

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

BETWEEN:

DENISE SEELEY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY

Respondent

DECISION

MEMBER: Michel Doucet

2010 CHRT 23
2010/09/29

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I. INTRODUCTION

[1] This is an employment discrimination case on the basis of sections 7 and 10 of the *Canadian Human Rights Act* (the “CHRA”). Denise Seeley (the “Complainant”) filed a complaint alleging that the Respondent, the Canadian National Railway (“CN”) has discriminated against her on the basis of her family status by failing to accommodate her and by terminating her employment.

[2] CN denies the complainant’s allegations.

[3] All the parties, including the Canadian Human Rights Commission (“CHRC”), were present at the hearing and were represented by counsel.

[4] There are two other related complaints against CN. By agreement of the parties, these two other matters were treated in a separate hearing and will be decided separately. Although the facts in the present case and in those two other cases are very similar and that the witnesses for CN were the same, except for one who did not testify in this case, the evidence is, in many regards, different. The witnesses of CN, who testified in this case, did not, without necessarily contradicting themselves, repeat exactly the same evidence in the two other cases. Also, documents which were disclosed in this hearing were not filed as evidence in those two other cases. These differences will explain any discrepancies that may exist in the facts when they are compared.

A. The Facts

(i) The Canadian National Railway

a) General information

[5] CN is a federally regulated corporation which derives its revenues from the transportation of goods by train. It is a transcontinental railway company which operates in Canada and in the United States. Its freight trains transport goods 24 hours a day, 7 days a week, 365 days a year.

[6] CN employs more than 15,000 employees in Canada. Employees are organised in two groups described as “operating” and “non-operating”. The “non-operating” group is comprised of employees working in clerical, mechanical and engineering positions. The “operating” group employees are also known as “running trades employees” and consist of Conductors and locomotive engineers. CN has over 4,000 “running trades” employees throughout Canada of which 2,400 are Conductors.

[7] The Crew Management Centre (“CMC”) in Edmonton is a very important part of CN operations. CMC is responsible for all the crew calling and deployment for the Western region. They manage the workforce for “running trades” and also manage a payroll of 204 million dollars. Elaine Storms is the Director of CMC. She occupied this position in 2005.

b) Running trades employees

[8] As stated earlier, locomotive engineers and Conductors form part of what is identified as the “running trades’ employees”. Locomotive engineers operate the engine and Conductors are basically in charge of all the other aspects pertaining to the movement of a train.

[9] Running trades employees either work “road” or “yard”. “Road work” consists of employees who will get on a train at a particular terminal and take the train to another terminal. They will then layover at the away terminal and come back to their home terminal later. A yard

employee would typically work in the yard, switching box cars and making up trains. The yard employee does not leave the terminal.

[10] In terms of hiring, CN tends to hire its running trades employees in large group. CN did significant hiring in the seventies, a spattering in the eighties; then again it did significant hiring in the nineties and also during the last couple of years.

[11] Ms. Ziemer, a Human Resources Officer from Vancouver, testified that in 1996 the percentage of women in the “running trades” was about 3%. This figure was 3.7% in 2006 and is now around 3.1%. She added that men predominantly showed more interest for running trades jobs.

[12] She also explained that the cost of hiring and training a Conductor would be in the vicinity of 18,000 to 20,000\$, per Conductor. The training takes from three (3) to six (6) months. The cost of training a locomotive engineer is between 28,000\$ to 30,000\$, in addition to what it cost to train him or her as a Conductor.

[13] In order to be qualified to work as a Conductor, an employee must have his rules and medical cards up to date. These cards have to be updated every three years. If the employee is on the working board, he or she will generally get a notice that tells him or her that his cards are about to expire and then he just needs to make the proper arrangements to bring them up to date. If the employee is on lay off, he will need to take care of this by himself.

[14] Due to the nature of CN’s operation, running trades employees must be able to work where and when required, subject to restrictions imposed by law and the collective agreement. In light of these considerations, CN feels that mobility and flexibility constitutes basic job requirements for running trades employees. It considers these requirements as necessary because of the volume of goods it transports and because of the fluctuation in traffic which can occur over a short time period of time due, for example, to changes in the economy or to seasonal factors such as the grain harvest season.

[15] When an employee is working or available to work, he is said to be on the “working board”. The “working board” includes all employees who are not on lay off. Employees on the “working board” are either on “assignments” or in a “pool”.

[16] An employee who is on the “working board” can also be said to have been “set up”. The decision to “set up” an employee is made following discussions between managers at the terminal where the employees are supposed to be set up and the union. The decision is based on the numbers of employees needed to perform the work that is expected.

[17] There is also another board, which forms part of the “working board”, but which is designated as the “spare board” or “emergency board”. Employees on this board will only be called to work to fill in when other employees are either on vacation or unavailable to work for any other reasons.

[18] Running trades employees work on a mileage basis. The working board is adjusted on weekly basis so that each employee can do approximately 4,300 miles a month. When doing the adjustment of the working board, CN will look at the previous week to see how many miles were made by the employees. They will divide this number by 4,300 and the result will indicate the number of employees that would potentially be needed for the following week.

[19] At all relevant times to this matter, Conductors in the Western Region of Canada were represented by the United Transportation Union (“UTU”). The Western Region includes all of CN’s rail terminals from Vancouver, British Columbia, to Thunder Bay, Ontario. The applicable collective agreement for Conductors in the Western Region is Agreement 4.3 (the “Collective Agreement”).

c) The changes made in 1992 and the creation of the furlough boards

[20] In 1992, technological changes allowed CN to do away with the car at the tail end of the train, which is more commonly known as the “caboose”. This decision prompted the elimination of the position of brakeman. After this decision, Conductors, who used to work in the “caboose”,

were moved up to the front of the train with the locomotive engineer. Eliminating the position of brakemen meant that CN needed less running trades' employees to run its trains. The reduction in the number of employees was done through the negotiation process with the Union. The negotiation resulted in the creation of the "furlough boards".

[21] A "furlough board" comes into existence when there is a surplus of employees, but not enough work for everyone. The "furlough board" will then guarantee the employee's earnings up to the 4,300 miles provided for in the Collective Agreement whether he or she works or not. The employee on the "furlough board" has to remain available for work, but if he or she isn't called to go to work, he or she still gets paid his or her salary.

[22] The changes made to the working conditions in 1992, also created the notion of "forcing", which produces different results for different categories of employees in the running trades. According to section 148.11 of the Collective Agreement, employees hired subsequent to June 29th, 1990, can be forced to cover work at another terminal in the Western region and are obligated to report at that terminal within, at most thirty (30) days unless they present a "satisfactory reason" justifying their failure to do so. These employees are commonly referred to as "category D" employees. They are also referred to as "non-protected" employees, insofar as they are obligated to respond to a recall outside of their terminal.

[23] Other categories of employees include those who were hired prior to June 29, 1990. These are referred to as "protected" employees. In this group of "protected employees" we have those who were hired prior to 1982 and who are referred to as "Category A" and "Category B" employees, respectively. These employees cannot be assigned for work outside of their local terminals. Employees hired after 1982 but prior to June 29, 1990, are referred to as "Category C" employees and may only be assigned to protect work at adjacent terminals. For example, "Category C" employees at the Jasper terminal could only be assigned to the adjacent terminals of Edson and Kamloops.

[24] The status of "protected" employees represents an exception to the general rule. The number of these employees will diminish over time through simple attrition and the status will

eventually disappear altogether. The “protected” employees also have the benefit of the “furlough boards”. “Non-protected” employees are not entitled to the “furlough board”.

[25] With the creation of the “furlough boards”, which in essence allowed some employees to be protected at their home terminal, CN needed to find a way to fill positions in cases of shortages at other locations. This is where section 148.11 of the Collective Agreement came into being. This provision, as we have just seen, allows CN to “force” unprotected employees to other terminals in the Western region to cover work.

[26] Prior to the enactment of section 148.11, CN would get employees to cover shortages by issuing what is referred to as a “shortage bulletins” and allowing employees to bid on these shortages, if they so desired. These “bulletins” were put out at each “change of card” which would happen about four times a year. Since it is difficult for CN to predict where a shortage will occur, these bulletins would cover various locations, whether or not there was actually a shortage there. Employees who wished to work at a shortage at a certain location would post a bid for that location and if that location ever became short, the employee who had posted a bid could be called to cover the work there.

[27] CN still puts out shortage bulletins and employees are still allowed to bid on these, but given that protected employees can now stay at their home terminal on the furlough board and still be paid, there is little incentive for them to bid on these potential shortages.

[28] CN also used a system which is referred to as the “whitemanning” which allows it to send a surplus of employees at one terminal to an adjacent terminal. For example, in such a scenario employees in Kamloops, B.C., would be running trains that the Vancouver crews would normally take to Kamloops.

[29] It is also possible that manager will be called upon during a shortage situation. Almost all of the transportation managers are qualified to operate trains. CN will call upon its managers as a last resort after it has exhausted its supply of running trades employees.

[30] Employees who are assigned to another terminal pursuant to section 148.11 of the Collective Agreement are afforded with certain amenities at their assigned terminal. These include, when available, rooms equipped with kitchenettes and also the possibility of travelling back to their home residence at regular intervals or, alternatively, having CN cover the cost associated with bringing a family member to the shortage location.

[31] According to subsection 148.11(f) of the Collective Agreement, the first employee called upon to protect work will be the junior qualified employee on lay off in the seniority territory with a seniority date subsequent to June 29, 1990. The collective agreement does not provide for a maximum duration for covering work. If the shortage turns out to be permanent, then CN will proceed to hire people for that location.

[32] Section 115 of the Collective Agreement provides that an employee who is laid off will be given preference for re-employment when staff is increased in his seniority district and will be returned to service in order of seniority. The provision also provides that if the employee is employed elsewhere at the time of recall, he may be allowed thirty (30) days in which to report. If he fails to report for duty or if he fails to give “satisfactory reason” for not doing so, within fifteen (15) days of the recall, he will forfeit all his seniority rights.

[33] An employee, who would wish to raise a “satisfactory reason” to justify his or her failure to report for work, would first have to make a request to the Crew Management Centre (“CMC”). He or she would then be instructed to write a letter to his or her immediate supervisor at his home terminal. If the reason raised could have an impact on the Collective Agreement some discussions with the union might be necessary.

(ii) The Complainant’s work history

[34] The Complainant was hired by CN as a “brakeman” on July 2nd, 1991 and she qualified as a freight train Conductor in 1993. Her home terminal was Jasper, Alberta. The Complainant and her husband lived in Jasper until the birth of their first child in 1999. They then moved to Brule, Alberta, a small community located at about ninety-eight (98) kilometres from Jasper. She was

an employee of CN until her employment was terminated, in 2005, for refusing to cover the shortage in Vancouver.

[35] Her husband is also employed by CN as a locomotive engineer with currently 32 years of service.

