything other than consensual. Although there is some question as to the timing of the commencement of the relationship, the evidence in this regard is not clear. Accordingly, while we have other concerns with respect to Mr. Scarizzi's credibility and judgment, we do not find this evidence to be particularly helpful in this regard.

iii) Sexist and Racist Jokes by Domenic Scarizzi in the 1990's

[82] Ms. Marinaki testified that Domenic Scarizzi did not continue to make racist and sexist jokes and comments after she returned from Revenue Canada. Although several other witnesses testified that his behaviour continued unabated into the 1990's, no one witnessed any comments made in Ms. Marinaki's presence in this period. When she was asked a second time if the behaviour continued, Ms. Marinaki said 'Not at the beginning'. She never went on, however, to describe any examples of this type of behaviour that occurred after she came back from Revenue Canada.

[83] Ms. Marinaki's denial that the behaviour continued into the 1990's would ordinarily be the end of the matter. However, Ms. Marinaki's testimony during the hearing was inconsistent with the theory of the case set out in the pleadings and in counsel's opening statements. In light of this inconsistency, the disagreement between Ms. Marinaki's evidence and that of other Commission witnesses, and having regard to Ms. Marinaki's disability, we were concerned as to the accuracy of her oral testimony. We have looked carefully at Ms. Marinaki's earlier written descriptions of what occurred in her workplace to see whether she had previously alleged that Mr. Scarizzi continued to make racist and sexist jokes and comments after she returned to International Operations. She did not. We also looked at what it was that Ms. Marinaki complained about when she did discuss her problems at work with some of her colleagues. Here, she focussed on her perception that her career progression was being blocked, particularly by Mr. Thivierge. ⁽¹⁴⁾

[84] We accept the evidence of Ms. Sangiorgi, Mr. Hunt, Ms. McShane, and Ms. Singh and find that Domenic Scarizzi did continue to make racist and sexist jokes and comments to some of his

colleagues during the 1990's. However, in light of Ms. Marinaki's specific denials, and the absence of other reliable evidence to suggest otherwise, we cannot conclude that Mr. Scarizzi continued to act that way towards Ms. Marinaki.

iv) The December 15 Confrontation

[85] Ms. Marinaki saw Dr. Resnick every two weeks throughout the fall of 1992. She states that she was seeing Dr. Resnick to discuss her own progress and how she was coping with her mother following the death of her father. Although Ms. Marinaki states that in September of 1992 she was very happy and did not have any problems, on a review of all of the evidence we are of the view that it is probable that Ms. Marinaki was continuing to suffer from the consequences of her father's death throughout the fall of 1992.

[86] There were no difficulties with respect to Ms. Marinaki's absences from the workplace for her appointments with Dr. Resnick until December 15, 1992. Ms. Marinaki states that when she returned from her appointment that day, Mr. Scarizzi began yelling at her, called her a 'Goddamn Greek', and demanded that she complete a leave form for her absence. According to Ms. Marinaki, Mr. Scarizzi then threw the leave form at her. Ms. Marinaki says that Mr. Scarizzi told her that she was only allowed one medical appointment per year, and showed her a memo to that effect. In the course of the confrontation, Mr. Scarizzi said things to her such as 'Don't give me that shit', and 'Vaffanculo', which Ms. Marinaki understands to mean 'Fuck You' in Italian. Ms. Marinaki testified that this was the first time Mr. Scarizzi had called her a 'Goddamn Greek' or said 'Vaffanculo' to her.⁽¹⁵⁾ According to Ms. Marinaki, no one else was required to count medical appointments as sick leave.

[87] The memo is in fact minutes of a management meeting which took place on September 9, 1992, which notes that employees are allowed one medical and one dental appointment a year, and that additional appointments must be counted as sick leave. Ms. Marinaki states that she had never seen the memo, nor was she aware of the policy. She states that Mr. Scarizzi had asked her to note her doctor's appointments on the calendar in his office, and that she had done so.

[88] Ms. Marinaki says that she completed the leave form, and the appointment was charged against her unused sick leave. While she continued to see Dr. Resnick on a regular basis, she was never again asked to use sick leave for any of these absences.

[89] Ms. Marinaki's August, 1993 statement notes that this incident was witnessed by a number of International Operations employees, including Ms. Sangiorgi. However, Ms. Sangiorgi was not asked anything about it during her testimony, nor was any one else called to confirm Ms. Marinaki's version of events.

[90] Not surprisingly, Mr. Scarizzi recalls this incident somewhat differently. According to Mr. Scarizzi, Ms. Marinaki was away from the office two or three times a week throughout the fall of 1992. He stated that Ms. Marinaki would sometimes tell him in advance that she would be away for a medical appointment, other times she would simply not show up for work, and later claim to have been at a medical appointment. Mr. Scarizzi says that he had no idea why she was going to all of these appointments. Although he had tried to be flexible with Ms. Marinaki, Mr.

Scarizzi states that he finally did ask her to complete a leave form because the situation was getting out of control. Mr. Scarizzi says that he gave Ms. Marinaki the leave form to complete at the end of December or the beginning of January, when attendance forms were handed out to all employees. He vehemently denies having a confrontation with Ms. Marinaki about the leave issue either on December 15 or at the end of the month, and further denies ever yelling at her, calling her a 'Goddamn Greek' or using the word 'Vaffanculo'. Mr. Scarizzi admits that he may have used the expression 'Vaffanculo' in the workplace from time to time, but insists that he never directed the term at anyone⁽¹⁶⁾.

[91] Mr. Scarizzi's testimony that Ms. Marinaki was away from the office two or three times a week throughout the fall of 1992 is at odds with the testimony of Ms. Marinaki, and more tellingly, with Mr. Scarizzi's own earlier description of events. In the response that Mr. Scarizzi prepared in relation to Ms. Marinaki's internal harassment complaint, he stated that Ms. Marinaki had approximately 7 or 8 appointments between September and mid-December of 1992. This is quite consistent with Ms. Marinaki's own description of the frequency of her appointments. We find that Mr. Scarizzi exaggerated the frequency of Ms. Marinaki's absences from the workplace in order to buttress his own position.

[92] There are other problems with Mr. Scarizzi's version of events: he insisted in his testimony that his polite request that Ms. Marinaki note her absence on December 15 as sick leave came at the end of the month when he was distributing monthly leave forms to all of the employees, however, his February, 1994 statement states that he left the form on her desk before she came back to work on December 15. Similarly, he testified that he wanted Ms. Marinaki to start completing the forms each time she went to an appointment, yet it is common ground that this was the only time that Ms. Marinaki was required to count a medical appointment as sick leave. Mr. Scarizzi's explanations for these discrepancies are not satisfactory.

[93] Finally, Ms. Marinaki testified that her first complaint to Mr. Thivierge was prompted by this confrontation. Both Ms. Marinaki and Mr. Thivierge agree that Ms. Marinaki came to see Mr. Thivierge sometime in December with her complaints about Mr. Scarizzi.

[94] In light of the foregoing, just as we rejected Mr. Scarizzi's testimony that he never used sexist or racist 'humour' in the workplace, we reject his explanation of this event in its entirety. He is simply not a credible witness. We find that there was a confrontation between Mr. Scarizzi and Ms. Marinaki on December 15 about her absences from work, and that Mr. Scarizzi raised his voice with Ms. Marinaki during this confrontation.

[95] Having concluded that the confrontation occurred, what did Mr. Scarizzi say to Ms. Marinaki? Ms. Marinaki alleges that Mr. Scarizzi yelled at her, calling her a 'Goddamn Greek' and saying 'Vaffanculo' to her. However, the statement that Ms. Marinaki prepared in 1993 in connection with her internal harassment complaint deals with this incident in some detail, but makes no mention of the 'Goddamn Greek' comment, although Mr. Scarizzi's use of the term 'Vaffanculo' is mentioned. Similarly, Ms. Marinaki's 'Statement of Particulars' supplementing her internal harassment complaint does not mention the 'Goddamn Greek' reference. Indeed, the first time that Ms. Marinaki alleges that Domenic Scarizzi ever called her a 'Goddamn Greek' was in September of 1994, in her response to the draft internal harassment report.⁽¹⁷⁾ It is not clear from

Ms. Marinaki's submissions, however, when this comment is supposed to have occurred. In light of these omissions, and having regard to our general concerns with respect to the reliability of Ms. Marinaki's testimony, we cannot find that Mr. Scarizzi called Ms. Marinaki a 'Goddamn Greek' on December 15, 1992.

[96] We are satisfied, however, that Mr. Scarizzi did use the term 'Vaffanculo' in anger in the course of the confrontation. Ms. Marinaki's testimony in this regard has never varied. Mr. Scarizzi acknowledged that it was an expression that he used on occasion, and other co-workers confirmed hearing Mr. Scarizzi use the expression in the workplace. While Mr. Scarizzi denies saying it in the course of this confrontation, as previously noted, we do not find Mr. Scarizzi at all credible.

[97] Although not explicitly argued, in our view, we must also consider whether Mr. Scarizzi singled out Ms. Marinaki for differential treatment with respect to her medical appointments, and if so, whether her sex or national or ethnic origin played any role in this.

[98] Mr. Shipley explained the policy regarding medical leaves, and confirmed that employees were permitted up to a half day a year for medical appointments. Regular appointments for ongoing conditions were to be taken as sick leave, although there is discretion in management to grant leave with pay in such circumstances. It is clear from the testimony of Mr. Shipley and others that a fair bit of latitude was extended to employees in this regard, and that the policy was only enforced where an employee was absent on a continuing basis.

[99] We simply cannot conclude on the basis of the evidence before us that there was any connection between Ms. Marinaki's sex or her national or ethnic origin and Mr. Scarizzi's selective enforcement of the medical leave policy. ⁽¹⁸⁾ A far more likely explanation for Mr. Scarizzi's actions was Ms. Marinaki's ongoing absences from work. It is clear from Ms. Marinaki's own testimony that she was away from the office on a regular basis to see Dr. Resnick. An employee's regular absences from the workplace are a matter of legitimate concern to an employer. While Mr. Scarizzi clearly did not handle the situation at all well, the fact is Ms. Marinaki was missing several hours of work once every two weeks, at a time when, by all accounts, resources in International Operations were stretched to the limit.

[100] While this whole situation could potentially raise issues with respect to the treatment of disabled employees, we must keep in mind that we are not dealing with a complaint based on disability, but rather a complaint of sexual and ethnic harassment.

v) Ms. Marinaki's December Complaint to Mr. Thivierge

[101] Ms. Marinaki and Mr. Thivierge agree that Ms. Marinaki came to see Mr. Thivierge in December, 1992 with complaints about Mr. Scarizzi's behaviour.

[102] According to Ms. Marinaki, she first took the sick leave memo to her union, who told her that the memo violated the terms of the collective agreement, and suggested that she speak to her Director. She says that she then went to see Mr. Thivierge. It is interesting to look at precisely what Ms. Marinaki's principle concern was in her meeting with Mr. Thivierge. Although Ms.

Marinaki's meeting with Mr. Thivierge was precipitated by her confrontation with Domenic Scarizzi on December 15, 1992, both Ms. Marinaki's oral testimony and her earlier written description of events make it clear that the main issue raised by Ms. Marinaki in her meeting with Mr. Thivierge was Ms. Marinaki's concern about the relationship between Mr. Scarizzi and Marie Thibeault.