[36] The Complainant worked as a Conductor from 1991 to 1997. In 1997, she was laid off, as were many other employees of CN. She remained on layoff from November 1997 until February 2005. However, her employment relationship with CN was maintained throughout her layoff period. The Collective Agreement provides that an employee on lay off will continue to accumulate seniority. It further provides that he or she can stay on lay off indefinitely or until he or she is recalled or resigns.

[37] Between 1997 and 2001, the Complainant had performed some work for CN on emergency calls. More precisely, she worked twenty-five (25) tours of emergency calls between 1997 and 2000. In 2001, she worked four (4) more tours. She did not work from thereon.

[38] In January 1999, the couple's first child was born. The second one was born in 2003. Following the birth of her first child, the Complainant still did some emergency work on a few occasions, in Jasper, but the calls being unpredictable, this made it difficult for her to make the necessary child care arrangements. After the birth of her second child, the Complainant did not do any emergency work for CN.

(iii) The Vancouver shortage

[39] In February 2005, CN was experiencing a severe shortage of running trades employees in its Vancouver terminal. This situation was mainly due to a growing economy and an increase in CN's business volume which had outpaced its capacity to provide running trades employees locally. According to Ms. Storms seventy two (72) Conductors were needed in Vancouver to cover the shortage and Vancouver had only fifty three (53) Conductors working. She added that "it was definitively one of the most serious shortages that I had seen in my career."

[40] Due to its location, the Vancouver terminal is a very active one. It includes extensive yard and intermodal operations where goods are transferred from and onto ships. The Vancouver terminal therefore constitutes a focal point for CN's Canadian market as vast amounts of materials and consumer goods shipped to and from Asia and North America transits through it and are afterwards transported throughout Canada on CN's rail network.

[41] A shortage of running trades employees in Vancouver carries significant implications, as it can affect CN's ability to operate adequately throughout its network.

[42] In order to maintain its level of operation, CN decided in February 2005 to recall laid off Conductors from the Western region to protect the shortage affecting the Vancouver terminal. These employees were "non-protected" employees with a seniority date subsequent to June 29, 1990. As such, they were subject to Article 148.11(c) of the Collective Agreement.

[43] Ms. Storms also testified that during that period she went to Vancouver to help with the deployment of officers. She added that officers had been called in from all over Canada to help with the shortage.

[44] In terms of how long this "shortage" might last, Mr. Joe Torchia, the Director of Labour Relation for CN, indicated that it might have been possible to give an estimate, but that they would be reluctant to do so "because then people tend to hold you to it." He agreed that the uncertainty regarding the length of the shortage could have an impact on what housing arrangements CN might be willing to agree too. Ms. Storms was more precise and indicated that if the Complainant had reported to Vancouver, she would have probably stayed there for approximately a year, since the shortage situation in Vancouver was not resolved before 2006.

[45] Employees reporting to cover the shortage at the Vancouver terminal, would be asked to show up at the Thornton Yard, in Surrey, and from there, since Vancouver has a number of yards, they would be taxied to wherever they were needed. Employees would only be informed when they got to Vancouver where they were going to work and what shift they would be working on.

(iv) The Conductors recalled to cover the Vancouver shortage

[46] Forty-seven (47) laid off Conductors were recalled to cover the Vancouver shortage in February 2005. Ms. Storms explained that, in accordance with the Collective Agreement, employees are recalled on a seniority basis, starting with the senior person in the district. She added that CN would not allow a senior employee to bypass an opportunity to work, because that would mean that they were not protecting their seniority. At the time of the recall, the Complainant was third out of four on the seniority list of laid off employees at the Jasper terminal.

[47] The forty-seven (47) employees were initially contacted by phone. Again according to Ms. Storms, when these employees were called they were told that they had fifteen (15) days to report to cover the shortage.

[48] CN produced at the hearing a document providing part of the work history for some of these employees. Ms. Storms explained that this document was a result of information entered into the system by crew dispatchers at CMC. She was extensively cross-examined in regards to this document by the Complainant's counsel and by counsel for the CHRC. We will go over this document in some detail in the following paragraphs, as it was apparent that this information was important for all the parties. In order to protect the privacy of these employees, they will be identified by letters which do not correspond to their names.

[49] The employee identified by the letters AB, although recalled did not report to the Vancouver shortage. On March 22th, 2005, he was "set up" at the Sioux Lookout terminal. He continued to work there to the end of the year. Having been "set up" at his home terminal, he did not have to cover the shortage in Vancouver. Although this employee was "set up" on March 22nd, he only worked on March 24th and then he did not work again until April 1st. After this date he works again on April 10th and 11th, but doesn't work until April 18th. On July 22, he takes a personal leave and doesn't return to work until August 12th. He works from that date to August

20th, but does not work again before September 22nd. He works again on September 30th and then does not work until October 28th.

[50] Employee HI was working on a shortage at Hornepayne at the time of the recall. He worked on that shortage up until May 18th, 2005. After that he went home for a week and then went to Vancouver to cover the shortage on May 30th. He was later recalled to his home terminal on September 19th 2005. He took a transfer to Fort Francis on October 29th and worked there until the end of the year.

[51] According to the documents produced by CN, while he was in Vancouver, this employee started off by doing four (4) shifts of training. After he had completed his training on June 3rd, he only starts working on June 9th, six days later. Ms. Storms specified that it could well be that during that time he was still in training, although she did not know for sure. After June 9th, he is shown as “available” from June 17th to June 26th and then he is off work for “miles”. That means that he had been at the shortage location for a specified amount of time and he could go home for a few days. He did not work in Vancouver from June 16th to July 6th. From July 23rd to August 8th he also did not work. Then he has another break on September 1st and his next working date is September 25th. On October 29th, as I’ve stated earlier, he is “set up” in Fort-Francis, but does not actually work there before December 22nd, 2005. When asked by the Complainant’s counsel why an employee would be set up for almost two months and not work, Ms. Storms replied: “I can’t answer that.”

[52] Employee P was laid off at North Battleford on February 25th. On March 19th he took a week’s vacation and then he was “set up” at his home terminal on March 26th. As already mentioned, when an employee is set up, he or she is no longer under an obligation to cover a shortage. Ms. Storms did emphasize though that being “set up” does not mean that the employee is working every day. In the case of employee P, for example, from March 26th to the end of April, he only worked 7 days at his home terminal, but Ms Storms added that we must be careful when looking at this information as those tours can last two (2) or three (3) days each, although no

evidence confirming that this was the case was submitted. The employee was again laid off again on April 24th, 2005. From that date to the rest of the year, employee P moved around within the Saskatchewan zone “taking a clearance” at other terminals.

[53] The expression “taking a clearance” refers to the situation where a laid off employee with seniority in the Western region elects to go to another terminal where a position he can hold is available. When a position becomes available at his home terminal, the employee will return there. If an employee is exercising his seniority and “takes a clearance”, he or she is said to be working and will not have to report to cover a shortage. According to Ms. Storms, this would have been an option for the Complainant. In order to do that, Ms Storms explained that the Complainant would have had to call CMC and inquire where she could “take a clearance”.

[54] Employee Y was also called to protect the shortage in Vancouver on February 25th, 2005. On that day he was on a “leave of absence”, but according to Ms. Storms, CMC would have contacted him within the next few days. Ms. Storms added that she had checked into this employee’s work record and that it indicated that he was “Absent without Leave” on March 4th, 2005 and that his employment was terminated. But then she added, “I don’t know exactly what the details were, but I believe there was a mistake made and he should have just been shown laid off at that time.” Whatever happened, this employee did not go to the shortage and was eventually “set up” at his home terminal on March 15th, 2005. On April 9th, he was again laid off and then on April 30th, he was given a leave of absence by his trainmaster. Ms. Storms testified that she tried to contact his trainmaster as well as the Superintendent of his Division to see why this employee had been given a leave of absence, but that the trainmaster had retired and the Division had not kept any records of this instance. She also stated that the Superintendent didn’t have any recollection of this situation. Ms Storms also added, “We had a hard time contacting the employee and quite frankly he was dodging us. He did work the majority of time at his home location. He either worked or was in training or was on a leave of absence for the majority of the shortage.” Finally, on December 25th, 2005, this employee was “set up” in Saskatoon.

[55] Employee U was called to cover the shortage in Vancouver at the same time as everyone else. Ms. Storms testified that she had personally talked to this employee and had been informed by him that his father was terminally ill. She added that she had then taken it upon herself to extend his time to report. This employee stayed on the laid off board until June 26th 2005, at which time he was given a leave of absence by the trainmaster at his terminal. On July 24th, he was “set up” at his home terminal. His father passed away in October and he booked off on bereavement. He stayed at his home terminal for the remainder of the year.

[56] Ms. Storms also testified that initially when they started contacting employees for the shortage, the staff at CMC would just write notes down in their work records as they were making the calls. But, because the shortage was so large, things were getting a little “unwieldy” and Ms. Storms instructed her staff to put charts together so that they could see where things were and how many people would cover the shortage. The information we find on these charts were gathered and recorded by different employees at CMC. The first chart was produced on March 7th, 2005.

[57] The entry on this chart for March 16th 2005 for Employee E indicates “15 days to report, 30 requested. G. Spanos pls advise or arrange travel.” On April 20th, 2005, the entry shows “Per Manitoba Zone [E] has been given a compassionate LOA until further notice – per Ron Smith – due to personal issue.” According to Ms. Storms, Ron Smith is the manager of the running trades’ employees for the Manitoba zone. Ms. Storms testified that she did recall “a little bit” about this instance. This situation was very similar to employee U. Employee E had a terminally ill parent as well. On May 19th, 2005, the entry indicates “Per Manitoba zone this individual has been given a compassionate [leave of absence] until further notice per A. Nashman and K. Carroll.” Mr. Carroll was the general manager of the Vancouver, South Division, and Mr. Nashman was the general manager of the Western Operation Centre. Employee E was on a leave of absence until July 30th, 2005 and afterwards absent without leave from July 31st to September 8th. On September 10th, he is transferred to another terminal (Brandon, Manitoba) and finally he resigned on October 19th.

(v) **The Complainant's recall to work**

[58] On February 25th, 2005, the Complainant received a phone call from an unidentified employee of the CMC, in Edmonton. This employee asked her: "If CN were to set you up, how long would you take to report to duty?" She replied that that really depended on whether she was being "set up" in Jasper or if she was going to be forced somewhere else. According to her recollection, as she wrote it in a letter dated March 4th, 2005, addressed to C. Pizziol, the Trainmaster at the Jasper terminal, the CMC employee answered that "it did not look likely that she would be forced anywhere as all terminals were short, including Jasper". In that case she figured that she would probably need a couple of weeks to figure out some sort of child care arrangement for her two children. This evidence of the Complainant was not challenged by CN.

[59] No other employee from CMC, other than the Director, Elaine Storms, was called as a witness. Elaine Storms was not privy to this conversation between the Complainant and the unidentified CMC employee.

[60] The next day, on February 26, 2005, Joe Lyons, the Manager Operations, Crew Management Centre, Western Operations, spoke on the telephone with the Complainant's husband. He informed him that the Complainant was being forced to Vancouver to cover a shortage under the provisions of the collective agreement.