[103] Ms. Marinaki testified that when she went to see Mr. Thivierge, she told him that Mr. Scarizzi and Ms. Thibeault were 'a bit more than friends' and that they were interfering with the work of the unit. Ms. Marinaki says that she also told Mr. Thivierge that she wanted a transfer out of the unit because Mr. Scarizzi was harassing her and using abusive language towards her.

[104] According to Ms. Marinaki, Mr. Thivierge asked her why she was saying these things about Mr. Scarizzi and Ms. Thibeault. He then told her to 'Go see yourself in the mirror, you stupid you'. Mr. Thivierge confirmed that Ms. Marinaki was only entitled to one medical appointment per year. Ms. Marinaki says that Mr. Thivierge told her that he would not transfer her out of the unit until the following September. Mr. Thivierge then called Mr. Scarizzi into the meeting, and told Ms. Marinaki to cooperate with him and to listen to what Mr. Scarizzi had to say. Mr. Thivierge said that Mr. Scarizzi had a lot of complaints about Ms. Marinaki, that he claimed that she had a negative attitude, and was not cooperating with him. Ms. Marinaki said that this had never been raised before, and that she asked Mr. Thivierge for examples of this behaviour, but he would not give them to her. According to Ms. Marinaki, Mr. Scarizzi did not say anything in the meeting, and she then left.

[105] Mr. Thivierge testified that Ms. Marinaki did come to see him sometime in December. He recalls the purpose of the meeting as being to discuss a potential DAP assignment for Ms. Marinaki. Mr. Thivierge explained to Ms. Marinaki that DAP assignments were temporarily frozen. Mr. Thivierge does not recall whether or not the issue of medical appointments and the use of sick leave was discussed, although he was aware from his discussions with Mr. Scarizzi that there was a concern about Ms. Marinaki's medical appointments.

[106] According to Mr. Thivierge, Ms. Marinaki told him that she was unhappy working in International Operations as it did not offer her a challenge. Mr. Thivierge recalls Ms. Marinaki raising a concern about the relationship between Mr. Scarizzi and Ms. Thibeault, and favouritism being shown towards Ms. Thibeault, although he is not sure if it was in the course of this meeting that this was raised. He says that when Ms. Marinaki did raise the issue with him, he asked her to elaborate, and that she declined to do so.

[107] Mr. Thivierge says that he discussed Mr. Scarizzi's relationship with Ms. Thibeault with Mr. Scarizzi. Mr. Scarizzi assured Mr. Thivierge that his friendship with Ms. Thibeault was not interfering with the workplace, and that she was not getting any special treatment. Mr. Scarizzi said that Ms. Thibeault was a keen employee, who took on additional assignments on a voluntary basis. Mr. Thivierge testified that this was consistent with his own observations of Ms. Thibeault as an employee, and he did not pursue the matter further.

[108] Mr. Thivierge denies that Ms. Marinaki ever raised any concerns with respect to harassment on the part of Mr. Scarizzi, or with respect to his use of abusive language.

[109] Domenic Scarizzi does not recall if there was a meeting in December although we did not understand him to deny that one could have occurred. He does not recall anything about any such meeting. Mr. Scarizzi denies that anyone ever spoke to him about his relationship with Ms. Thibeault and the effect that it was having on the workplace.

[110] We have no difficulty concluding that Ms. Marinaki told Mr. Thivierge that she was distressed by the relationship between Mr. Scarizzi and Ms. Thibeault, and that she wanted to be transferred out of the unit. It is also likely that during the course of this meeting, Ms. Marinaki expressed dissatisfaction with the way Mr. Scarizzi was treating her. We are not in a position, however, to make any specific findings with respect to the precise nature of the treatment complained of by Ms. Marinaki. In particular, we cannot find that Ms. Marinaki complained about Domenic Scarizzi using abusive language directed at her. Both Ms. Marinaki and Mr. Thivierge have consistently maintained their differing versions of this meeting, with Ms. Marinaki insisting that she told Mr. Thivierge about the abusive language and Mr. Thivierge being equally adamant that abusive language was never mentioned. We have noted our concerns with respect to the reliability of Ms. Marinaki's evidence elsewhere in this decision. In light of these concerns, and given that Ms. Marinaki bears the burden of proof on this point, we simply cannot find it more probable than not that Ms. Marinaki specifically mentioned Mr. Scarizzi's use of abusive language to Mr. Thivierge during the course of this meeting.

vi) March Medical Leave Issue

[111] In early March of 1993, Ms. Marinaki states that she had a confrontation with Mr. Scarizzi regarding the status of her sick leave account. Mr. Scarizzi had been advised by the Pay and Benefits department that Ms. Marinaki was in a negative position as far as her entitlement to sick leave was concerned. Ms. Marinaki says that she told Mr. Scarizzi that it was an administrative error, whereupon he began yelling at her, telling her that she had two days to clear up the matter or he would deduct the amount by which she was overdrawn from her pay. Ms. Marinaki states that Mr. Scarizzi again used the term 'Vaffanculo' in the course of the confrontation. Ms. Marinaki does not know if other employees were advised that they were ostensibly in a negative position with respect to their sick leave accounts.

[112] Ms. Marinaki says that she called Pay and Benefits and obtained written confirmation that the records were indeed in error. On March 15, 1993, Ms. Marinaki wrote to André Thivierge, forwarding a copy of the letter she had received from Pay and Benefits, and asked that the records be rectified. Her letter goes on to say: '... due to circumstances I wish to request a transfer from my present unit.' Ms. Marinaki did not explain what 'circumstances' she was referring to. The letter was copied to Ms. Marinaki's union representative as well as to Mr. Scarizzi.

[113] Mr. Scarizzi testified that the Director General's office had sent him a list of 3 or 4 employees in his unit, including himself, who appeared to have anomalies in their leave accounts. Mr. Scarizzi says that he raised the matter in a unit meeting, and simply asked employees to verify the status of their leave accounts and report any anomalies before the end of the financial year.

[114] Mr. Scarizzi states that he was not angry during this discussion, and that he never used the term 'Vaffanculo' with Ms. Marinaki. He further stated that he did not have the power to dock employees' pay. Mr. Scarizzi received a copy of Ms. Marinaki's letter to Mr. Thivierge. He had no idea what the 'circumstances' were that Ms. Marinaki referred to. He did not hear anything further with respect to this issue.

[115] For the same reasons we gave for our findings regarding the December 15 confrontation, we accept Ms. Marinaki's evidence that there was a heated discussion between herself and Mr. Scarizzi regarding the status of her sick leave account, and that Mr. Scarizzi again used the term 'Vaffanculo' directed at her in anger. Ms. Marinaki's evidence with respect to this issue has never wavered, with her more contemporaneous written statements describing the incident in terms similar to her oral testimony. It is also reasonable to conclude that Ms. Marinaki's March 15 letter to Mr. Thivierge was prompted by the confrontation with Mr. Scarizzi and the further deterioration in their relationship.

[116] While we are satisfied that the confrontation occurred as described by Ms. Marinaki, there is insufficient evidence before us to find that Ms. Marinaki was singled out by Mr. Scarizzi with respect to the status of her sick leave account because of either her sex or her ethnicity.

vii) Mr. Thivierge's Response to Ms. Marinaki's Letter

[117] Mr. Thivierge recalls an encounter with Ms. Marinaki around this time during which she told him how much she hated the work in International Operations. She said that she was going 'brain dead', and wanted a transfer out of International Operations or out of her unit. Mr. Thivierge said that he encouraged Ms. Marinaki to market herself and to look for other opportunities. Mr. Thivierge indicated that March and April was the busiest time of year in International Operations, and that a change in unit was not possible at that time. Mr. Thivierge anticipated shuffling the units in a few months, and asked Ms. Marinaki to try to hang on. Mr. Thivierge states that he received Ms. Marinaki's March 15 letter shortly after his discussion with her, and that having just discussed the question of a transfer with her in person, he did nothing further.

viii) The April 28 Meeting

[118] On April 28, 1993, Ms. Marinaki met with Mr. Thivierge, Mr. Scarizzi, Mr. Shipley and her union representative, André Gratton. Ms. Marinaki recalls very little about the meeting. André Gratton did not testify.

[119] Mr. Scarizzi, Mr. Thivierge and Mr. Shipley testified with respect to the April 28 meeting. All recall discussing Ms. Marinaki's frequent medical appointments. Mr. Thivierge and Mr. Scarizzi recall Ms. Marinaki complaining that she was being dealt with harshly by management, and that Mr. Scarizzi was 'on her case' about her appointments. Mr. Shipley and Domenic Scarizzi also recall a discussion regarding access to DAP assignments. All three agree that at no time during this meeting did Ms. Marinaki mention any concerns about either sexual or ethnic harassment in International Operations. There seemed to be a general perception amongst the management representatives that the meeting had been a productive one, that the air had been

cleared and a common understanding reached. Ms. Marinaki testified that she did not share this view.

ix) "The Harassment Continues"

[120] Mr. Shipley testified that he met Ms. Marinaki in the hall sometime shortly after the April 28 meeting. According to Mr. Shipley, Ms. Marinaki told him that 'the harassment continues'. Mr. Shipley said the entire encounter lasted 15-20 seconds. He did not know what Ms. Marinaki was referring to, or who was harassing her, and he did not ask. He did not follow up with her later to try to find out what she was talking about, figuring she could call him if she wanted to. He also testified that there was a harassment complaint process in place that she could access if she wanted to, although he did not tell Ms. Marinaki about it and does not know if anyone else had. He does not know if managers were briefed on the harassment policy, but does know that it was not posted on office bulletin boards.

[121] Rather than follow up with Ms. Marinaki when she told him the harassment was continuing, Mr. Shipley told Ms. Marinaki's Director, André Thivierge, about 'a potential situation'. Mr. Thivierge told Mr. Shipley that it was 'a performance issue', and Mr. Shipley did nothing further. Mr. Shipley acknowledged that, without knowing who it was that Ms. Marinaki was complaining about, his telling Mr. Thivierge of Ms. Marinaki's comments had the potential to 'blow the whole thing up'. He also acknowledged that, with the benefit of hindsight, he could have gone back and followed the matter up with Ms. Marinaki.

x) DAPs Unfrozen

[122] By memo dated May 13, 1993, International Operations employees were advised that the freeze on DAP assignments had been lifted, and that requests to apply for DAPs would be considered on a first come, first served basis. Ms. Marinaki immediately applied to participate in the DAP program. Her request was approved by Mr. Thivierge, again 'subject to operational requirements'. It is clear from the narrative that Ms. Marinaki prepared in support of her internal harassment complaint that she viewed this as another attempt by Mr. Thivierge to block her progress. Ms. Marinaki did not get another DAP assignment.

xi) Dr. Resnick Gets Involved

[123] On May 25, 1993, Ms. Marinaki's family physician, Dr. Morris Resnick, wrote to Mr. Thivierge complaining about the restrictions being imposed on Ms. Marinaki with respect to her attendance for medical appointments. Dr. Resnick states that 'restricting her to one Physicians (sic) visit a year is putting undue pressure on her and is a form of harassment.' Dr. Resnick goes on to observe that Ms. Marinaki should be transferred out of the division, in view of the stress that she was under. Finally, Dr. Resnick suggested that Ms. Marinaki could be assessed by a Health and Welfare physician if Mr. Thivierge so desired.

[124] Having had no response from Mr. Thivierge, on June 15, 1993 Dr. Resnick wrote directly to Dr. Mohanna, the Medical Director at Health and Welfare. Dr. Resnick noted that Ms. Marinaki had been unhappy about returning to International Operations, and that Mr. Thivierge

had told her that if she found another position, they 'would talk about it'. Dr. Resnick stated that 'Since then, she has had five offers of transfer, within the Department of Health and Welfare ... but when they spoke to Mr. Thieverge (sic), he blocked all the moves.' Dr. Resnick then asked Dr. Mohanna to evaluate Ms. Marinaki and suggest what help she could get for her intense stress. Dr. Resnick's letter to Dr. Mohanna makes no mention of any inappropriate conduct on the part of Domenic Scarizzi.

[125] Mr. Thieverge responded to Dr. Resnick's letter on June 29, having just received Dr. Resnick's letter. Mr. Thieverge noted that if Ms. Marinaki had obtained an offer of transfer, he could not have prevented her from going. Mr. Thieverge stated that he had never refused to give Ms. Marinaki a letter of reference, and that he was willing to do anything possible to help Ms. Marinaki get a permanent transfer. Mr. Thieverge stated that until he got Dr. Resnick's letter, he was unaware that Ms. Marinaki was under intense stress.

[126] Dr. Resnick died before this hearing, and thus was unavailable to testify. It is reasonable to assume, however, that the source of his information was Ms. Marinaki. We do not know what the five offers of transfer that Dr. Resnick refers to were, and Ms. Marinaki did not tell us. Further, there is nothing in the evidence that would suggest that in May of 1993 Ms. Marinaki was being told that she could not attend her medical appointments. While Dr. Resnick's description of Ms. Marinaki as being under intense stress at this time appears reasonable, it seems that Ms. Marinaki was either not being candid with her physician as to what was going on in her workplace, or, perhaps as a result of this stress, had become confused or had misconstrued what had happened.

[127] It is also clear that at least as of May, 1993, Ms. Marinaki's employer had actual notice that Ms. Marinaki was under medical treatment for stress.

xii) The Intake Issue

[128] By the 1990's, International Operations had centralized the system for receiving incoming mail. Each week, one adjudicator would be assigned to process incoming correspondence for the unit, matching it to the appropriate files for action. Adjudicators were assigned to intake duties on a rotational basis. Records were kept as to what correspondence was in the area at the start of the week, how much was processed during the week, and what was left over on Friday. Work left undone at the end of one week was then to be dealt with on a priority basis the following week.

[129] Around the beginning of June, Ms. Marinaki became concerned that she always seemed to follow Ms. Sangiorgi in the Intake area, and that Ms. Sangiorgi did not clear the area by the end of the previous week, leaving additional work for Ms. Marinaki to do. Ms. Marinaki says that she raised her concerns with Mr. Scarizzi several times, but that nothing was done.

[130] On June 7, 1993, Mr. Scarizzi sent Ms. Marinaki a memo regarding their several discussions about intake duties. Mr. Scarizzi's memo indicates that the week before Ms. Marinaki had not dealt with the leftover correspondence at all, let alone on a priority basis. Mr. Scarizzi reaffirms that intake duties were part of Ms. Marinaki's responsibilities. It should be noted that the tone of Mr. Scarizzi's memo is both polite and professional.

[131] On June 9, 1993, Ms. Marinaki responded to Mr. Scarizzi's memo with one of her own. Ms. Marinaki's memo notes that the employee working in the Intake area the previous week had been absent, and that 'no planning action was taken for the duration of the employees (sic) absence'. Ms. Marinaki's memo goes on to instruct Mr. Scarizzi that 'Alternate plans must be made in circumstances such as (sic); and responsibility must not rely (sic) on the next employee'. Not only is Ms. Marinaki's responding memo aggressive in tone, it does not address Mr. Scarizzi's concern with respect to her refusal to process left-over correspondence on a priority basis, and indeed implicitly confirms that refusal. [\(19\)](#)

[132] It is difficult to understand the nature of Ms. Marinaki's concerns with respect to the Intake area duties. Given that performance was measured on the basis of throughput, it should not make any difference how much correspondence was left over at the beginning of any given week, the important thing being how much correspondence the employee processed in the course of the week. By all accounts, Ms. Marinaki was something of a perfectionist, and took great pride in keeping current with all of her tasks. It may well be that it irked her that her work ethic was not shared by others. It seems that Ms. Marinaki may also have demanded more of herself than was asked by her manager, in that she wanted to leave a clean desk at the end of her turn in the Intake area. As a result, she may have viewed the accumulated backlog as a barrier to her achieving the goal that she set for herself. In either event, the stress that she suffered with respect to Intake duties appears to be largely self-induced.

[133] There was some suggestion that Intake duties were not allocated fairly, and that female employees may have been singled out for more than their fair share of this undesirable task. Suffice it to say that the evidence before us is insufficient to support such a finding.

xiii) The July 7 Incident

[134] Ms. Marinaki states that Mr. Scarizzi also called her a 'Goddamn Greek' during a confrontation that took place in the Intake area. This incident is described in the narrative prepared by Ms. Marinaki in support of her internal harassment complaint as having occurred on July 7, 1993. Although Ms. Marinaki's narrative description seems to suggest that the incident was witnessed by her co-workers, no one else testified to having observed this confrontation.

[135] It is noteworthy that although the description of the incident in Ms. Marinaki's written narrative closely matches the description given in her oral testimony in many respects, the written narrative makes no mention of the 'Goddamn Greek' comment. It does mention Domenic Scarizzi having used 'his favourite words', which Ms. Marinaki described elsewhere as 'Vaffanculo'. Given that the written narrative was prepared only a couple of months after the incident in question, this discrepancy alone is sufficient to cast doubt on Ms. Marinaki's oral testimony more than six years later. When coupled with the fact that no one else supported Ms. Marinaki's version of events, we cannot conclude on a balance of probabilities that Mr. Scarizzi did call Ms. Marinaki a 'Goddamn Greek' on this occasion.

xiv) The Reference Request

[136] Upon receiving a copy of Mr. Thivierge's letter to Dr. Resnick, Ms. Marinaki decided to take Mr. Thivierge up on his statement that he would do anything possible to help Ms. Marinaki. On July 12, 1993 she wrote Mr. Thivierge requesting that both he and Mr. Scarizzi provide her with a letter of reference no later than July 16, 1993. Mr. Thivierge did not provide Ms. Marinaki with such a letter, stating that he was not in a position to assess her work performance, and that what he did know of Ms. Marinaki's performance from Mr. Scarizzi was not positive. Mr. Thivierge's explanation for his apparent retreat from the purported position of full support for Ms. Marinaki expressed in his letter to Dr. Resnick was somewhat disingenuous.

[137] Mr. Thivierge does not recall asking Domenic Scarizzi to provide Ms. Marinaki with a letter of reference, and there is nothing in the evidence to indicate that he did.

xv) **The July 14 Meeting with André Thivierge**

[138] Ms. Marinaki met again with André Thivierge on July 14, 1993. Ms. Marinaki dealt with this meeting briefly in her oral testimony, but provided more detail in her written narrative where she states that after she gave Mr. Thivierge her letter of July 12:

... I also told André that I'm unhappy in the unit, and that I wanted a transfer. He informed me that he is not willing to transfer me out as he will be re-shuffling the employees in September. **I told him at that point, that I can't tolerate the situation - 'As you are well aware that Domenic is dating Marie.' I was pretty open about it and that I can't live with the situation.** And I told him that they were following me, that I knew that I was monitored at all times, and I did not appreciate his attitude and the way he talks to me, whenever he talks to me. He [Mr. Thivierge] said: 'If you don't like it, just quit.' I said 'I'm not quitting'. And I said: 'I'm not here to hear that, I want you to solve the situation.' And he informed me that: 'I will make sure that you will be here for the next five years.' He stood up angrily and with a very strong and aggressive way, he went towards his windows and he turned around and said to me: 'Get the hell out of my office.' (emphasis added)

At this point, Ms. Marinaki left Mr. Thivierge's office and went home. Ms. Marinaki does not recall if she ever saw Mr. Thivierge again after this meeting, and there is no evidence of any further direct contact between the two.

[139] Mr. Thivierge recalls that the principle subject discussed in this meeting was Ms. Marinaki's belief that Mr. Thivierge had prevented her from going on a DAP assignment the previous fall. He denies raising his voice or saying that he would make sure that Ms. Marinaki stayed in International Operations for the next five years.

[140] Given the conflict between Ms. Marinaki and her supervisors over the previous several months, it is hard to imagine that Mr. Thivierge would be intent on keeping Ms. Marinaki in International Operations when she did not want to be there. Clearly, even though Ms. Marinaki was a talented and productive adjudicator, by this point life would have been much easier for all concerned if Ms. Marinaki had been able to obtain a satisfactory job elsewhere. Even if we were

to accept Ms. Marinaki's version of this meeting, it is apparent from her own description of her discussion with Mr. Thivierge that, as of July 12, 1993, what was troubling her most was neither sexual nor ethnic harassment by Domenic Scarizzi, but Mr. Scarizzi's relationship with Ms. Thibeault. While Ms. Marinaki noted that she did not appreciate the way that Mr. Scarizzi talked to her, it is the relationship with Ms. Thibeault that she says she cannot live with.

[141] This view is confirmed when, further on in Ms. Marinaki's narrative she recounts a subsequent discussion with Mr. Scarizzi:

A couple of days later, Domenic came and he wanted to see how I was feeling and what was happening, and I just told him that I don't appreciate what's going on and that he's dating Marie, and he makes me feel uncomfortable and I wanted out of the unit

xvi) The PM-3 Competition

[142] In early 1993, International Operations management began a staffing action to fill vacancies at the PM-3 level for positions as Managers. Ms. Marinaki competed in this competition, as did Domenic Scarizzi and 20 other candidates. Ms. Marinaki scored 19 out of a possible 90 marks on a written exam, and thus was not called for an interview. Mr. Scarizzi scored 55 points, meeting the minimum standard to proceed further, and was interviewed. The results of the competition were released on August 11, 1993. Mr. Scarizzi was one of five successful candidates, and was included on the eligibility list arising out of the competition. Ms. Marinaki was unhappy with the results of the competition, believing that the merit principle had not been adhered to.⁽²⁰⁾

xvii) The August 17 Confrontation Regarding Intake Duties

[143] Ms. Marinaki states that she became concerned about the frequency of her assignments to the intake area. She states that she was assigned to work in the intake area every other week. According to Ms. Marinaki, when she asked Mr. Scarizzi why intake duties were not being rotated amongst all of the employees, he said that he wanted her to do it and that was all there was to it. When she told him that she was not going to do it, Mr. Scarizzi said 'Fuck you' to her.

[144] Ms. Marinaki states that she was so upset by Mr. Scarizzi's conduct that she called the Canadian Human Rights Commission. The Commission apparently referred Ms. Marinaki to the Public Service Commission, who in turn referred her to the Departmental Harassment Co-ordinator. Ms. Marinaki met that same day with the Harassment Co-ordinator. Ms. Marinaki stayed home from work for the next few days, and then filed a complaint of harassment under the internal harassment complaint process. She also filed a grievance dealing with the same issues.

[145] Domenic Scarizzi testified that the schedule for intake duties had been modified through the summer to take employees' vacation schedules into account. When Mr. Scarizzi asked Ms. Marinaki to go into the intake area on August 17, she refused, telling him to write her a letter. Ms. Marinaki subsequently went to Personnel, and did not return to the office.