[61] Joe Lyons, who used to work under Ms. Storms, was not called as a witness. Besides the fact that he no longer works for CN, no other explanation was given for his absence.

[62] CN also produced at the hearing a letter from Joe Lyons to the Complainant dated February 28th, 2005, which states: "*Further to our telephone call on February 25, 2005, recalling you to CN you are recalled to the working board effective immediately as per the provisions of Article 115 of Agreement 4.3. There is also a shortage at Vancouver which requires the Company to invoke the provisions of Article 89.10 and 148.11(c) of Agreement 4.3. This Article provides that non protected employees are required to protect work over the seniority territory. In keeping*

with this Article you are required to protect the shortage of Yard employees at Vancouver.”

The Complainant testified that she never received this letter. This letter had been mailed to the Complainant's former address in Jasper where she no longer resided.

[63] The Complainant explained that before the recall of 2005, she had never refused being forced to another location, but her family status had now changed making it a more difficult option for her. In her March 4th, 2005, letter to Mr. Pizziol she explained *“I am in a very difficult situation. I have 2 children: one aged 6 enrolled in kindergarten in a french immersion school in Hinton, the other is 21 months old. We live in a hamlet, Brule, of less than 180 people situated nearly 40 km from Hinton. We have no immediate family nearby to help with the children. There is no registered daycare in Brule. There is a daycare in Hinton, however they only have standard business hours. My husband is also a railroader who as you know is required to work around the clock and may be gone anywhere from 15 to 24 hours.”* Consequently, she requested a 30 day extension *“to explore any options that may exist.”*

[64] Mr. Pizziol never replied to this letter. Mr. Pizziol was not called as a witness at the hearing and no explanation other than the fact that he does not work for CN anymore, was given for his absence.

[65] On March 7th, 2005, the Complainant made a follow-up call to Mr. Pizziol and left a voice-mail message explaining her family situation and the difficulties related to childcare. On that same day, she also wrote to the Local Chairperson of the UTU informing him of the letter she had sent to her supervisor requesting the thirty (30) day extension, She also added *“this is a troublesome situation for me and I don't have many option due to my young family, [my husband] railroad career and where we live.”*

[66] On March 26th, 2005, she again wrote to Mr. Pizziol asking him to consider her family situation. She repeated what she had written in her earlier letter, informing him that it would be difficult to take her children with her to Vancouver and that because of childcare responsibilities, neither was it feasible to leave them with their father whose own work obligations would cause

the same difficulties with childcare. She also requested that her situation be considered on a compassionate basis under the collective agreement and that she be allowed to wait out until Vancouver no longer required her services or until there was work available at the Jasper terminal or at the adjacent terminal in Edson. A copy of this letter was also sent to Ms. Storms. The Complainant did not receive an answer to this letter.

[67] Ms. Storms testified that she did not “specifically” recall this letter. She added that if she did receive the letter, and knowing that Mr. Lyon was “helming” the file, she would have forwarded it to him.

[68] The last paragraph of that letter stated: *“I can’t possibly be expected to put my family through upheaval to move them for an undetermined length of time at a whim. Employees with restrictive medical conditions have in the past been accommodated to hold regular yard jobs i.e. diabetics when their seniority would not permit other work in the terminal instead of forcing them to relocate to where they could hold. Is it reasonable to ask the same considerations for parents of young children if they demonstrate the need”* and then she goes on *“I’m asking you to consider my situation on a compassionate basis”*. On cross examination, counsel for the Complainant asked Ms. Storms if that had indicated to her that the Complainant was seeking accommodation regarding her family status. Ms. Storms answered: “No. I wouldn’t have thought about it like that. When you are looking for a leave of absence, you go to your own supervisor. He may have conferred with Human Resources who look after that type of things. Most of our employees or a good deal of our employees have children and it was not a common consideration to request to be excused from protecting shortages. I would have expected Mr. Pizziol to contact Human Resources about this kind of thing.” (The emphasis is mine.) No evidence that Mr. Pizziol contacted Human Resources regarding the Complainant’s situation was produced at the hearing.

[69] On March 29th, 2005, the Complainant wrote to Joe Lyons, copying both Mr. Pizziol and Ms. Storms. In this letter she wrote that she had not receive notification in writing informing her that she was being forced to protect the shortage in Vancouver, although other employees in

Jasper had received such notification. On that same day, she also sent a letter to Ms. Storms requesting her to reconsider her situation.

[70] Joe Lyon wrote to the Complainant on March 30th, 2005. In this letter, he informed the Complainant that her request for a thirty (30) extension had been authorised and that the date at which she would be expected to report to Vancouver was “*moved to March 29th*”. The Complainant testified that she never received that letter. The letter also makes reference to a telephone conversation of March 30th, 2005 between the Complainant and Joe Lyons. The Complainant testified that she had no recollection of a telephone conversation on that date.

[71] On April 27th, 2005, Joe Lyon again wrote a letter to the Complainant informing her that CN had accommodated her need for additional time to consider her options and “*make the necessary child-care arrangements*”. The letter went on to state that while CN recognizes that her “*child-care [issues] are important personal responsibility*” her obligation to CN is “*to manage those personal obligations in such a way that you are able to fulfill your employment and collective agreement obligations*”. The Complainant testified that she never received this letter. The address on the letter was not the correct address. CN acknowledged that the letter had been returned to the CMC stamped “unclaimed” by Post Canada and had not been remailed to the Complainant.

[72] In her letter of March 4th 2005, the Complainant had requested a thirty (30) extension to report for work. According to CN, the Collective Agreement allows for such an extension when an employee is employed elsewhere at the time they are notified to report for work. This was not the case for the Complainant. Notwithstanding the provision of the collective agreement, during a meeting in May 2005, between officers of CN and officers of UTU, CN advised the union that it would extend the time period for the Complainant to report for work until June 30th, 2005.

[73] Mr. Torchia testified on cross-examination that he had had discussion, sometime in May 2005, with the General Chairperson of UTU regarding the possibility of extending the time the Complainant had to report to cover the shortage. These discussions took place in Edmonton

during a meeting where various topics were on the agenda. He added that he does not recall if he took any notes during this meeting or if any memos or emails were thereafter prepared. He further testified that he was the “decision maker” in regards to whether or not the extension would be granted.

[74] On June 20th, 2005, L. Gallegos, Manager Operations. Crew Management, Western Operations Centre, who had by then replaced Mr. Lyons, wrote to the Complainant indicating that CN had accommodated her needs for additional time to consider her options and make the necessary child-care arrangements. CN requested that the Complainant advise it by June 30th, 2005, whether or not she would report for duty to cover the shortage in Vancouver and it further informed her that her failure to do so would result in her forfeiting her seniority and her employment being terminated in accordance with the terms of Article 148.11 of the collective agreement. The letter added:

“While the Company recognizes that your child care is an important personal responsibility, you must also acknowledge that your obligation to CN is to manage these personal obligations in such a way that you are also able to fulfill your employment and collective agreement obligations.”

[75] On June 27th, 2005, the Complainant received another letter from Mrs. Gallegos informing her that her failure to report to Vancouver by that day, would result in her forfeiting her seniority rights and her services with the company being dispensed with at noon on July 2nd 2005, in accordance with the provision of the collective agreement.

[76] Ms. Gallegos was not called as a witness at the hearing and no explanation for her absence was given.

[77] On June 27th, 2005, the Complainant wrote a letter to Ms. Gallegos in which she states:

You have not addressed my previous letter dated March 26/05 which clearly states my position and my request to CN that would alleviate this situation. I did not request additional time to make necessary child-care arrangements as your letter

implies. Your letter also implied I have not provided a response to the Company of whether or not I will be reporting for work in Vancouver. I provided a response in a letter dated March 26 to CN Supervisor (Jasper) C. Pizziol.

E. Storms also received from me a copy of a letter I addressed to J. Lyons, requesting to receive notice of recall that was sent out to other employees affected. I have since been waiting for a decision or response to my requests and to date have not received any. The only correspondence I have received is your letter threatening to terminate my employment with the Company. My correspondence is being ignored by CMC management and treated as if it does not exist. This refusal to acknowledge my requests, the persistent phone calls stating I must report for duty or lose my seniority, and the run-around I am receiving is harassment and I ask that it stops.

Since the time I sent these letters in March, shortly after my medical with Medisys, I suffered a spinal injury resulting in a fractured vertebra and am still in a recovery process. I cannot work anywhere at this time. I did not inform Crew Management, as I was waiting to hear back from the Company with a decision whether or not to honour my request that would allow me to remain in laid-off status for compassionate reasons.

As I have again responded in a timely manner before the latest deadline you have imposed I hope you will do the same and I ask that you relinquish the deadline until you have informed me in writing of your decision based on my request for a compassionate allowance.

In the meantime, I am medically unable to report for duty and upon hearing from you I can provide a medical report to verify my injury.

[78] The Complainant did not receive a response to this letter.

[79] On July 4th, 2005, Ms. Gallegos informed the Complainant that her seniority rights had been forfeited and her employment terminated because she had failed to cover the shortage in Vancouver. The Complainant's union filed a grievance on her behalf challenging the decision to terminate her employment. The grievance was never processed to the hearing stage.

[80] Ms. Storms testified that the manager of the division is the primary decision maker in terms of granting or not an employee's request to be relieved from reporting to a shortage. He would take the persons situation into account and decide what to do with it. He has the power to either grant a leave of absence or an extension of the delay to report. She added that in the case of a large shortage, like the one occurring in Vancouver in 2005, the manager would also discuss the situation with his general manager. In 2005, the general manager to whom Mr. Pizziol, the trainmaster in Jasper, reported was Denis Broshko.

[81] Mr. Broshko was not called as a witness and no explanation was given for his absence. There was also no evidence submitted by CN indicating that Mr. Pizziol had actually discussed the Complainant's situation with Mr. Broshko.

[82] Ms. Storms also indicated that it was not the norm for CMC to grant extension of time to report, but she added that there had been "odd times" where she had decided to extend time in concert with the division. For example, in the case of the employee whose father was terminally ill, she said that she had spoken to the employee and had made the decision to grant him a further extension of fifteen (15) days. After the expiry of the fifteen (15) days extension this employee remained on layoff status and later on he was given a further leave of absence of a few months by his division.

[83] As we've seen earlier, in her letter of June 27th, 2005, the Complainant had informed her employer that in April 2005, she had suffered an injury while horseback riding and that while she was in the "recovery process" she could not report to the shortage in Vancouver. After it received this information, CN sought more details regarding her medical condition. It was also seeking advice from its medical department regarding the significance and the implications of her injuries. On February 27th, 2006, CN wrote a letter to the Complainant informing her that it had "*committed to review your case with the Union including the potential for reinstatement if in fact your medical evidence supports your inability to respond for work in February 2005. It must be clearly understood that any consideration of reinstatement will of course include the fact you must protect all work at CN within the terms and conditions of your Collective Agreement.*" The Complainant testified that she did not respond to this letter, because by this time she had fully recovered from her accident and no medical condition prevented her from working.