[146] We were provided with a copy of the schedule for intake and telephone duties for July and August of 1993. In this nine week period, Ms. Marinaki was scheduled to perform intake duties for two weeks, as was one other (male) employee. Ms. Marinaki was also scheduled for two weeks of telephone duty, as was Guida Sangiorgi. Mr. Scarizzi stated that during this period there were seven adjudicators in his section. The schedule certainly suggests that Ms. Marinaki was being asked to assume more than her fair share of intake and telephone duties during the period in question. We have not, however, been provided with schedules for any other period covered by the complaint. We do not know which other employees were on vacation, and for how long, nor do we know whether other employees had performed more than their share of intake and/or telephone duties in the months leading up to the summer of 1993. As a result, while based upon this single document we might suspect that Mr. Scarizzi may have assigned Ms. Marinaki more than her share of undesirable tasks over the summer of 1993, we cannot conclude on a balance of probabilities that she was singled out for differential treatment on the basis of either her sex or her national or ethnic origin.

V. EVENTS AFTER AUGUST, 1993

i) The Investigation of Ms. Marinaki's Internal Harassment Complaint

[147] On August 23, 1993 Ms. Marinaki filed a complaint under the HRDC internal harassment complaints process wherein she complained of harassment, abuse of authority, intimidation, and discrimination on the basis of sex, marital status and ethnic origin. Ms. Marinaki indicated that the infractions were committed by her manager (Mr. Scarizzi) and were knowingly permitted by her Director (Mr. Thivierge). Although Ms. Marinaki's letter of complaint is sketchy, she subsequently provided a tape recording detailing her complaint. The transcribed narrative largely reflects the same issues which form the subject of Ms. Marinaki's human rights complaint.

[148] The HRDC harassment policy indicates that, depending on the circumstances, steps may be taken immediately upon the filing of a complaint to separate the complainant from those named in the complaint, both physically and hierarchically. In this case, Ms. Marinaki's letter of complaint asked that she be transferred to a temporary position outside of International Operations, and that is what was done.

[149] Ms. Marinaki's internal complaint was investigated by two HRDC employees selected by the respondent. The investigation was carried out over a period of some fourteen months. Ten individuals were interviewed and documentation, including correspondence, minutes of meetings, leave records, work rotation schedules, and collective agreement information was reviewed.

ii) The Internal Harassment Report

[150] The report of the internal harassment investigation was delivered to Monique Plante, the Assistant Deputy Minister of the Income Security Programs Branch on October 11, 1994. The

report found numerous instances of poor management on the part of both Mr. Scarizzi and Mr. Thivierge but did not sustain Ms. Marinaki's complaint.

[151] As far as Mr. Scarizzi's conduct was concerned, the investigators concluded that Mr. Scarizzi did use foul, abusive or offensive language in the workplace, and regularly made racist and sexual comments. The investigators concluded that Ms. Marinaki reasonably perceived Mr. Scarizzi's comments as being directed towards her. Although not clear from the report, it appears that the investigators nevertheless found that while Ms. Marinaki may have perceived Mr. Scarizzi's behaviour to have been directed at her, in fact it was not. The HRDC harassment policy defines harassment as: '... any improper behaviour by an employee that **is directed at** and is offensive to another employee, or endangers an employee's job or threatens the economic livelihood of the employee.' (emphasis added) As a result, this aspect of Ms. Marinaki's complaint was not sustained.

[152] The investigators further concluded that management was not consistent in its treatment of employees as far as attendance at medical appointments was concerned, and lacked sensitivity in dealing with employees' medical needs. Notwithstanding this finding, the investigators concluded that Mr. Scarizzi had been correct in his treatment of Ms. Marinaki, given her frequent visits to her doctor. The investigators found nothing to support Ms. Marinaki's allegations regarding the negative effect that Mr. Scarizzi's relationship with Ms. Thibeault purportedly had on the workplace. Similarly, the investigation did not support Ms. Marinaki's allegations of favouritism towards Ms. Thibeault.

[153] Finally, the investigation dismissed Ms. Marinaki's allegations of intimidation and abuse of authority on the part of Mr. Scarizzi as they related to Mr. Scarizzi's alleged threats to stop Ms. Marinaki's pay cheque and denial of access to DAP assignments. The investigators noted that Ms. Marinaki did not seem to understand the difference between transfers, deployments, and new positions, and DAP assignments or secondments.

[154] Insofar as Ms. Marinaki's allegations against Mr. Thivierge were concerned, the internal investigation concluded that Mr. Thivierge had not taken adequate action to alleviate the strong perception of unfair treatment within International Operations. Although they did not deal explicitly with the alleged offer of a CS-2 position by Pierre LaFrance, the report concluded that management had acted appropriately by establishing fair rules regarding DAP assignments, and that Ms. Marinaki had misunderstood Mr. Thivierge's actions with respect to finding her a new job. The investigators found no evidence to support Ms. Marinaki's claim that Mr. Thivierge used abusive language towards her, but did find that Mr. Thivierge did not treat employees in a consistent fashion. As far as Ms. Marinaki's complaint that Mr. Thivierge did not respond appropriately to her complaints about Mr. Scarizzi is concerned, the investigators concluded that Mr. Thivierge did deal with Ms. Marinaki's allegations about Ms. Thibeault, but that he did not follow up appropriately regarding Ms. Marinaki's complaints of Mr. Scarizzi's use of abusive language.

[155] The internal report noted that Ms. Marinaki was unhappy with the work organization after her return to International Operations in September, 1992, and that she displayed a negative attitude and inappropriate and difficult behaviour thereafter. The investigators also noted that

there was a mistrust of management amongst some employees, and that a number of employees had expressed concerns about possible recriminations for having participated in the interview process. Indeed, one employee categorically refused to be interviewed for fear of negative career consequences.

iii) HRDC's Response to the Internal Harassment Investigation

[156] Ed Tamagno testified on behalf of the Respondent. Mr. Tamagno was the Director General of International Benefits and Foreign Affairs, and as such was charged with responsibility for dealing with the results of the internal investigation of Ms. Marinaki's complaint. Mr. Tamagno testified that in his view, the investigators had concluded that there was no substance to Ms. Marinaki's complaints of harassment and discrimination. Although the HRDC investigators had made negative findings about management within International Operations, in Mr. Tamagno's opinion, the investigators were not competent to reach the conclusions that they did, and had not interviewed enough people to arrive at the conclusions that they reached. The findings of the internal investigation did not coincide with Mr. Tamagno's own observations of the workplace, and therefore he did not take any action as a result of the report.

[157] In cross-examination, Mr. Tamagno explained that he did not believe that the HRDC investigators were competent because they lacked managerial experience. Mr. Tamagno did not, however, know the extent of the investigators' managerial experience. Although Mr. Tamagno believed that the investigators did not interview enough employees to justify their conclusions, he did not know how many employees had been interviewed in the course of the internal investigation, or who they were. He had never seen the statements given by the various witnesses, and did not know what had been said to the investigators. Mr. Tamagno professed to be in touch with what was going on in the workplace, and clearly felt that he was the better judge of the issues, however he was unaware of many of the difficulties between Ms. Marinaki and her supervisors in the year leading up to her internal harassment complaint.

[158] Once the internal harassment report was released, Mr. Shipley wrote to Assistant Deputy Minister Plante suggesting two particular training courses that he felt would be beneficial 'to those concerned'. Senior management was subsequently advised that all employees of the group had undergone training on harassment issues, and that both Mr. Scarizzi and Mr. Thivierge had been further sensitized by taking two Public Service Commission courses on the subject. A number of International Operations employees testified that they never received any kind of training regarding harassment or the Departmental harassment policy. Mr. Scarizzi stated that he did not recall ever taking any courses designed to sensitize him to issues of harassment. Mr. Thivierge testified that he did not take either of the courses recommended by Mr. Shipley, although he did take a staff relations course that had a component on harassment. Both Mr. Thivierge and Mr. Scarizzi took a course on 'Surviving Harassment Charges' designed for those wrongfully accused of harassment. Suffice it to say that the course, which dealt with strategies for fighting allegations of harassment, could by no means be considered a course designed to sensitize managers to issues of harassment.

iv) Ms. Marinaki's Grievance

[159] The grievance that Ms. Marinaki filed in connection with these matters was held in abeyance pending the findings of the internal harassment investigation. Once the internal report was delivered, various attempts were made to resolve Ms. Marinaki's situation, all of which were unsuccessful. On January 8, 1996, Monique Plante dismissed Ms. Marinaki's grievance at the final level on the basis that she was satisfied with the findings of the internal investigation and was not prepared to intercede in the matter.

v) Assignments Given to Ms. Marinaki During the Internal Investigation

[160] Ms. Marinaki's letter of complaint asked that she be transferred to a temporary position outside of International Operations. HRDC initially found Ms. Marinaki a three-month term position in the National Benefits Division at the CR-5 level. The term was subsequently extended, and Ms. Marinaki spent a total of eight months in National Benefits. In May of 1994, Ms. Marinaki found herself an assignment in HRDC Assignment Services, where she stayed until September of that year, when she was involved in a car accident and was off of work until February, 1995. By this time the internal investigation had been completed and the investigation report had been delivered. Ms. Marinaki's grievance was still outstanding, however, and it was decided not to return her to International Operations pending the outcome of the grievance. Ms. Marinaki then moved through a series of temporary positions, including a six-month stint in the Systems Branch. ⁽²¹⁾

[161] Serge Rainville took over from Monique Plante as Assistant Deputy Minister of the Income Security Programs Branch in the late summer of 1995. Mr. Rainville endeavoured to negotiate a resolution to Ms. Marinaki's case, ultimately without success. During the settlement discussions, Mr. Rainville had Ms. Marinaki work in his office for a period of three months starting in November, 1995. Ms. Marinaki's entire workday was to be devoted to finding herself another position. Mr. Rainville provided \$5,000 for training for Ms. Marinaki to assist her in her job search. He further agreed to provide her with employment references, should any such references be required. Mr. Rainville testified that if Ms. Marinaki was not successful in finding another job in three months, his position was that she would have to go back to International Operations.

[162] Ms. Marinaki states that during the period of the internal investigation, the positions in which she was placed were both meaningless and unsatisfactory. She states that during this period she was not kept advised of what was happening, and was often moved from position to position on very short notice. Ms. Marinaki alleges that the respondent monitored her performance and her use of sick leave, and kept records of her performance without making her aware of such records, in violation of HRDC's disciplinary policies. Ms. Marinaki says that Mr. Thivierge continued to be involved in decisions regarding her, contrary to the HRDC Harassment Policy. In final argument, counsel for the Canadian Human Rights Commission and Ms. Marinaki were clear that they viewed all of these matters strictly as retaliation for Ms. Marinaki having complained of discrimination and harassment. The issue of the allegations of retaliation will be dealt with further on in this decision.

vi) Negative Employment References

[163] Ms. Marinaki's pre-hearing statement of issues states that HRDC knowingly and intentionally frustrated her attempts to secure employment outside of International Operations by providing unfair and inaccurate references regarding her abilities and work performance. Ms. Marinaki testified to her belief that this was done in retaliation for her complaints of harassment and discrimination.

[164] Ms. Marinaki mentioned two specific examples where she says that this happened. The first was in relation to the purported offer of a CS-2 position in October, 1992, which we have already dealt with. It is worth repeating that this pre-dates any complaint of harassment or discrimination. The second instance mentioned by Ms. Marinaki related to an AS or PM position in the Appeals and Controls section of International Operations. According to Ms. Marinaki, she had applied for a position, but was not called for an interview. When Ms. Marinaki subsequently learned that the position had been filled, she telephoned Kathleen Herb, who had evidently been involved in running the competition. Ms. Marinaki stated that Ms. Herb told her that she had 'been turned down in references'. Ms. Marinaki testified that Ms. Herb told her that three references had been sought - one from Mr. Scarizzi, one from Mr. Haney (who supervised Ms. Marinaki after she left International Operations in 1993) and one from a Ms. Bordeleau. According to Ms. Marinaki, Ms. Herb told her that Mr. Scarizzi's reference was negative - he said that Ms. Marinaki was not a team player, and that she was unreliable and uncooperative.