B. ISSUES

[84] The issue raised in this case is as follows: has CN discriminated against the Complainant in the context of employment contrary to sections 7 and 10 of the *CHRA* by failing to accommodate her and by terminating her employment on the ground of family status.

C. THE LAW AND THEORY OF THE CASE

(i) The relevant provisions of the *CHRA*

[85] Section 3 of the *CHRA* states that “family status” is a prohibited ground of discrimination.

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, **family status**, disability and conviction for which a pardon has been granted.

3. (1) Pour l’application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l’origine nationale ou ethnique, la couleur, la religion, l’âge, le sexe, l’orientation sexuelle, l’état matrimonial, **la situation de famille**, l’état de personne graciée ou la déficience.

(The emphasis is mine.)

[86] For its part, section 7 states:

7. It is a discriminatory practice, directly or indirectly,

a) to refuse to employ or continue to employ any individual, or

b) in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination.

7. Constitue un acte discriminatoire, s’il est fondé sur un motif de distinction illicite, le fait, , par des moyens directs ou indirects;

(a) de refuser d’employer ou de continuer d’employer un individu;

(b) de le défavoriser en cours d’emploi.

[87] Section 10 of the *Act* provides:

10. It is a discriminatory practice for an employer, employee organization or employer organization

a) to establish or pursue a policy or practice, or

b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale or l'organisation syndicale;

(a) de fixer ou d'appliquer des lignes de conduite;

(b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

[88] In considering sections 7 and 10, it is important to highlight the purpose of the *CHRA* as stated in section 2:

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

[89] The Supreme Court of Canada and other Courts have consistently told us to interpret human rights in a large and liberal manner. In *CNR v. Canada (Human Rights Commission) (Action Travail des Femmes)*, [1987] 1 S.C.R. 1114, the Court stated, at paragraph 24 :

24. Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

(ii) The Law

a) The *prima facie* case

[90] The initial onus is on the complainant to establish a *prima facie* case of discrimination on the basis of family status. A *prima facie* case is “one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent.” (See *Ontario Human Rights Commission and O’Malley v. Simpsons – Sears*, [1985] 2 S.C.R. 536, at p. 558.)

[91] Once a complainant establishes a *prima facie* case of discrimination, he or she is entitled to relief in absence of a justification by the respondent. (*Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202, at p. 208.) In order to prove a *prima facie* case of discrimination, the Complainant must establish that she was treated in an adverse differential manner and was terminated because of her family status, contrary to section 7 of the *CHRA*.

b) What approach is to be applied to determine whether there has been discrimination on the ground of family status?

[92] The evaluation of whether there is discrimination on the ground of family status is carried out according to the test set out in *Public Service Labour Relations Commission v. BCGSEU*,

[1999] 3 S.C.R. 3 (“*Meiorin*”), just as it would be for any other prohibited ground of discrimination. However, in recent years, the interpretation of the notion of “family status” has led to the creation of two distinct schools of thought. Some cases have adopted a broad approach towards the scope of “family status”, while other have taken a more narrow approach. In order to better understand what is included in the notion of “family status” we will review a certain number of these cases.

[93] In *Schaap v. Canada (Dept. of National Defence)* [1988] C.H.R.D. No. 4, the Tribunal was considering whether relationships formed in a common-law relationship as opposed to those in a legal marriage fell within the protected groups of “marital status” and “family status”. In its decision the Tribunal found the need for a blood or legal relationship to exist and defined family status as including both blood relationships between parent and child and the inter-relationship that arises from bonds of marriage, consanguinity or legal adoption, including, of course, the ancestral relationship, whether legitimate, illegitimate or by adoption, as well as the relationships between spouses, siblings, in-laws, uncles or aunts and nephews or nieces. In *Lang v. Canada (Employment and Immigration Commission)*, [1990] C.H.R.D. No. 8, the Tribunal stated at page 3: “The Tribunal is of the view that the words “family status” include the relationship of parent and child.”

[94] In *Brown v. Department of National Revenue (Customs and Excise)*, (1993) T.D. 7/93, the Tribunal held at pages 15 and 20:

With respect to ground (b) [family status], the evidence must demonstrate that family status includes the status of being a parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, the Complainant was unable to participate equally and fully in employment with her employer.

[...]

It is not suggested by counsel for the Complainant that the employer is responsible for the care and nurturing of a child. She was advocating however that there was a

balance of interest and obligation as set out in s. 2 and 7(b) of the C.H.R.A. which must be recognized within the context of “family status”.

A parent must therefore carefully weigh and evaluate how they are best able to discharge their obligations as well as their duties and obligations within the family. They are therefore under an obligation to seek accommodation from the employer so that they can best serve those interests.

We can therefore understand the obvious dilemma facing the modern family wherein the present socio-economic trends find both parents in the work environment, often with different rules and requirements. More often than not, we find the natural nurturing demands upon the female parent place her invariably in the position wherein she is required to strike this fine balance between family needs and employment requirements.

[95] The Tribunal finally concluded that the purposive interpretation to be affixed to the *CHRA* was a clear recognition that within the context of “family status” it is a parent’s right and duty to strike that balance coupled with a clear duty on the part of the employer to facilitate and accommodate that balance within the criteria set out by the jurisprudence. The Tribunal added that “to consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of “family status” as a ground of discrimination.”

[96] The Tribunal also considered “family status” as a ground of discrimination in *Hoyt v. Canadian National Railway*, [2006] C.H.R.D. No. 33. In this decision, the Tribunal referred to a judicial definition of the term “family status”, as well as to prior decisions of the Tribunal which set forth requirements to establish a *prima facie* case of discrimination based on that ground. The Tribunal specifically stated :

117 Discrimination on this ground has been judicially defined as ‘... practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic relating to their ... family.’ (*Ontario (Human Rights Commission) v. Mr. A et al* [2000] O.J. No. 4275 (C.A.); affirmed [2002] S.C.J. No. 67].

118 This Tribunal has considered the evidentiary requirements to establish a *prima facie* case in a decision that predates the Ontario case, though is clearly consistent with its definition:

"... the evidence must demonstrate that family status includes the status of being a parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, the Complainant was unable to participate equally and fully in employment with her employer" (*Brown v. Canada (Department of National Revenue, Customs and Excise)* [1993] C.H.R.D. No. 7, at p. 13. See also *Woiden et al v. Dan Lynn*, [2002] C.H.R.D. No. 18, T.D. 09/02)

[97] However, a different enunciation of the evidence necessary to demonstrate a *prima facie* case was articulated by the British Columbia Court of Appeal in *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society*, [2004] B.C.J. No. 922, at paragraphs 38 and 39, a decision on which CN put a lot of weight during its closing arguments. In that decision the British Columbia Court of Appeal decided that the parameters of family status as a prohibited ground of discrimination in the *Human Rights Code* of British Columbia should not be drawn too broadly or it would have the potential to cause "disruption and great mischief" in the workplace". The Court directed that a *prima facie* case is made out "when a change in a term or condition of employment imposed by an employer results in serious interference with a substantial parental or other family duty or obligation of the employee." (The underlining is mine.) Low, J.A. observed that the *prima facie* case would be difficult to make out in cases of conflict between work requirements and family obligations.

[98] In *Hoyt*, this Tribunal did not follow the approach suggested in the *Campbell River* case. The Tribunal summarized its position in regards to that case as follows:

120 With respect, I do not agree with the [British Columbia Court of Appeal's] analysis. Human rights codes, because of their status as 'fundamental law,' must be interpreted liberally so that they may better fulfill their objectives (*Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 547, *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at pp. 1134-1136; *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84 at pp. 89-90). It would, in my view, be

inappropriate to select out one prohibited ground of discrimination for a more restrictive definition.

121 In my respectful opinion, the concerns identified by the Court of Appeal, being serious workplace disruption and great mischief, might be proper matters for consideration in the Meiorin analysis and in particular the third branch of the analysis, being reasonable necessity. When evaluating the magnitude of hardship, an accommodation might give rise to matters such as serious disruption in the workplace, and serious impact on employee morale are appropriate considerations (see *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489 at pp. 520 - 521). Undue hardship is to be proven by the employer on a case by case basis. A mere apprehension that undue hardship would result is not a proper reason, in my respectful opinion, to obviate the analysis. (The underlining is mine.)

[99] In addition to the compelling logic of the Tribunal’s decision in *Hoyt* for not following the approach in *Campbell River*, this Tribunal concludes that the approach suggested in that case imposes an additional burden on the Complainant by suggesting that the protected ground of family status includes proof of a “serious interference with a substantial parental or other family duty or obligation” and that this is inconsistent with the purpose of the *CHRA*. As the Supreme Court of Canada made it clear in *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403, at para. 56, it is not appropriate, when interpreting human rights statutes, to impose additional burdens.

[100] The Tribunal’s approach in *Hoyt* was cited by the Federal Court of Canada in *Johnstone v. Canada (Attorney General)*, [2007] F.C.J. No. 43, at paragraphs 29-30. This was an application for judicial review by Ms. Johnstone of the decision of the CHRC to not refer her complaint alleging family status discrimination to the Tribunal.

[101] In *Johnstone*, the Federal Court agreed with the approach of the Tribunal in *Hoyt* in regards to discrimination on the basis of family status, and stated that “...there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status.” (*Johnstone*, supra, at para. 29). The Court also stated that the suggestion of the British Columbia Court of Appeal in the *Campbell River* case that *prima facie* discrimination will only arise where the employer changes the conditions of employment seems “to be unworkable and, with respect,

wrong in law.” (*Johnstone*, supra, at para.29). The Court also found that the “serious interference test” which the Court viewed as the approach apparently adopted by the CHRC for not sending the matter to the Tribunal, “fail[ed] to conform with other binding authorities which have clearly established the test for a finding of *prima facie* discrimination.” (*Johnstone*, supra, at para. 30.)

[102] The Federal Court’s decision in *Johnstone* was upheld by the Federal Court of Appeal, although the Court of Appeal stated that it was not expressing an opinion on the proper version of the test in relation to *prima facie* discrimination on the ground of family status. Instead the Federal Court of Appeal based its reasoning on the finding that the failure of the CHRC to clearly identify the test it applied was “a valid basis for finding the decision of the Commission to be unreasonable. ([2008] F.C.J. No. 427, at para. 2).

[103] The Tribunal has recently rendered its decision in the *Johnstone* matter (see *Johnstone v. Canada Border Services*, 2010 CHRT 20). In that decision the Tribunal held:

[220] This Tribunal agrees that not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence, but this is not the argument put forward in the present case. Ms. Johnstone’s argument is that such protection should be given where appropriate and reasonable given the circumstances as presented.

[221] As discussed above, we are addressing here a real parent to young children obligation and a substantial impact on that parent’s ability to meet that obligation. It is not before this Tribunal to address any and all family obligations and any and all conflict between an employee’s work and those obligations.

[...]

[230] [...] this Tribunal finds nothing in Section 2 that creates a restrictive and narrow interpretation of ‘family status’.

[231] To the contrary, the underlying purpose of the Act as stated is to provide all individuals a mechanism “to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society...” It is reasonable that protections so afforded include those naturally arising from one of the most fundamental societal

relationships that exists, that of parent to child. The fact that the language of Section 2 mentions “lives that they are able and wish to have” carries with it the acknowledgement that individuals do make separate choices, including to have children, and that the Act affords protection against discrimination with respect to those choices.

[...]

[233] This Tribunal finds that the freedom to choose to become a parent is so vital that it should not be constrained by the fear of discriminatory consequences. As a society, Canada should recognize this fundamental freedom and support that choice wherever possible. For the employer, this means assessing situations such as Ms. Johnstone’s on an individual basis and working together with her to create a workable solution that balances her parental obligations with her work opportunities, short of undue hardship.

[104] Recently the Public Service Staffing Tribunal (the “PSST”) considered whether to follow the approach to family status set out in *Hoyt* or in *Campbell River* and determined that it would apply the *Hoyt* approach. In *Chantal Rajotte v. The President of the Canada Border Services Agency et al*, 2009 PSST 0025, the PSST stated that “the proper approach to be followed is the one set out in *Hoyt* which is also recognized by the Federal Court in *Johnstone*.” (para. 127.) The PSST further stated:

Accordingly, the evidence must demonstrate that the complainant is a parent, that she has duties and obligations as a member of society, and further that she was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with the respondent’s conduct, the complainant must prove she was unable to participate equally and fully in employment. (para 127.)

[105] A review of some recent cases out of the British Columbia Human Rights Tribunal (the “BCHRT”) demonstrates that the decisions of that Tribunal are not consistently following the approach in *Campbell River*. For example, it has not been found to be applicable in the case of provision of services (*Stephenson v. Sooke Lake Modular Home Co-operative Association*, 2007 BCHRT 341). It has also been distinguished in two BCHRT decisions involving an employment situation (*Haggerty v. Kamloops Society for Community Living*, [2008] BCHRT 172, par. 17 and *Mahdi v. Hertz Canada Limited*, [2008] BCHRT 245, paras. 60 and 61).

[106] In *Falardeau v. Ferguson Moving (1990) Ltd., dba Ferguson Moving and Storage et al.*, 2009 BCHRT 272, the BCHRT referred to the *Campbell River*, *Hoyt* and *Johnstone* decisions, and also to another of its decision in *Miller v. BCTF (No. 2)*, 2009 BCHRT 34. The BCHRT pointed out that in *Miller*, it had stated that *Campbell River* applied only in the context from which it arose. It cited the following statement from *Miller*: “The [*Campbell River*] formulation of what is necessary to establish discrimination on the basis of family status in the context of competing employment and family obligations is not applied mechanically in all cases of alleged discrimination on the basis of family status.” (*Falardeau*, at para. 29.)

[107] The issue in *Falardeau* concerned whether an employee, who had refused to do overtime because of child care responsibilities for his son, had been discriminated against on the ground of family status. The Tribunal found that the complainant had not established a *prima facie* case. The Tribunal stated at paras 31 and 32:

In the present case, Ferguson sought to maintain a well-established pattern of overtime hours to meet the needs of its customers. To the extent Mr. Falardeau made the respondents aware of his child-care needs and arrangements, they thought, correctly on the evidence before me, that he was readily able to obtain coverage for his son's care if his work hours were extended. Indeed, he had done so on many occasions. The fact that neither the pattern of Mr. Falardeau's work, nor his childcare demands or arrangements had changed, suggests that he may have made an issue of overtime because of his dislike of work on construction sites, rather than because of his family responsibilities.

There was no evidence that his son had any special needs, or that Mr. Falardeau was uniquely qualified to care for him. Although these factors are not required to establish a "substantial" parental obligation, the evidence in this case established no other factors which would take Mr. Falardeau's case out of the ordinary obligations of parents who must juggle the demands of their employment, and the provision of appropriate care to their children. I am unable on these facts to find a "serious interference with a substantial parental or other family duty or obligation." (The underlining is mine.)

[108] The BCHRT in *Falardeau* was essentially following the reasoning formulated in the *Campbell River* case. But even if it had followed the *Hoyt* approach, its conclusion might not have been different. The main difference between the situation in *Falardeau* and in the present

case is that in *Falardeau* there had been no changes in Mr. Falardeau pattern of work or in his childcare demands or arrangements. Furthermore, his employer had been made aware of Mr. Falardeau's child-care needs and arrangements and it thought, rightly, that Falardeau was readily able to obtain coverage for his son's care if his work hours were extended. Therefore, Mr. Falardeau had not been able to make out a *prima facie* case on the ground of family status, as he had not proven that he was unable to participate equally and fully in employment as a consequence of his duties and obligations as a parent.

[109] In the present case, the Complainant by being forced to cover a shortage in Vancouver was facing a serious interference with her parental duties and obligations. The matter might have been different had the Complainant refused to be set up at her home terminal.

[110] In his closing arguments CN's counsel argued that the Complainant's position was based on an incorrect premise. He qualified the complaint as a request that the employer accommodate the Complainant's "parental preferences and lifestyle choices." He added that this position was based on an exceedingly broad interpretation of the *CHRA* and that the only characteristic raised by the Complainant as triggering protection under the *Act* is the fact that she is a parent and as such must see to the upbringing of her children. Counsel further submitted that requiring an employee who is a parent to comply with his or her responsibility to report to work as required by the collective agreement does not amount to discrimination *prima facie*. Rather, he argued that the refusal by an employee to comply with his or her responsibilities in this regard amounts to a choice which is exclusively personal in nature and which, absent exceptional circumstances, no employer is obligated to accommodate. Accordingly, he concluded that upholding the complaint in this case would amount to adding "parental preferences" to the list of prohibited grounds of discrimination set out in the *CHRA* under the guise of an expansion of the notion of "family status".

[111] In support of his arguments, Counsel referred to numerous cases and awards, including the British Columbia's Court of Appeal decision in *Campbell River* which he suggested presented a more structured and pragmatic approach than the Tribunal's decision in *Hoyt*. He also made reference to an arbitration award in *Canadian Staff Union v. Canadian Union of Public*

Employees, (2006) 88 C.L.A.S. 212. In this case, the grievor had refused to relocate to Halifax after having applied for a job which indicated that the place of work would be Halifax. The grievor resided in St. John's, Newfoundland where he had shared custody of his children with his former spouse. He also was responsible for the care of his aging mother. The union argued that the notion of "family status" was not limited to the status of being a parent *per se*, but also extended to the accommodation of the grievor's family responsibilities.

[112] The award stated that the grievance raised important issues of human rights law which were summarized as follows: "whether an employer's designation of a specific geographic location in a job posting, and insistence that an employee who wished to hold that job live where he or she can report regularly to work at that location *prima facie* constitutes discrimination on the basis of marital status or family status, if the employee's marital and family responsibilities effectively preclude him or her from living where he or she can report regularly to work at the specified location." (at para. 6.)

[113] The arbitrator dismissed the grievance on the ground that "for the purposes of any statute relevant here, and the Collective Agreement, it was the Grievor's choice, not his marital and family responsibilities, that precluded him from moving to Halifax." (at para. 9.) The arbitrator added: "what the Employer did here did not constitute *prima facie* discrimination on the basis of marital status or family status and the Employer was not required by law to accommodate the Grievor to the point of undue hardship."

[114] In his analysis of the relevant cases, the arbitrator adopted the narrower approach of *Campbell River* in regards to the interpretation of "family status". Although interesting, the Tribunal notes that the facts relevant to this award are in many regards different from those in the present case. In that case, the grievor had applied for a job, knowing full well that the job description indicated that it was to be located in Halifax. The grievor had a choice, he could decline to go to Halifax and remain in his position in St. John's, which is not the case for the Complainant whose choice was either to report to Vancouver for an undetermined amount of time or see her employment relationship terminated. The facts also indicate that there was no significant increase in pay or benefits involved between the job in Halifax and the one in

St. John's and that the grievor had applied for the job posted because he wanted a change and new challenges (para. 15). The Tribunal also notes that the grievor's children were 19 years old, starting university, and 15, starting high school, and, as indicated by the arbitrator, although the grievor's sons undoubtedly benefited greatly from his regular presence in St. John's, they required no special care from him, and he could make arrangement for their maintenance in his absence. (Para. 141.)

[115] CN counsel also made reference to the Ontario Human Rights Tribunal's decision in *Wight v. Ontario (No 2)*, 33 C.H.R.R. D/191, which dealt with an employee who, at the expiry of her maternity leave, refused to return to work claiming that she was unable to make appropriate daycare arrangements. Her employment was thereafter terminated on the ground that she had abandoned her position. In this case the Tribunal found that the Complainant had "steadfastly" refused to acknowledge her employer's reasonable expectations that she would take whatever steps are necessary to return to work when her maternity leave would expire. In the Tribunal words: "She had decided she was going to be on a maternity leave until October at the earliest or January at the latest." (para. 321). The Tribunal added that this was not a case of someone who, despite her best efforts, could not find day care for her child and had to make a choice between her child and her job. Again a factual situation which is very different from the present one.

[116] Counsel also made reference to *Smith v. Canadian National Railway*, 2008 CHRT 15, a decision rendered in May 2008, by the then Tribunal Chairperson. The Tribunal fails to see how this decision can be said to be "comparable" to the present situation. In the *Smith* case, although the complainant did assert, amongst other grounds, that he had been discriminated against on the basis of family status, the Tribunal found that this ground of discrimination had not been raised in the complaint and that no jurisprudence was presented as to whether the facts amounted to family status discrimination. (para. 289.)

[117] CN's counsel finally referred the Tribunal to a series of awards rendered by the Canadian Railway Office of Arbitration ("CROA"). Although interesting, all the CROA decisions are founded on their particular facts and do not help us in the determination of the proper test to follow in this case.

[118] The Tribunal also disagrees with CN's argument that an open-ended concept of family status would open up the floodgates and that it would have the potential of causing disruption and great mischief in the workplace. As the Human Rights and Citizenship Commission of Alberta noted at para. 242 of its decision in *Rawleigh v. Canada Safeway Ltd*, decision rendered on September 29, 20009, "every case must be weighed on its own merits and unique circumstances. To support the belief that the floodgate may be opened to opportunistic individuals is very dangerous and possibly discriminatory."