[165] Ms. Herb did not testify, nor did Ms. Bordeleau. Mr. Haney does not recall ever speaking to Ms. Herb, although he does not deny that he could have. Mr. Scarizzi denies ever being contacted by anyone for a reference for Ms. Marinaki.

[166] While we did not find Mr. Scarizzi to be a credible witness⁽²²⁾, in light of our concerns with respect to Ms. Marinaki's reliability as a witness, and in the absence of any corroboration of her hearsay evidence, we are not satisfied on a balance of probabilities that Mr. Scarizzi did in fact provide Ms. Herb with a negative reference regarding Ms. Marinaki as she has alleged. It is therefore unnecessary to consider the issue of retaliation in this regard.

vii) Ms. Marinaki's Return to International Operations in February, 1996

[167] Despite all of the efforts made to find a new job for Ms. Marinaki, these efforts were ultimately unsuccessful. There is evidence that positions were available, although Ms. Marinaki states that the positions were not acceptable to her for various reasons. It is clear that by the end of 1995, Mr. Rainville and others were questioning the sincerity of Ms. Marinaki's efforts to find another job and the good faith of her settlement efforts.

[168] On January 8, 1996 Ms. Plante rendered her decision with respect to Ms. Marinaki's grievance at the final level of the grievance process. With both Ms. Marinaki's internal harassment complaint and grievance having been dismissed, and no other position having been found for Ms. Marinaki, the decision was made by Mr. Tamagno to return Ms. Marinaki to International Operations. After she was advised that she would have to go back to International Operations, Ms. Marinaki went off on sick leave. On February 1, 1996 Dr. Blattel (Ms. Marinaki's new family physician) wrote a note to Mr. Tamagno wherein he advised Mr. Tamagno that Ms. Marinaki could return to work on February 19, but that she '... must not return

to Place Vanier. Her old workplace causes her too much stress, and return there may precipitate a prolonged absence.' On February 8, 1996 counsel retained by Ms. Marinaki wrote Mr. Shipley and Mr. Tamagno reiterating the medical concerns regarding returning Ms. Marinaki to International Operations.

[169] Mr. Tamagno stated that operational requirements compelled him to return Ms. Marinaki to her substantive position in International Operations. With respect to the health concerns expressed by Dr. Blattel, Mr. Tamagno stated that he had no knowledge of her medical condition and no first hand knowledge of the nature of the stress caused to Ms. Marinaki. He did not know whether she was on any medication. He did not try to contact Dr. Blattel for additional information about Ms. Marinaki's condition or seek an independent medical assessment of Ms. Marinaki's condition. Mr. Tamagno did not himself have any medical training. Nevertheless, he concluded that Ms. Marinaki's physician was not in a position to make such a determination regarding the risk to Ms. Marinaki's health, and directed that she return to International Operations.

[170] Ms. Marinaki went back to work in International Operations on February 19, 1996. Two days later she suffered a panic attack and was removed from the workplace in an ambulance. Ms. Marinaki has not worked since. As noted earlier, she suffers from Major Depression and is currently receiving Long-Term Disability benefits.

viii) Failure to Complete Forms

[171] Some time after Ms. Marinaki left the workplace in February, 1996 she decided to apply for Worker's Compensation and Long Term Disability benefits. She encountered significant delays in having the necessary forms filled out by HRDC. Ms. Marinaki did not receive a Record of Employment for some three months after she was struck off strength at HRDC, and thus was unable to collect Employment Insurance Sick Leave benefits. Claims for reimbursement under the Departmental Health Care Plan were delayed. Counsel for Ms. Marinaki submitted in final argument that the delays in processing Ms. Marinaki's benefit forms constituted acts of retaliation against Ms. Marinaki for having complained of harassment and discrimination in the workplace. This issue will be discussed along with the other allegations of retaliation further on in this decision.

VI. PSYCHIATRIC EVIDENCE

[172] The Commission called Dr. Anna Maria Sokolowska, who was qualified as an expert in Psychiatry. Dr. Sokolowska has treated Ms. Marinaki since June 1997, following a referral from Dr. Blattel.

[173] Dr. Sokolowska described Ms. Marinaki's symptoms in 1997 as acute depression and anxiety. Ms. Marinaki was suffering from poor sleep patterns, scattered thinking and social withdrawal. Ms. Marinaki's memory and concentration were impaired, she felt that she was unworthy, and did not wish to live. Based upon the presence of these symptoms, and applying

the diagnostic criteria from DSM-IV, the diagnostic manual of the American Psychiatric Association, Dr. Sokolowska diagnosed Ms. Marinaki as suffering from a major depression with anxiety. Dr. Sokolowska has treated Ms. Marinaki with major anti-depressant medications and therapy focussed on rebuilding Ms. Marinaki's self-esteem.

[174] Dr. Sokolowska also testified with respect to Ms. Marinaki's current psychiatric state. According to Dr. Sokolowska, Ms. Marinaki 'is in poor shape'. She is acutely anxious, and may be suicidal. Dr. Sokolowska anticipates that this condition would manifest itself in Ms. Marinaki's testimony through crying, scattered thought and an inability to fully articulate her thoughts.

[175] Dr. Sokolowska described Ms. Marinaki as suspicious and mistrustful. She stated that while Ms. Marinaki is always in touch with reality, her illness may affect her perception of reality.

[176] At the time that she initially assessed Ms. Marinaki in 1997, Dr. Sokolowska was of the opinion that Ms. Marinaki was disabled and unable to return to work. She remains of that opinion today. According to Dr. Sokolowska, much of Ms. Marinaki's potential for recovery is dependant upon the outcome of these proceedings. Once this hearing is behind her, Ms. Marinaki will require time to 'cool down', followed by a period of retraining before she will be able to return to work. Ms. Marinaki's return to work should be carried out in accordance with a reintegration plan.

[177] Dr. Sokolowska testified that Major Depressive disorders are caused by loss, whether it be the loss of a person close to the patient, or loss of some other kind. Internalized anger can also lead to this condition. It is Dr. Sokolowska's opinion that Ms. Marinaki's problems were caused by harassment in the workplace. Dr. Sokolowska bases this opinion on her understanding that Ms. Marinaki did not have a previous history of psychiatric problems. Dr. Sokolowska stated that while Ms. Marinaki had various stressors in her life such as the breakdown of her first marriage and the death of her father, she had coped with these matters, and they had not affected her ability to function.

[178] We accept Dr. Sokolowska's diagnosis that Ms. Marinaki is suffering from Major Depression. This is a matter clearly within Dr. Sokolowska's expertise. The symptoms described by Dr. Sokolowska as indicating the presence of Major Depression are consistent with DSM-IV. Indeed, the respondent does not take issue with the diagnosis as it relates to Ms. Marinaki's current condition.

[179] The Tribunal does not accept Dr. Sokolowska's opinion that the cause of Ms. Marinaki's depression was harassment in the workplace. In arriving at this conclusion, Dr. Sokolowska relies upon her knowledge of Ms. Marinaki's history, which she describes as being essentially unremarkable prior to the start of her problems at work. Dr. Sokolowska views the other stressors in Ms. Marinaki's life during this time as insignificant, as Ms. Marinaki continued to function, despite these events. It became apparent, however, that Dr. Sokolowska's knowledge of Ms. Marinaki's history was incomplete. Most significantly, Dr. Sokolowska was not aware that between April and September of 1992, Ms. Marinaki was away from the workplace on sick leave

because of the stress resulting from the death of her father. This was immediately before Ms. Marinaki's return to International Operations, and what Dr. Sokolowska understands to be the start of her problems.

[180] Dr. Sokolowska was confronted with additional information about Ms. Marinaki's history in cross-examination. We found her responses to Mr. Graham's questions to be unsatisfactory. Having staked her opinion as to the cause of Ms. Marinaki's problems on Ms. Marinaki's past history, Dr. Sokolowska then tried to minimize the significance of that history when it did not support her thesis. We were left with the overwhelming impression that Dr. Sokolowska's objectivity in this regard had been compromised by her evident sympathy for, and desire to help Ms. Marinaki.

[181] While Ms. Marinaki's difficulties at work undoubtedly exacerbated her emotional difficulties, based on the evidence before us we cannot find that her illness was caused by harassment in the workplace.

VII. FINDINGS OF CREDIBILITY

[182] The outcome of this case depends almost entirely on our assessment of the credibility of Ms. Marinaki and Mr. Scarizzi. A summary of our findings with respect to the credibility of each is set out below. In reaching our conclusions on the issue of credibility, we have applied the principles set out by the British Columbia Court of Appeal in *Farnya v. Chorney*.⁽²³⁾

i) Findings Regarding Ms. Marinaki's Credibility

[183] We are of the view that Ms. Marinaki is not a reliable witness for a number of reasons:

- a) At a minimum, Ms. Marinaki was seriously mistaken in her recollection that in the 1980's, Mr. Scarizzi gave her the cartoons and jokes produced at the hearing.
- b) Ms. Marinaki was less than candid with respect to her explanation of the reasons for her absence from the workplace in the spring and summer of 1992.
- c) Ms. Marinaki was not forthright about her unhappiness at returning to International Operations in September of 1992.
- d) Ms. Marinaki's misinterpretation of her discussions with Pierre LaFrance in the fall of 1992 raise real doubts as to the general reliability of her perception of events.
- e) The reference to Ms. Marinaki having received five offers of transfer since September, 1992 in Dr. Resnick's letter of June 15, 1993 could only have come from Ms. Marinaki. The evidence does not support this assertion.

f) The evidence of Ms. Marinaki's own psychiatrist indicates that the perception of reality of those suffering from Major Depression may be affected by the illness. This was consistent with our own observations on a number of matters.

g) Ms. Marinaki seemed to attach ominous significance to events that seemed quite innocuous to us. For example, she testified that her discussions with prospective employers often concluded with the prospective employer asking her if she still lived on Riverside Drive. Ms. Marinaki was concerned that people seemed to know where she lived, given that they did not necessarily have a copy of her résumé, and that the comments were often made during her first contact with the prospective employer. With the greatest of respect, this does not make a great deal of sense. It is hard to imagine why a prospective employer would be the least bit interested in the details of Ms. Marinaki's living arrangements. A review of the record reveals that Ms. Marinaki often used her home address on letters of application and that her home address also appears on her résumé. A far more likely scenario is that the prospective employers did have either a letter from Ms. Marinaki or her résumé, and were simply confirming that they had a current address where Ms. Marinaki could be reached.

h) Throughout these proceedings, recurring themes have emerged as major sources of Ms. Marinaki's dissatisfaction. She appeared strangely fixated on the relationship between Domenic Scarizzi and Marie Thibeault, and was unwavering in her belief that André Thivierge was actively trying to obstruct her career advancement. Based upon our review of the evidence, both of these concerns were misguided and, as we have previously stated, based upon a misperception of events.

ii) Findings Regarding Mr. Scarizzi's Credibility

[184] We were not at all impressed by Mr. Scarizzi's testimony, much of which we found to be self-serving. There are a number of reasons for concluding that Mr. Scarizzi was not a credible witness:

a) Mr. Scarizzi initially insisted that none of his supervisors ever spoke to him about his use of foul language in the workplace.⁽²⁴⁾ This evidence is at odds with that of Ms. McShane, as well as with that of Mr. Thivierge, another of the respondent's own witnesses, both of whose evidence we prefer to that of Mr. Scarizzi. Suffice it to say that we found his evidence on this subject entirely unsatisfactory.

b) Mr. Scarizzi stated that no one ever spoke to him about his relationship with Ms. Thibeault. Once again, Mr. Scarizzi's evidence conflicts with that of Mr. Thivierge, whose testimony we prefer.

c) Mr. Scarizzi grossly overstated the frequency of Ms. Marinaki's medical appointments in the fall of 1992 to make her look bad, and to justify his own actions.

d) Mr. Scarizzi's testimony that he never sought costs against Ms. Marinaki in relation to his Federal Court Judicial Review was both misleading and calculated to portray him in a good light.⁽²⁵⁾

e) Mr. Scarizzi omitted to mention a number of relevant details with respect to his employment history and overstated the extent of his supervisory responsibilities on his Résumé. While this is entirely collateral to the issues before us, in our view it is reflective of Mr. Scarizzi's lack of candour.