[119] The Tribunal also wished to remind that the Supreme Court of Canada and other Courts have consistently held that that human rights must be interpreted in a large and liberal manner. In *CNR v. Canada (Human Rights Commission) (Action Travail des Femmes)*, [1987] 1 S.C.R. 1114, the Court stated, at paragraph 24 :

24. Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

[120] From the above analysis, the Tribunal concludes that there are two different interpretations in the case law with regard to a *prima facie* case of discrimination based on family status: the one in *Campbell River* and the one in *Hoyt*. The Tribunal is of the opinion that the effect of the approach in *Campbell River* is to impose a hierarchy of grounds of discrimination, some grounds, as the ground of family status, being deemed less important than others. This approach is not supported by the purpose of the *CHRA*. Furthermore, all the permutations of the approach applied to the ground of family status in British Columbia subsequent to the *Campbell River* decision, support the Tribunal's conclusion that family status should not be singled out for a different and more onerous or more stringent *prima facie* standard. The only solution is to apply the same test

as for the other grounds enumerated in section 3 of the *CHRA*. This approach was accepted in *Hoyt* and approved by the Federal Court in *Johnstone*.

[121] I will therefore follow the approach in *Hoyt* which is consistent with human rights principles in treating all prohibited grounds of discrimination as equal.

[122] Furthermore, taking into account the special nature and status of human rights legislation as a quasi-constitutional legislation, the Tribunal concludes that the interpretation and application of family status proposed in *Hoyt* is the proper one to adopt. As stated earlier, human rights legislation must be given a liberal and purposive interpretation, in which protected rights receive a broad interpretation, while exceptions and defenses are narrowly construed.

c) Has a *prima facie* case of discrimination on the basis of family status been made out?

[123] In 2005, the Complainant was the parent of two young children. The evidence also establishes that she told CN that a temporary move to Vancouver, with no information with regard to how long she would have to stay there or about the housing arrangements once she arrived there, would disrupt her children's care and that it would be impossible for her to make arrangements for appropriate child care. In addition, her husband was also a railroader with long absences and unpredictable schedules. She had indicated that as long as she was able to work out of her home terminal in Jasper, she could manage to find child care, although, she added, with difficulty.

[124] In her various letters to CN, the Complainant explained her family situation, but she never received any answer. CN's witnesses testified that parental responsibilities such as child care were not a "satisfactory reason" not to protect a shortage. CN considered that the Complainant's situation did not qualify as requiring accommodation on the basis of family status under the *CHRA*. It also considered the Complainant's situation as a personal choice not to abide by her professional obligations in order to prioritize other aspects of her life, a situation it referred to as "work-life" balance."

[125] The Tribunal concludes that the law simply does not support CN's view of family status as not including the Complainant's situation. The Complainant's situation as a parent of two small children and the ramifications, as she explained in her various letters, of ordering her to Vancouver does bring her within the ground of family status. She specifically requested accommodation of CN and had directed her request to the right CN officials. CN's witnesses recognized that such a request should be made to the employee's supervisor who in this case was Colin Pizziol, the trainmaster in Jasper. The Complainant had addressed her letters to him. Unfortunately, Mr. Pizziol was not called as a witness and CN's other witnesses could not testified to how he had dealt with this request. The unchallenged evidence of the Complainant was that neither her supervisor, nor any other managers of CN, had ever responded to her letters, nor discussed with her situation.

[126] Having regard to the evidence submitted at the hearing, the Tribunal concludes that the Complainant has established a *prima facie* case of discrimination based on the ground of family status. The evidence demonstrates that the Complainant was a parent and that her status included the duties and obligations generally incurred by parents. As a consequence of those duties and obligations, the Complainant, because of CN's rules and practices, was unable to participate equally and fully in employment with CN. This being the case, the onus now shifts to CN to demonstrate that the *prima facie* discriminatory standard or action it adopted is a bona fide occupational requirement.

d) Did CN provide accommodation to the Complainant?

[127] The burden to demonstrate accommodation to the point of undue hardship is that of the employer.

[128] Because of her family situation, the Complainant asked for accommodation. CN did not provide her with accommodation, except that they did accept to extend the time she had to report to cover the shortage in Vancouver for about 4 months. According to CN's witnesses this "accommodation" was granted to allow her to make the "necessary child care arrangements". It is surprising to see the term "accommodation" used, as none of CN witnesses felt that they were

under an obligation to offer “accommodation” to the Complainant or that the *CHRA* applied to her situation. CN’s position was that the Complainant had to make a choice between her job and her family situation and that was that. Mr. Kerry Morris, CN’s Labour Relation Manager, testified that he “did not see family status as an accommodation issue”. His comprehension of what the Complainant was seeking, although he had never spoken to her, was an extension of the time she had to report in order to “make childcare arrangements”. He felt that CN had given her significant time to make the necessary arrangements.

[129] For his part, Mr. Torchia testified that “the request that came to me [he did not indicate from whom the request came] was that they [the Complainant, KW and CR] needed more time to sort out their affairs. It was child care issues and they needed more time. I granted the request. In my mind I was accommodating them by giving them more time. I didn’t think that was unreasonable what I was doing. They had been off for a period of time, not like somebody who was set up, laid off, set up, laid off that would be expecting to go to work. They were off for a considerable period of time. So therefore they weren’t probably expecting this at that point in time and giving them extra time to do that seemed reasonable in my mind.” He added that he knew that there “was parental obligations of some sort” and he understood that the Complainant “needed some time to make arrangements”, but added that this did not raise in his mind any issue regarding the *CHRA*.

[130] Both the testimony of the Complainant and of CN’s witnesses establishes, without a doubt, that CN did not apply its accommodation policy in the Complainant’s case. The evidence also demonstrates that other employees who needed accommodation for reasons that could also bring them under the purview of the *CHRA* and CN’s accommodation policy and who did not report to Vancouver or did not report immediately, were not terminated by CN. For example, employees U and E, whose parents were ill, were both given leave of absence on compassionate ground and were not ordered to report to Vancouver. Also, other employees whose situations were not explained at the hearing were either given leave of absences or were set up by their supervisors and did not have to report to cover the shortage.

[131] CN's justification for denying the Complainant's request for accommodation due to family status was essentially that the nature of its business required that all employees available report to Vancouver to help address the shortage in 2005. But, when asked by CN's counsel whether if, had the Complainant reported to Vancouver in 2005, that would have resolved the shortage, Ms. Storms answered without any hesitation, "no", but immediately added that it would have meant that one less manager needed to fill in.

[132] To evaluate whether there has been discrimination on a prohibited ground in an employment context, and whether an employer has accommodated an employee up to the point of undue hardship, the applicable test is the one set forth by the Supreme Court of Canada in the *Meiorin* decision. In that decision, the Supreme Court of Canada standardized the test applicable to discrimination and rejected the old distinction between direct and indirect discrimination.

[133] Once the Complainant has established a *prima facie* case of discriminatory, the onus shifts to the employer to demonstrate that the *prima facie* discriminatory standard or action is a *bona fide occupational requirement* ("BFOR"). In this regard, the Supreme Court of Canada has stated at paragraphs 54 and 55 of the *Meiorin* decision :

An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool*, *supra*, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must

accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the prima facie case of discrimination stands.

[134] At the hearing, CN did not spend much time on the first two criteria in *Meiorin*, except to assert in its closing arguments that the evidence had clearly showed that the standard under review was enacted for a purpose rationally connected to the performance of CN's business interest and that CN and the Union had enacted them in an honest and good faith belief that it was necessary to the operation of CN's railway network. CN did not indicate on what "evidence" it was relying to make this affirmation and the reference to the "Union" is unsupported by the evidence, as nobody from the Union was called as a witness and I have no recollection of any evidence on this point by any other witnesses. Regardless, I will proceed to analyse the two first steps in assessing whether CN has successfully established a *BFOR* defence.

[135] The first step is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job. The task is to determine what the impugned standard is generally designed to achieve. The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose. In this case, the particular standard at issue is the "forcing" of employees to cover a shortage. According to section 148.11 of the Collective Agreement, employees hired subsequent to June 29th, 1990 can be "forced" to cover work at another terminal in the Western region and are obligated to report at that terminal within at most thirty (30) days unless they present a "satisfactory reason" justifying their failure to do so. These employees are commonly referred to as "category D" employees. They are also referred to as "non-protected" employees, insofar as they are obligated to respond to a recall outside of their terminal. If they do not respond to a recall their employment with CN can be terminated.

[136] Other categories of employees include those who were hired prior to June 29, 1990. These are referred to as "protected" employees. In this group of "protected employees" we have those who were hired prior to 1982 and who are referred to as "Category A" and "Category B" employees, respectively. These employees cannot be assigned for work outside of their local

terminals. Employees hired after 1982, but prior to June 29, 1990, are referred to as “Category C” employees and may only be assigned to protect work at adjacent terminals.

[137] In this case, category “D” employees, which include the Complainant, were recalled from lay off and “forced” to cover the shortage in Vancouver. As we have seen due to its location, the Vancouver terminal is a very active one. It constitutes a focal point for CN’s Canadian market. A shortage of running trades employees in Vancouver carries significant implications, as it can affect CN’s ability to operate adequately throughout its network. Neither the Complainant nor the CHRC contested the fact that CN had a legitimate purpose in seeking to address the shortage of Conductors in Vancouver in 2005. Forcing employees to cover shortages can be considered as rationally connected to the performance of the job, certainly when the shortage can have an impact on the operation of the employer. The Tribunal therefore concludes that CN has met the first part of the *Meiorin* tripartite test.

[138] Once the legitimacy of CN’s more general purpose is established, it must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. If the imposition of the standard was not thought to be reasonably necessary or was motivated by a discriminatory intention, then it cannot be a *BFOR*. (See *Meiorin, supra*, at para. 60). There was no evidence submitted at the hearing to the effect that CN’s standard of forcing employees to cover shortages, as it is expressed in article 148.11 of the Collective agreement, was adopted with the intention of discriminating against the claimant. It is true that counsel for the Complainant did raise in his closing arguments a point about article 148.11 being discriminatory. More specifically, he alluded to the differences in treatment between Conductors, who were hired prior to June 1990 and those hired afterwards. He noted that the Complainant had not commenced her employment with CN under this distinction. The evidence shows that the Complainant was hired in 1991, but that the distinction was introduced in February 1992 and applied to employees hired after June 1990. Counsel further argued that since the “vast majority of women Conductors” were hired after June 1990, this distinction constituted a discriminatory practice against women Conductors. Although interesting from an argumentative point of view,

the Tribunal cannot find any convincing evidence to support this conclusions. The Tribunal concludes therefore that CN has met the second part of the *Meiorin* test.

[139] CN's third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose. At this stage, CN must establish that it cannot accommodate the Complainant and others adversely affected by the standard without experiencing undue hardship. In other words, since the Complainant was adversely affected on the ground of her family status by the standard of forcing employees to cover shortages could CN accommodate her without experiencing undue hardship? The answer to this question will be in the affirmative for the following reasons.

[140] The use of the term "undue" infers that some hardship is acceptable. It is only "undue hardship" that satisfies this test. (See *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at page 984.) It may be ideal for an employer to adopt a practice or standard that is uncompromisingly stringent, but if it is to be justified it must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship. (*Meiorin*, supra, at para. 62.) Furthermore, when an employer is assessing whether it can accommodate an employee it must do an individualized assessment of the employee's situation. In this regard, in *McGill University Health Centre (Montréal General Hospital) v. Syndicat des employés de l'Hôpital general de Montréal*, [2007] 1 S.C.R. 161, at para. 22, the Supreme Court of Canada stated: "The importance of the individualized nature of the accommodation process cannot be minimized."

[141] In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pages 520-21, Wilson J. addressed the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship. Amongst the relevant factors are the financial cost of the possible methods of accommodation, the relative interchangeability of the workforce and facilities and the prospect of substantial interference with the rights of other employees. It was also stated that a standard or practice that excludes members of a particular group on impressionistic assumptions is generally suspect. (*British Columbia (Superintendent of Motor Vehicles) v. British Columbia Council of Human Rights*, [1999] 3 S.C.R.

868 (*Grismer*), at para. 31). Employers must also be innovative yet practical when considering accommodation options in particular circumstances.

[142] In his closing arguments, CN's counsel suggested that the Supreme Court of Canada had restated the principles applying to the notion of "undue hardship" in its decision in *Hydro Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC. The Tribunal does not accept this interpretation of that decision. On the contrary, the Tribunal finds this decision to be consistent with the previous decisions of the Supreme Court on the issue of "undue hardship". In *Hydro Québec*, the Court stated that although the employer does not have a duty to change the working conditions in "a fundamental way", it does have the duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work. (par. 16). The Court also stated that "[b]ecause of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without, undue hardship, offer the employee a variable work schedule or lighten his or her duties – or even authorize staff transfers – to ensure that the employee can do his or her work, it must do so to accommodate the employee." (para. 17.) (See also *Jonhstone v. Canada Border Services*, supra, at para. 218.)

[143] CN argues that if accommodation was required under the *CHRA*, reasonable accommodation was provided by it granting the Complainant more than four (4) months to report to Vancouver, rather than the minimum fifteen (15) days set out in the Collective Agreement. CN further states that granting the relief sought by the Complainant would constitute undue hardship because it would effectively grant all employees who are parents an equivalent to "super seniority" under the Collective Agreement solely on the basis of their status as parents.

[144] I will address first the claim that "reasonable accommodation" was provided.

[145] CN argues that providing extra time to the Complainant to report to Vancouver was all the accommodation that it was required to provide. However, the evidence clearly shows that such accommodation was not in any way a meaningful response to the Complainant's request and to

the factual underpinnings of her situation which she had communicated to the employer through her correspondence.

[146] The unchallenged evidence of the Complainant establishes that she wrote to Mr. Pizziol, the trainmaster in Jasper, and to other managers of CN on numerous occasions, explaining her family situation. She informed them that it would be difficult for her to take her children to Vancouver and that because of childcare responsibilities neither was it feasible to leave them with their father whose own work obligations would cause the same difficulties with childcare. She also requested that her situation be considered on a compassionate basis under the collective agreement and that she be allowed to wait out until Vancouver no longer required her services or until there was work available at the Jasper terminal or at the adjacent terminal in Edson.

[147] Ms. Storms testified that she did not see these letters as indicating that the Complainant was seeking accommodation regarding her family status. She added that the manager of the division, in this case Mr. Pizziol, was the primary decision maker in terms of granting or not an employee's request to be relieved from reporting to a shortage. She added that to make that decision, he would have taken the person's situation into account and decided what to do with it. Mr. Pizziol had the power to either grant a leave of absence or an extension of the delay to report. Ms. Storms further added that in the case of a large shortage, like the one occurring in Vancouver in 2005, the manager would also discuss the situation with his general manager. In 2005, the general manager to whom Mr. Pizziol reported was Denis Broshko.

[148] As it was the case for Mr. Pizziol, Mr. Broshko was not called as a witness and no explanation was given for his absence. There was also no evidence submitted by CN indicating that Mr. Pizziol had actually discussed the Complainant's situation with Mr. Broshko.

[149] Mr. Torchia testified on cross-examination that he had had discussion with the General Chairperson of UTU regarding the possibility of extending the time the Complainant had to report to cover the shortage. He added that during these discussions the issue of accommodation for family status was "never mentioned" and that he had never seen the Complainant's correspondence on this matter.

[150] The evidence clearly establishes that CN was not sensitive to the Complainant's situation. It did not answer her many requests for some form of accommodation and did not even meet or contact her to discuss her situation, even though its own accommodation policy directs that the employee be met as a first step in the process. It is also clear from there evidence, that neither Mr. Storms nor Mr. Torchia felt that they had any responsibility regarding any issue pertaining to the *CHRA*. They both testified that the supervisor of the employee and Human Resources were the ones with whom this issue should be raised. Unfortunately for CN, as indicated above, neither Mr. Pizziol, nor the person responsible for Human Resources in Edmonton, Ms. Mary-Jane Morrison, were called as witnesses.

[151] It is clear that CN witnesses did not consider "family status" - at least, family status matters that involve parental obligations and responsibilities - as a ground of discrimination that necessitated any form of accommodation. In their conception of the various grounds of discrimination set out in the *CHRA*, they seem to have chosen some grounds as opening a right to accommodation and others that did not. For example, they testified that CN had not hesitated to "accommodate" some employees who were recalled to cover the shortage in Vancouver because of a sick parent. They also acknowledge that CN had in the past accommodated employees for medical reason. But without inquiring into the nature of her request, they decided that the Complainant's situation did not qualify as one requiring accommodation under the *CHRA*.

[152] Ms. Ziemer also testified that CN had accommodated an employee in order to allow him to be absent from the working board every second weekend because he only had visitation rights for 48 hours every two weeks. In another case an accommodation was granted to an employee who was involved in a lengthy custody battle in Court. This person was given additional time off for this reason.

[153] Even if the Tribunal was to accept CN's argument that it had provided appropriate "accommodation" to the Complainant by granting her more time to report to Vancouver, CN's failure to meet the procedural obligations of the duty to accommodate would in itself still give rise to a violation of the Complainant's human rights. The Supreme Court of Canada has acknowledged that both the decision-making process and the final decision have to be taken into

consideration in analyzing a *BFOR*. In *Meiorin*, the Court stated at para. 66: “It may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer’s reasons for not offering any such standard.” (See also *Oak Bay Marina Ltd.v. British Columbia (Human Rights Tribunal) (No. 2)*, 2004 BCHRT 225, at paras. 84-86).

[154] In *Lane v. ADGA Group Consultant Inc.*, 2007 HRTO 34, at para. 150, (decision upheld by the Ontario Superior Court of Justice, Divisional Court, at [2008] O.J. No. 3076, 91 O.R.(3d) 649) the Ontario Human Rights Tribunal held that:

...[T]he failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination. It denies the affected person the benefit of what the law requires: a recognition of the obligation not to discriminate and to act in such a way as to ensure that discrimination does not take place.

[155] In *Meiorin*, the Supreme Court identified the following question as being relevant in analyzing the procedural part of the accommodation process followed by the employer:

- i. Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- ii. If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- iii. Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
- iv. Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- v. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

- vi. Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

[156] To meet the procedural component of the duty to accommodate, CN had a duty to show that it had considered and reasonably rejected any accommodation that would have accommodated the needs of the Complainant.

[157] The only evidence that this assessment of other form of accommodation might have occurred is that of Kerry Morris who testified that CN had had discussion, in the context of the grievance negotiation with UTU, about “alternative means of accommodation” so that the Complainant and the two other employees CR and KW could stay in Jasper. He suggested that UTU had proposed moving Conductors from an adjacent terminal to Vancouver, but according to Mr. Morris this was not feasible as all employees at the Kamloops terminal were working and moving them to Vancouver would only create a shortage in Kamloops. He explained that another alternative would have been to move three other employees from the Jasper terminal to Vancouver to cover the shortage instead of the Complainant and KW and CR, but, according to Mr. Morris, UTU felt that this solution was contrary to the seniority provision of the collective agreement and it was not ready to give its approval. Other than this, there was no evidence that CN considered or investigated alternative approaches to the Complainant’s situation and even with these options, the evidence shows that they were only considered after the termination of the Complainant’s employment. The Tribunal also notes that this evidence is not consistent with the evidence given on this matter in the Whyte and Richards cases.

[158] The evidence also indicates that CN did not apply its own accommodations guidelines and policies. CN has a very comprehensive accommodation policy. This policy recognizes all the prohibited grounds enumerated in the *CHRA*, including “family status”, and the policy clearly indicates that, wherever possible, employment policies and practices are to be adjusted so that “*no individual is denied employment opportunities...*” It also specifies that accommodation “*means making every possible effort to meet the reasonable needs of employees.*”

[159] CN “*Accommodation Guidelines*” explains that the objective of the Policy is “*to ensure that working conditions are not a barrier to employment.*” It also makes clear that CN has to show flexibility in eliminating any barriers and that it should make “*every effort to ensure that no one is put at a disadvantage because of a special need or requirement.*”

[160] The policy also defines the process to be followed in case an accommodation for one of the enumerated grounds is raised and it provides a checklist to be followed by managers and supervisors in case of such a request. The policy explains:

- *The first thing to do when an employee reports a problem or special need is to meet with the individual. Allow the employee to present the problem or need, ask questions to fully understand the request, and together discuss possible solutions.*
- *If no solutions can be identified in this manner, do not reject the request outright. Ask for advice, seek other solutions to the problem, and evaluate the impact of any potential accommodation with the appropriate functions, including the People department, among other. The employee has the responsibility to participate actively in the process, and to facilitate reasonable accommodation. Unions also have a recognized and important role and responsibility in the accommodation of the needs of employees.*
- *It is extremely important to keep records of the meeting held, the various solutions proposed, and the arguments used to accept or reject each option. This information is indispensable in the event of a complaint.*
- *Promptly inform the person in question of the decision taken, explaining the reasons for the decision. In the event that a request for accommodation is denied, employees may have a right to grieve under the appropriate grievance procedure or make a complaint under the CHRA.*

[161] The person responsible for the accommodation policy at CN’s Edmonton office is, as indicated earlier, Mary-Jane Morrison, a Human Resources Officer. It is with her that people who have question about the policy or its procedure consult. As noted earlier, Ms. Morrison was not a witness at the hearing. Instead, CN called as witness Stephanie Ziemer, the Human Resources Officer in Vancouver. Ms. Ziemer had no hands on implication or any personal knowledge of the Complainant’s situation, but she did testify that she would have expected that the policy had been

followed in this case and that “at some point Human Resources would have been involved.” No evidence of any involvement by Human Resources was presented at the hearing.

[162] It is also clear from the evidence of CN other witnesses that they felt that the accommodation policy was not any of their concerns. Mr. Torchia, for example, testified in cross-examination that he knew that CN had an accommodation policy in 2005, although he added that he had never received any formal training on it. He was also unable to say if there had been any “in house” training or seminars on the application of the *CHRA* for managers and supervisors, although he added that he was sure there had been. He added that throughout his career he had dealt with issues of accommodation in various grievances and in his dealings with the Union.