VIII. LEGAL PRINCIPLES

[185] Section 14 of the *Canadian Human Rights Act* makes it a discriminatory practice to harass an individual on a prohibited ground of discrimination. Sex and national or ethnic origin are prohibited grounds of discrimination.

[186] Sexual harassment is a form of sex discrimination. In *Janzen v. Platy Enterprises Ltd.*⁽²⁶⁾, the Supreme Court of Canada defined sexual harassment as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment." The Court went on to describe sexual harassment as "a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it", one that "attacks the dignity and self-respect of the victim both as an employee and as a human being".⁽²⁷⁾

[187] These principles have also been applied in cases of racial harassment⁽²⁸⁾ and, in the Tribunal's view, are equally applicable to harassment on the basis of national or ethnic origin.

[188] Victims of harassment need not prove that they have suffered pecuniary losses. *Janzen* establishes that harassment also encompasses situations in which employees must endure propositions and inappropriate comments without economic consequences.⁽²⁹⁾

[189] For behaviour to amount to harassment, some element of repetition or persistence will usually be required, although in some situations, a single, serious incident may be sufficient to constitute harassment. This has been described as the 'inversely proportional rule'⁽³⁰⁾. In other words, the less serious the conduct and its consequences, the more persistence will have to be demonstrated.

[190] Pursuant to Section 65 of the *Canadian Human Rights Act*, acts or omissions committed by employees in the course of their employment are deemed to be acts or omissions of the employer. An exception to this general principle is created where the employer did not consent to

the acts or omissions complained of, exercised due diligence to prevent the acts or omissions from being committed and, subsequently, took appropriate action to mitigate the effects thereof.

[191] Finally, for a complaint to succeed, it is not necessary that discriminatory considerations be the sole reason for the actions in issue. It is sufficient that the discrimination be a basis for the employer's actions⁽³¹⁾.

IX. ANALYSIS

[192] As we have previously noted, the outcome of this case depends almost entirely on our assessment of the credibility of the principal witnesses, and ultimately, on the sufficiency of the evidence led by the Commission and Ms. Marinaki. In applying the appropriate legal standard to the facts before us, we are mindful that the burden falls on Ms. Marinaki and the Commission to satisfy us on a balance of probabilities that Ms. Marinaki's complaint has been substantiated.

[193] When examined as a whole, the evidence leads us to conclude that in 1992-1993, International Operations was an organization under significant stress. Employees felt overworked as a result of downsizing at a time when the workload was increasing. There was evidence of a generally harsh management style where, in order to meet production objectives, supervisors were not always professional in their dealings with employees. There was also a perception on the part of some employees of unequal treatment by management. The question for the Tribunal, however, is not whether there were management problems in International Operations, but whether either Ms. Marinaki's sex or national or ethnic origin were factors in her treatment by management.

[194] We have divided this section of our analysis into a consideration of the question of sexual harassment followed by consideration of whether Ms. Marinaki was the victim of ethnic harassment. In her final submissions, Commission counsel urged us to consider the intersection of multiple proscribed grounds and Ms. Marinaki's status as a Greek woman. We have indeed taken this into consideration in our deliberations, but have divided our analysis into separate sections in the interests of clarity.

i) Was Ms. Marinaki Sexually Harassed?

[195] It is clear that there was significant conflict between Mr. Scarizzi and Ms. Marinaki in the period that he supervised her. Ms. Marinaki resented Mr. Scarizzi's efforts to deal with her, and Mr. Scarizzi did not manage her very well. We have found that there were a series of confrontations between Mr. Scarizzi and Ms. Marinaki over the 1992-1993 period relating to a variety of different issues. These confrontations arose out of Mr. Scarizzi's attempts to manage work related issues, and neither Ms. Marinaki's sex nor her ethnicity played any role in creating the conflict. We have also found, however, that in the course of these confrontations Mr. Scarizzi became angry with Ms. Marinaki, that he raised his voice with her, and that he swore at her. In particular, we have accepted Ms. Marinaki's testimony that Mr. Scarizzi directed the term 'Vaffanculo' at her on several occasions when he was angry.

[196] Mr. Scarizzi's conduct during these various confrontations was inappropriate. It was abusive. It was unprofessional. It was poor management. But was it sexual harassment?

[197] Applying the *Janzen* test, we are satisfied that Mr. Scarizzi's behaviour was unwelcome conduct that detrimentally affected Ms. Marinaki's work environment. The issue is whether it was sexual in nature.

[198] The question of what behaviour will be viewed as sexual in nature has recently been considered in some detail by Madam Justice Tremblay-Lamer of the Federal Court in *Franke*⁽³²⁾, where she noted that a relatively broad range of conduct can be considered to be sexual in nature. The Tribunal should decide the question on a case-by-case basis, based on the test of the reasonable person in the circumstances.^{—(33)}

[199] Ms. Marinaki testified that she understood the term 'Vaffanculo' to mean 'Fuck you', whereas Mr. Scarizzi stated that he understood it to mean 'Ah, Fuck!'. We have not been provided with any testimony that would suggest that the use of the Italian term has a meaning or significance that is different from the use of either of the suggested corresponding English expressions.

[200] In our view, a reasonable person would not consider the use of either 'Fuck you' or 'Ah, Fuck!', in anger, to be sexually harassing. While the word 'Fuck' can most certainly have a sexual connotation, in the context in which it was used here by Mr. Scarizzi, it was clearly an expression of anger and frustration and was in no way sexual in nature.

ii) Was Ms. Marinaki Ethnically Harassed?

[201] We have already found that Mr. Scarizzi did not make any racist jokes or comments that Ms. Marinaki was aware of during the period covered by the complaint. The principle remaining evidence that would connect Mr. Scarizzi's conduct to Ms. Marinaki's ethnicity is the allegation that he called her a 'Goddamn Greek'. Ms. Marinaki's complaint states that this occurred on at least 10 occasions during the period that he supervised her, although she only identified two such occasions in her testimony.^{—(34)}

[202] Although he denied using the phrase, we have found Domenic Scarizzi not to be a credible witness. However, the burden is on Ms. Marinaki to demonstrate, on a balance of probabilities that this did occur. While it is indeed possible that Mr. Scarizzi did use the expression 'Goddamn Greek' at some point in relation to Ms. Marinaki, for the reasons already indicated, we cannot find on a balance of probabilities that he did say it as alleged by Ms. Marinaki.

[203] On the basis of the evidence before us, we cannot conclude that the conflict between Mr. Scarizzi and Ms. Marinaki had anything to do with Ms. Marinaki's ethnicity, or that her national or ethnic origin was a factor in Mr. Scarizzi's treatment of Ms. Marinaki. As a result, we cannot find that Ms. Marinaki was harassed because of her national or ethnic origin.

iii) Employer Liability

[204] In light of our conclusion that Ms. Marinaki was neither sexually nor ethnically harassed, it is not necessary to consider the adequacy of André Thivierge's and HRDC's response to Ms. Marinaki's complaints. Section 65 of the *Canadian Human Rights Act* only comes into play when there has been a finding of harassment or discrimination on the basis of a proscribed ground.

[205] In the event that we are in error in our conclusion that there has been no harassment on the basis of either Ms. Marinaki's sex or her national or ethnic origin, we would have had no hesitation in concluding that the protection of section 65 was not available to HRDC because:

- a) HRDC's harassment policy was not communicated or made accessible to employees;
- b) It does not appear that HRDC provided International Operations employees with any training with respect to issues of harassment or the harassment policy before Ms. Marinaki filed her internal harassment complaint. In particular, no effort was made to inform employees how complaints could be filed in accordance with the policy.
- c) HRDC management had clearly been aware of inappropriate language and conduct on the part of Domenic Scarizzi going back to the late 1980's, and had failed to take any kind of meaningful action to ensure that it did not continue.
- d) Steve Shipley was specifically told by Ms. Marinaki that 'the harassment continues'. Not only did Mr. Shipley fail to follow up with Ms. Marinaki in an effort to address her concerns, he went to her Director and advised him of Ms. Marinaki's comment, completely ignoring any duty of confidentiality that he might have to Ms. Marinaki. This behaviour is all the more remarkable coming as it did from a representative of the Human Resources section.
- e) The fourteen months that the internal investigation took to complete is totally unacceptable. Not only is it unfair to all of those involved in the complaint, it is particularly unfair to Ms. Marinaki who was being moved from job to job. In our view, the failure to deal with complaints of harassment in a timely fashion itself creates a systemic barrier to proper enforcement of a harassment policy, and can only serve to actively discourage victims from coming forward with complaints.
- f) Mr. Tamagno's complete disregard of all of the negative findings in the harassment report leads one to ask why HRDC bothered to investigate Ms. Marinaki's complaint in the first place. If absolutely no attention was to be paid to the conclusions of the investigation, it is difficult to conclude that it was intended to be a meaningful method of dealing with allegations of workplace harassment.
- g) HRDC failed to follow up on remedial action after the delivery of the harassment report. Although representations were made to senior management

with respect to training having been provided to staff, and in particular to Domenic Scarizzi and André Thivierge, it appears that this was not done.

h) One of the most disturbing aspects of this case was the repeated references to the climate of fear and intimidation that exists within International Operations. Not only was this noted by the Departmental investigators in the internal harassment report, in the course of this hearing several Commission witnesses expressed concerns about possible career repercussions for having testified against the Department. The existence of such an environment is inconsistent with the exercise of due diligence by an employer to prevent harassment and can only serve to actively discourage complaints of harassment from being brought forward.

i) Mr. Tamagno's unilateral decision to return Ms. Marinaki to International Operations in the face of specific medical advice to the contrary, without any attempt to verify the appropriateness of that advice, was stunning in its arrogance. If Mr. Tamagno did not accept Dr. Blattel's medical opinion, the appropriate course of action was for him to seek a second opinion, rather than to simply substitute his own opinion for that of Ms. Marinaki's treating physician.

X. RETALIATION

[206] Ms. Marinaki and the Canadian Human Rights Commission allege that HRDC retaliated against Ms. Marinaki because she asserted her right to a harassment-free workplace. In particular, they maintain that Ms. Marinaki was put in a series of meaningless and unsatisfactory positions during the internal investigation in retaliation for her complaints of harassment and discrimination. Further examples of allegedly retaliatory behaviour include the failure to keep Ms. Marinaki advised of what was happening, and the moving of Ms. Marinaki from position to position on short notice during the internal investigation. Ms. Marinaki alleges that HRDC monitored her performance and use of sick leave, and kept records of ostensible performance problems without making her aware of such records, in violation of HRDC's disciplinary policies. Ms. Marinaki states that Mr. Thivierge continued to be involved in decisions regarding her, contrary to the Departmental Harassment Policy. Finally, Ms. Marinaki alleges that HRDC failed to complete the various forms and process benefit claims in a timely manner. In final argument, counsel for the Canadian Human Rights Commission and Ms. Marinaki were clear that all of these matters were characterized strictly as retaliation.

[207] Ms. Marinaki and the Canadian Human Rights Commission urge us to sustain Ms. Marinaki's complaint based upon these acts of retaliation, even if we conclude that her original complaint of harassment has not been made out.

[208] These submissions raise several questions:

i) Did HRDC have adequate notice that retaliation was in issue in this case?

- ii) Does this Tribunal have jurisdiction to consider the allegations of retaliation?
- iii) Did HRDC in fact retaliate against Ms. Marinaki?

[209] Each of these questions will be addressed in turn:

i) Did HRDC have Adequate Notice that Retaliation was in Issue in This Case?

[210] As we have previously noted, the conduct of this case has been plagued from the start by a lack of precision in the identification of the theory of the case, including the characterization of events following the departure of Ms. Marinaki from International Operations after she filed her internal harassment complaint in August of 1993.

[211] The events occurring after August of 1993 could potentially engage the *Canadian Human Rights Act* in three different ways, each involving different sections of the *Act*:

- a) As ongoing acts of sexual or ethnic harassment, in which case the focus would be on establishing a nexus between the acts in issue and Ms. Marinaki's sex and/or ethnicity (section 14);
- b) As evidence of the respondent's failure to take appropriate steps to mitigate the effects of earlier harassment, thus disentitling the respondent to the due diligence defence (section 65); or
- c) As acts of retaliation for the making of an earlier complaint, in which case the focus would be on establishing a connection between the subsequent acts and the earlier complaint (section 14.1 of the post-1998 *Act*).

[212] Obviously, the way in which the respondent might choose to defend itself with respect to the events after August of 1993 would depend on how the events are characterized.

[213] How were they characterized here? Ms. Marinaki's complaint was filed in March of 1996, and refers only to her (approximately ten) short-term assignments away from her section between 1993 and 1995, and to her forced return to work in February of 1996. It is not clear from the complaint form whether these matters are being referred to as incidents of harassment, as evidence of a failure to mitigate, or as retaliation. There is no mention of the monitoring and documenting of Ms. Marinaki's performance or of the alleged failure on the part of the respondent to complete Ms. Marinaki's forms in a timely manner. Indeed, the forms issue only arose after Ms. Marinaki filed her human rights complaint. Neither Ms. Marinaki nor the Commission sought to amend the complaint to include these additional allegations.

[214] The Commission's pre-hearing statement of issues makes reference to the series of short-term assignments provided to Ms. Marinaki subsequent to the filing of her internal harassment complaint, and to her forced return to the workplace in February of 1996. The Commission characterizes the issues in the case as twofold: whether the respondent discriminated against Emilie Marinaki by harassing her on the basis of her sex and ethnic origin, and whether the

respondent has absolved itself of liability for the acts or omissions of its employees by the exercise of due diligence in accordance with the provisions of section 65. The failure to complete the forms is not mentioned as an issue in the Commission's disclosure, nor is there any reference to any issue of retaliation.

[215] Ms. Marinaki's statement of issues identifies the series of short-term assignments as meaningless and unsatisfactory, and indicates that the respondent knowingly and intentionally frustrated her attempts to secure a position outside of her home department by providing prospective employers with unfair and inaccurate references. The issue relating to the references is characterized as having occurred in retaliation for Ms. Marinaki's allegations of harassment. Ms. Marinaki also refers to her forced return to International Operations in the face of medical advice, but does not characterize this event in any particular fashion. Finally, Ms. Marinaki makes reference to the failure to complete forms in a timely manner, and characterizes this as continuing harassment.

[216] The respondent recognized that retaliation was an issue in this case, having referred to section 14.1 of the *Act* in its statement of issues. However, this appears to be in response to the complainant's reference to the alleged provision of negative references as retaliation. It is not clear from the respondent's statement of issues that there was any appreciation that the allegations of retaliation extended beyond this single issue.

[217] Finally, at no time in Mr. Lister's opening statement did he make any reference to acts of retaliation. Ms. Cheney did make reference to "make-work assignments", but did not characterize these as retaliatory. There was no mention of the alleged failure on the part of the respondent to complete forms, beyond a passing reference to Ms. Marinaki's financial problems. Once again, there is no suggestion that any acts attributed to the respondent constituted acts of retaliation.

[218] The jurisprudence is clear that human rights complaints are not like criminal indictments. The complaint form is intended to provide general notice to the parties, and can be amended, provided adequate notice is provided to the respondent ⁽³⁵⁾.

[219] In the Tribunal's view, the key issue is one of fairness. Did the respondent have adequate notice of the case it had to meet? The respondent's counsel says no. Mr. Graham understood that the events after August 1993 were being put forward as ongoing acts of sexual and ethnic harassment, and that the failure to complete Ms. Marinaki's forms was clearly identified as such by the complainant in her statement of issues. Mr. Graham states that he would have defended the respondent differently had the issues been characterized as retaliation. Specifically, with respect to the forms issue, he may have called someone from the respondent's pay and benefits section, and may, as well, have called the HRDC in-house counsel dealing with this matter at the time. In addition, different questions would have been posed to witnesses who did testify, specifically addressed to the issue of retaliation.

[220] In the Tribunal's view, there is merit to the respondent's position. It is up to the complainant and/or the Commission to define the issues and their theory of the case. No doubt, their task was made more difficult because of Ms. Marinaki's disability. However, what was required here was not the identification of facts in issue, but rather the characterization of factual

allegations within a legal framework. This is clearly counsel's responsibility. We do not expect the complainant and/or the Commission to spell out every last detail of their case in advance of the hearing. Cases will inevitably evolve and change as the evidence goes in. Fairness does, however, require that the general theory of the complainant's case be articulated in advance, and that the relevant sections of the *Act* or legal foundations for the claim be clearly identified. In our view, to allow the complainant to recast her theory of the case from ongoing harassment to retaliation, after all of the evidence is in, would be fundamentally unfair to the respondent and should not be permitted.

ii) Does this Tribunal have Jurisdiction to Consider the Allegations of Retaliation?

[221] Even if HRDC had been provided with adequate notice that retaliation was going to be an issue in this case, we do not believe that we have jurisdiction to consider such allegations here. Ms. Marinaki's complaint was filed in 1996, and the actions in issue took place between September of 1992 and late 1996. The *Canadian Human Rights Act* as it stood throughout this period made it an offense to threaten, intimidate or discriminate against an individual because the individual had made a complaint, assisted in the initiation or prosecution of a complaint, or because the individual proposed to do so. Those contravening Section 59 of the old *Act* could be prosecuted with the consent of the Attorney General of Canada. There was nothing in the pre-1998 *Act* which would give the Tribunal jurisdiction to deal with allegations of retaliation.

[222] In *Lagacé v. Canada (Canadian Armed Forces)*⁽³⁶⁾, the Human Rights Tribunal concluded that adverse differential treatment of an employee because that employee had complained to the Canadian Human Rights Commission about discrimination on a prohibited ground should itself constitute a prohibited ground of discrimination.⁽³⁷⁾ With respect, we cannot agree. While we accept that, for a host of policy reasons, it is indeed desirable that allegations of retaliation be dealt with in the context of the original complaint⁽³⁸⁾, in our view, the Human Rights Tribunal's interpretation of the old *Act* in *Lagacé* is one that the plain wording of the statute as it then stood simply cannot bear.

[223] Unlike many Provincial Human Rights Codes, which specifically identify retaliation as a discriminatory practice, the old *Canadian Human Rights Act* did not, making it instead a summary conviction offence. As a summary conviction offence, it would seem that Parliament intended that allegations of retaliation be dealt with in a different forum, subject to a different standard of proof and a stricter application of the rules of evidence than that used in Tribunal proceedings.

[224] The *Canadian Human Rights Act* was amended in 1998 to specifically make retaliation a discriminatory practice, thus bringing it within the jurisdiction of the Canadian Human Rights Tribunal⁽³⁹⁾. Does this assist Ms. Marinaki? In our view, it does not: to apply the new retaliation provision of the *Act*⁽⁴⁰⁾ to acts occurring before the section came into force would be to attach new consequences to events that took place before the enactment. This would be giving the legislation retrospective effect, which is not generally permissible, and is not supported by the wording of the legislation.

[225] For these reasons we are of the view that we are without jurisdiction to consider Ms. Marinaki's allegations of retaliation.

iii) Did HRDC in Fact Retaliate Against Ms. Marinaki?

[226] It is unnecessary to deal with the allegation that Ms. Marinaki was given negative references in retaliation for her having complained of harassment and discrimination in the workplace, in light of our finding that Ms. Marinaki did not establish that any negative references were in fact provided.

[227] Given our conclusion the HRDC did not have adequate notice to properly defend itself against the other allegation of retaliation, it would be inappropriate to consider the merits of those allegations, even in the alternative.

XI. CONCLUSION

[228] This is a very sad case. It is apparent that Ms. Marinaki is seriously disabled, and may well have been disabled for a number of years while she was still in the workplace. The evidence raises questions as to how Ms. Marinaki's developing disability was handled by her managers. This complaint was not, however filed or presented as a complaint of discrimination on the basis of disability, but rather as a case of harassment on the basis of sex and national or ethnic origin. It is by no means certain that we would have come to the same result had we been deciding this as a disability case. We must, however, consider the evidence in light of the complaint as framed by the complainant. For the reasons set out above we cannot conclude that Ms. Marinaki was the victim of either sexual or ethnic harassment.

[229] While we have concluded that Ms. Marinaki has not been the victim of either sexual or ethnic harassment, she has nevertheless suffered greatly because of her illness. No doubt poor management on the part of the respondent and the respondent's failure to recognize and deal with her disability in a sensitive and appropriate manner has exacerbated Ms. Marinaki's suffering. We would encourage Ms. Marinaki to try to put these unfortunate events behind her to the extent possible, and to focus her energies and attention on trying to get well. She is clearly a talented individual with much to offer an employer.

XII. ORDER

[230] For the foregoing reasons this complaint is dismissed.

Original signed by:

Anne L. Mactavish, Chairperson

Guy Chicoine, Member

Reva Devins, Member

OTTAWA, Ontario

June 29, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T520/1599

STYLE OF CAUSE: Marinaki v. Human Resources Development Canada

PLACE OF HEARING: Ottawa, Ontario

(December 6-7, 9, 20-22, 1999; January 4-5, 7, 31, 2000;

February 1-4, 7, 9-11, 21-24; March 6-9; April 13, 18-20, 2000)

DECISION OF THE TRIBUNAL DATED: June 29, 2000

APPEARANCES:

Andrew Lister For Emilie Marinaki

Janice Cheney For the Canadian Human Rights Commission

J. Sanderson Graham For Human Resources Development Canada

1. ¹ A number of incidents were mentioned in Ms. Marinaki's testimony that are not specifically referred to in this decision. While we have considered each of these additional allegations made by Ms. Marinaki, we have concluded that there is insufficient evidence to make any specific findings with respect to certain of the incidents, and that others are simply not relevant. We note that most of these incidents were not relied on by counsel for the Commission and Ms. Marinaki in their final submissions.

2. ² For example, Ms. Marinaki's 1983 performance appraisal from the Department of National Defence states that Ms. Marinaki had made substantial progress towards learning her new position, but questions her loyalty, noting that she appeared to be looking for a better position from the first day she arrived. The supervisor conducting the review expressed the feeling that Ms. Marinaki was using the position as a stepping stone to a higher grade, even before she was fully knowledgeable in her present position.

3. ³ International Operations was initially part of Health and Welfare Canada. In 1994, as a part of the reconfiguration of various Government departments, Income Security programs were moved from Health and Welfare Canada to Human Resources Development Canada. For ease of reference, Ms. Marinaki's employer will be referred to throughout as "HRDC".

4. ⁴ Ms. Marinaki's very first appraisal in International Operations in 1984 had Ms. Marinaki expressing her desire to progress into a position in management. This desire is repeated in each subsequent performance appraisal. We know that Ms. Marinaki was also applying for other positions during this period: within her first year at International Operations, Ms. Marinaki was asking her supervisors to provide her with letters of reference to support these applications.

5. ⁵ Several co-workers testified for the Canadian Human Rights Commission: Gerry Hunt described Ms. Marinaki as argumentative, belligerent, and uncooperative; Neera Singh noted that Ms. Marinaki was loud; Eugenia McShane said that Ms. Marinaki was a challenging employee who 'pushed the envelope'. Ms. McShane (who supervised Ms. Marinaki for a period in the mid-80's) described Ms. Marinaki as volatile, sometimes annoying, and not afraid to challenge people. Ms. McShane also said that Ms. Marinaki could be 'like a dog with a bone' about issues

and sometimes 'annoyed the hell' out of her. The views of many of the respondent's witnesses are consistent with these assessments.

6. ⁶ Pat Iannitti (the Director of International Operations in the 1980's) said that Ms. Marinaki was a good employee, hardworking and highly productive, one who cared about her clients and her files. Former supervisors described Ms. Marinaki as a hard worker who was always willing to help others (Michel Tremblay) and who produced a significant volume of work with a minimal error rate (Mario Gratton).

7. ⁷ There is no suggestion that more work was given to Ms. Marinaki than to others because of Ms. Marinaki's sex or national or ethnic origin. Rather, Ms. McShane confirmed that productive employees such as Ms. Marinaki tended to be given extra work because they could handle it.

8. ⁸ Mr. Scarizzi's actions lie at the heart of Ms. Marinaki's complaint, and accordingly, the issue of his general credibility will be dealt with in greater detail further on in this decision.

9. ⁹ In his final submissions, Ms. Marinaki's own counsel said that "... the testimony of Ms. Marinaki's personality throughout the 1980's is that she fights back. I don't think that there is any way that that can be contradicted. Ms. Marinaki does not sit back and let the world walk over her. She didn't do it in the eighties; she certainly didn't do it in the nineties"

10. ¹⁰ Ms. Marinaki's explanation is that she was told by representatives of the respondent that she could only go back one year with her internal harassment complaint. Ms. Marinaki states that she was also told by the Canadian Human Rights Commission that her human rights complaint could only go back one year from the date of the complaint. However, a review of the complaint that Ms. Marinaki filed with the Canadian Human Rights Commission in 1996 reveals that her allegations go back some four years to 1992. Ms. Marinaki does not recall why she did not mention the existence of the documents in the context of her grievance.

11. ¹¹ This testimony is, of course, difficult to reconcile with her description of the negative effects that Mr. Scarizzi's earlier behaviour purportedly had on her.

12. ¹² In final submissions, counsel for Ms. Marinaki acknowledged that there was no evidence to support Ms. Marinaki's belief that Mr. Thivierge precipitated Ms. Marinaki's return to International Operations, and this issue was not pursued. Ms. Marinaki's testimony is significant, however, as this appears to mark the genesis of Ms. Marinaki's belief that Mr. Thivierge was blocking her career advancement.

13. ¹³ Ms. Marinaki was not alone in her perception that Ms. Thibeault was receiving preferential treatment. Ms. McShane confirmed that there was a perception that Ms. Thibeault was getting special treatment because of her relationship with Mr. Scarizzi and that this perception was affecting the workplace. While this may have been the perception of some employees, on a review of all of the evidence we are not satisfied that it was in fact the case.

14. ¹⁴ Guida Sangiorgi did say that Ms. Marinaki complained about Mr. Scarizzi making 'sexual remarks' to her. Although she believes that it was in the 1990's, Ms. Sangiorgi was not certain

when this complaint was made. Further, it is not clear whether Ms. Marinaki's reference to 'sexual remarks' refers to the type of sexual jokes and comments that Ms. Marinaki says only occurred in the 1980's, or was meant to refer to Mr. Scarizzi's use of the term 'Vaffanculo' in the 1990's, a term that Ms. Marinaki considered to be sexually harassing.

15. ¹⁵ At one point Ms. Marinaki testified that Mr. Scarizzi also said something during this confrontation about Greeks having a lot of money. She did not mention this in her initial recounting of events, and it was only mentioned once in her subsequent testimony. There is no reference to the allegation anywhere else in the evidence, and Ms. Marinaki seemed confused when she suggested that it was mentioned here. In all of the circumstances, we cannot find that any such comment was made during this confrontation.

16. ¹⁶ Mr. Scarizzi states that his understanding of the meaning of the term 'Vaffanculo' is 'Ah, fuck!'.

17. ¹⁷ The summary of Ms. Marinaki's interview with the HRDC investigators also refers to Ms. Marinaki having been called a 'Goddamn Greek'. It is not clear from this statement, however, who it is that is supposed to have said this, or where and when the statement was supposed to have been made.

18. ¹⁸ While it is by no means determinative of the issue, it is nevertheless interesting to note that Ms. Marinaki herself describes Mr. Scarizzi's behaviour as 'personal harassment' in her 1994 response to the draft internal harassment report rather than sexual or ethnic harassment.

19. ¹⁹ Ms. Marinaki's memo indicates that 296 items of correspondence were outstanding to the beginning of the week, and that she had been able to reduce it to 156 items, in addition to performing her own weekly tasks. This seems to confirm that Ms. Marinaki did not process leftover correspondence from the previous week on a priority basis, but would only do so when her regular weekly duties permitted.

20. ²⁰ Ms. Marinaki appealed the selection of Domenic Scarizzi for appointment through this competition, but did not challenge the selection of the other successful candidates. Although she was successful before the Public Service Commission Appeal Board, Mr. Scarizzi took the matter to the Federal Court of Canada. Mr. Justice Rothstein allowed Mr. Scarizzi's application for judicial review, quashing the decision of the Appeal Board, and restoring the decision of the Selection Board. Mr. Justice Rothstein also awarded costs against Ms. Marinaki. In concluding that special circumstances existed justifying such an award, Mr. Justice Rothstein considered the fact that Ms. Marinaki did not stand to gain personally from the results of the competition, having already been screened out. Mr. Justice Rothstein was of the view that Mr. Scarizzi had been singled out by Ms. Marinaki from amongst the other successful candidates, and that: 'The Appeal Board process is not a means for one disgruntled employee to cause difficulties for other employees'.

21. ²¹ Ms. Marinaki had long expressed a desire to work in the Systems area and Mr. Shipley testified that considerable efforts were made to find a temporary position for Ms. Marinaki in the

Systems field, in the hope that it would lead to a permanent position. Regrettably, this did not happen.

22. ²² We have already identified a number of specific instances where there were problems with Mr. Scarizzi's testimony. The question of Mr. Scarizzi's overall credibility is dealt with further on in this decision.

23. ²³ [1952] 2 D.L.R. 354

24. ²⁴ Mr. Scarizzi later conceded that Mr. Thivierge may have mentioned this subject to him.

25. ²⁵ Mr. Scarizzi's original testimony flew in the face of the Reasons of Mr. Justice Rothstein, which noted that Mr. Scarizzi did seek costs from Ms. Marinaki. When confronted with this, Mr. Scarizzi was forced to acknowledge that while he had not personally sought costs against Ms. Marinaki, his lawyers had on his behalf.

26. ²⁶ (1989), 10 C.H.R.R. D/6205

27. ²⁷ Ibid.

28. ²⁸ See, for example, *Dhanjal v. Air Canada*, 28 C.H.R.R. D/367 at D/412 aff'd [1997] F.C.J. No. 1599 (T.D.), and *Mohammad v. Mariposa Stores Limited Partnership*, 14 C.H.R.R. D/215 at D/218 (B.C.H.R.T.)

29. ²⁹ *Janzen*, supra, at p. 6226

30. ³⁰ *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces) (Re Franke)* [1999] F.C.J. No. 757, [1999] 3 F.C. 653, (1999) 167 F.T.R. 216. See also M. Drapeau, *Le harcèlement sexuel au travail*, Cowansville (Quebec): Les Éditions Yvon Blais, 1991, at p. 102.

31. ³¹ *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 at p. D/15

32. ³² Supra, footnote 30.

33. ³³ Tremblay-Lamer J. refers to the debate in the literature and in the jurisprudence as to whether the 'reasonable person' standard test is indeed appropriate, and whether such a standard may not serve to perpetuate norms and standards of behaviour developed in traditional, male-dominated workplaces. Some cases suggest the appropriate standard is that of the reasonable woman, others suggest the reasonable victim. In this case we are also urged to consider Ms. Marinaki's position as a Greek woman (although we were not provided with evidence of any cultural norms unique to the Greek community to assist us in this regard). The *Franke* decision is binding on this Tribunal, and we are therefore using a standard of the reasonable person. In this case, however, assuming a perspective of reasonableness, we do not think that the use of another standard would affect the result.

34. ³⁴ In addition to the two occasions already mentioned that allegedly occurred while Mr. Scarizzi was supervising her, Ms. Marinaki also stated that Mr. Scarizzi muttered the phrase under his breath when he passed her in the hall sometime after Ms. Marinaki left International Operations in 1993. Once again this is denied by Mr. Scarizzi and there is no mention of the incident in any of Ms. Marinaki's earlier statements. Given our concerns with respect to Ms. Marinaki's unreliability as a witness, we cannot find, on a balance of probabilities that it in fact occurred.

35. ³⁵ *Uzoaba v. Correctional Service of Canada*, (1994), 94 C.L.L.C. 17,021, aff'd (sub nom. *Canada (Attorney General) v. Uzoaba*,) [1995] F.C.J. No. 609, [1995] 2 F.C. 569, and *Cousens v. Canadian Nurses Association*, (1981) 2 C.H.R.R. D/365.

36. ³⁶ [1996] C.H.R.D. No. 11

37. ³⁷ It should also be noted that *Lagacé* is distinguishable from the present case on its facts: for most of the period during which representatives of HRDC are said to have retaliated against Ms. Marinaki, there was no complaint before the Canadian Human Rights Commission, whereas a complaint was pending before the Commission during the period covered by the complaint in *Lagacé*.

38. ³⁸ See *Entrop v. Imperial Oil Limited*, (1994), 23 C.H.R.R. D/186 for a discussion of these policy issues.

39. ³⁹ It should be noted that the fact that there has been an amendment to legislation does not mean that the law was necessarily different prior to the amendment. (See Section 45 of the *Interpretation Act*.) In this case, however, for the reasons given, we are of the view that the amendment does represent a change in the law.

40. ⁴⁰ Section 14.1