[163] Asked by CN counsel whether she was familiar with the duty to accommodate under the *CHRA*, Ms. Storms answered “No, not specifically. I know that it’s there and if I had to deal with it I would refer an employee to Human Resources.” On cross-examination she added: “I knew of it but I didn’t know the specifics of it. From our end what we handle is the pay end of it and once the accommodation is made we’ll be directed by Human Resources and the Division to adjust the pay, that’s my area of responsibility. I would have simply left it in Pizziol’s hands. I don’t know what he would have done with it. He may have gone to his boss, he could have gone several ways and I have no idea, you would have to ask Mr. Pizziol.” (The emphasis is mine.) Mr. Pizziol was not called as a witness.

[164] Ron Morrese, the General Supervisor of Operation, a senior manager at CN, testified that he had probably seen the accommodation policy, although he did not remember the details. He added that he was always in “operations” and that Human Resources dealt with the policy. He explained that they had the authority to tell “operations” what to do in those cases.

[165] According to the Complainant’s evidence, CN’s accommodation policy was not followed in her case. She added that she never met with her supervisor, the trainmaster in Jasper, nor did she get any response to the letters she had sent him or to other supervisors or managers of CN explaining her situation. There was also no evidence that she had met with anybody at Human

Resources or that she had been referred to them. It is clear from the evidence that CN did not follow the procedure set out in its own policy and that it had decided that “family status”, at least in terms of parental obligations and responsibilities, was not a ground of discrimination for which accommodation was required. It is also clear that CN never did an individualized assessment of the Complainant’s situation as it was required to do.

[166] I will now deal briefly with CN’s position to the effect that it would be undue hardship to grant the relief sought by the Complainant because she would then be granted “super seniority” based on the simple fact of her status as a parent.

[167] According to Stephanie Ziemer, CN does not capture the information regarding how many of its employees are parents. She added that the only way to have this information would be to review each employee’s file to see who they designate as dependants. Ms. Ziemer further added that from CN’s employees “group insurance” benefit plan “we can assume that approximately 68% of [CN’s] workforce are parents.” This very partial evidence falls well short of the evidence that CN would need to produce to justify discrimination on a balance of probabilities using the tripartite *Meiorin BFOR* test.

[168] CN did not produce evidence to prove that accommodating the Complainant in this case would have constituted undue hardship for the company. On the contrary, CN’s counsel during his examination of Ms. Storms asked her the following question: “If Ms. Seeley had reported to Vancouver in 2005 would that have resolved the shortage?” Her answer was: “No, it wouldn’t have resolved the shortage but everybody counts. We would have had one more person to man the operation and we would have used one less manager to fill in.” (The emphasis is mine.)

[169] Furthermore, if the Tribunal was to accept CN’s argument that because a vast majority of its employees are parents, accommodating the Complainant would cause it undue hardship, that would mean that any workplace with a large number of persons falling into a group with one or the other of the personal characteristics set forth in section 3 of the *CHRA* would automatically be precluded from the application of the law. For example, it would mean that women working in a workplace where the vast majority of employees are women would be precluded from making a

complaint of discrimination based on gender. Accepting CN's argument would have the effect of making it impossible for an individual to make a complaint on the ground of family status – at least, family status matters that involve parental obligations and responsibilities – because most of the employees in the workforce are parents and could also potentially follow the same route.

[170] CN did not produce any evidence that it was overwhelmed with requests for accommodation from people in the Complainant's situation. Only two other complaints, those of CR and KW, were produced. In *Grismer, supra*, at para. 41, the Supreme Court of Canada stated quite clearly that in the context of accommodation "impressionistic evidence of increased expense will not generally suffice." In *Lane, supra*, at paragraph 117, the Ontario Divisional Court added:

Undue hardship cannot be established by relying on impressionistic or anecdotal evidence, or after-the-fact justifications. Anticipated hardships caused by proposed accommodations should not be sustained if based only on speculative or unsubstantiated concern that certain adverse consequences "might" or "could" result if the claimant is accommodated.

[171] Regardless of the particular basis for CN's claim that it will suffer undue hardship, it is well established that the undue hardship analysis must be applied in the context of the individual accommodation being requested. As the Supreme Court stated in *Grismer, supra*, at paragraph 19, accommodation must be incorporated into the standard itself to ensure that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics which are frequently based on bias and historical prejudice. Accordingly, an employee's individual assessment is an essential step in the accommodation process unless it is in itself an undue hardship for the respondent (See *Grismer*, at paragraphs 22, 30, 32 and 38; *Meiorin*, at paragraph 65; *Audet v. National Railway*, 2006 CHRT 25, at paragraph 61 and *Knight v. Société des transports de l'Outaouais*, 2007 CHRT 15, at paragraph 72). Again, this individual assessment was not done in the case of the Complainant.

[172] Arguments that the acceptance of the need to accommodate in one instance will open the "floodgates" to claims by other employees are, in my view, unacceptable. As the Human Rights and Citizenship Commission of Alberta noted in *Rawleigh v. Canada Safeway Ltd*, unreported

decision, September 29th, 2009, at para. 242 “every case must be weighed on its own merits and unique circumstances. To support the belief that the floodgates may be opened to opportunistic individuals is very dangerous and possibly discriminatory.”

[173] In the instant case, CN failed to provide evidence that accommodating the Complainant would cause undue hardship in terms of costs. The only evidence regarding cost was with respect to the training of Conductors and there was no attempt to relate that evidence to the situation in the present case. We must remember that in order to be found to be “undue”, the cost of accommodation must be substantial. In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bs. Inq.), the Ontario Human Rights Tribunal stated, at paragraph 59: ““cost” would amount to undue hardship only if it would alter the essential nature or substantially affect the viability of the enterprise responsible for the accommodation.” This is recognized in CN’s own Accommodation policy which states: “*The costs incurred must be extremely high before the refusal to accommodate can be justified. The burden of justifying the refusal rests with the employer. The cost incurred must be quantifiable and related to the accommodation. Renovations or special equipment can be expensive but financial aid may sometimes be obtained from various organizations.*”

e) Conclusion

[174] For all of the above reasons, the Tribunal concludes that the evidence has established that CN has breached sections 7 and 10 of the *CHRA*. CN’s practice of requiring the Complainant to protect the shortage in Vancouver has had an adverse effect on her because of her family status. The evidence demonstrates that CN acted contrary to sections 7 and 10 of the *CHRA* by pursuing a policy and practice that deprived the Complainant of employment opportunities based upon her family status.

D. REMEDIES

[175] The remedies sought by the Complainant are compensation for lost wages and benefits, compensation for pain and suffering, special compensation, legal cost and interest and an order

that she be reinstated in her employment with CN with full seniority, benefits and all other opportunities or privileges that were denied to her. The CHRC also seeks an order ensuring that CN cease all discriminatory practices and behaviour and that it review its accommodation policy.

(i) An Order that CN Review its Accommodation Policy

[176] The CHRC requests an order, pursuant to section 53(2)a) of the *CHRA*, that CN take measures, in consultation with the CHRC, to redress its failure to properly accommodate its employees on the basis of family status, including issues of parental obligations and responsibilities. It further requests an order that appropriate human rights training for CN's managerial, human resources and crew management personal be put in place and that regular information sessions on accommodation policies in an effort to eliminate discriminatory attitudes and assumptions related to family status as a ground of discrimination be held.

[177] Although the Tribunal acknowledges that CN has a good policy on accommodation, it is clear that it has not been applied or implemented properly in the case of family status as a ground of discrimination. CN's managers and supervisors have failed to follow this policy in the Complainant's case. Having reviewed the evidence, I conclude that CHRC's request is justified.

[178] I therefore order CN to work with the Commission to ensure that the discriminatory practice and behaviour does not continue and to make sure:

- a) that the appropriate policies, practices and procedures are in place, and
- b) that CN, in consultation with the CHRC, retains appropriate persons to conduct workplace training for managers, human resource and crew management staff on issues of discrimination and human rights and particularly on accommodation on the ground of family status,

(ii) Reinstatement

[179] The Complainant seeks an order, pursuant to s. 53(2)(b) of the *CHRA*, directing CN to return her to her employment as a Conductor with CN. Section 53(2)(b) of the *CHRA* states that where the Tribunal finds the complaint is substantiated, it may order a respondent to make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that were denied the victim as a result of the practice.

[180] In order to provide this remedy in the present case, the Complainant must therefore be returned to her job without loss of seniority. The Tribunal orders CN to set up the Complainant to her position as Conductor at the Jasper terminal, after she has, if necessary, updated her rules and medical certificates. On the unchallenged facts put forward by the Complainant, there are three possible starting dates that the Tribunal could reasonably fix for the Complainant reinstatement. The first date suggested is July 1st, 2005, which could be seen as the effective date for implementation of the Complainant's request to be accommodated by being "set up" in a full time position in Jasper. The Tribunal does not accept this as an appropriate date as there was no evidence that the Complainant could have been set up in a full time position in Jasper at that time or if this would have been the appropriate accommodation. There was also no evidence of any employees being set up in Jasper at that time.

[181] The second date is March 1st, 2006. According to the evidence, this is the date that another laid off employee from Jasper, who had been recalled and had reported to Vancouver, was set up in Jasper. Since only four employees from Jasper, the Complainant, CR, KW and this employee, had been recalled and told to report to Vancouver it might be reasonable to expect that the Complainant, CR and KW would also have been set up in Jasper around March 2006. Again, there was no evidence produced showing that more than one employee had been set up in Jasper at that time and it is difficult for me to retain that date as the appropriate one.

[182] Finally, evidence was produced that in March 2007, CN hired thirty-nine (39) new Conductors were in Jasper and that many of these new Conductors have since been set up. It is

reasonable to conclude therefore that the Complainant had, at that time, seniority over these new Conductors and that she would have been set up in Jasper ahead of them. Therefore, I conclude that from the evidence, the Complainant would have been set up in March 2007 and this date is therefore the one retained for her reinstatement. In regards to her seniority, since seniority continues to accumulate even when an employee is on lay off, it will in this case continue to accumulate as if there had never been a breach in her relationship with CN in July, 2005.

(iii) Compensation for lost earnings

[183] The complainant seeks compensation for all wages and benefits lost pursuant to s. 53(2)(c) of the *CHRA*. Considering my conclusion as to the date of reinstatement, I order that the Complainant be compensated for all lost of wages and benefits from March 1st, 2007 to today. The parties are ordered to calculate the amount of wages owing using the formula provided for in the Collective Agreement. In regards to extra payments that a road Conductor could receive, since it would be difficult for the Tribunal to set an amount, it is ordered that the parties establish this amount by looking at the extras that were paid for the period to a Conductor with similar seniority working in the terminal, assuming that that Conductor had no unusual absences. The parties could, for example, take into consideration the extra payments that were paid to the employee who was set up in Jasper in March 2006.

[184] In regards to the issue of mitigation of damages, there is no question that the Complainant had a duty to mitigate. According to the Complainant's evidence, after the termination of her employment with CN in 2005, she worked at odd jobs, for example, as a waitress in a restaurant or for an outfitter, but she could not give a precise list of all her employment. Surprisingly, she could not provide a figure for her income during those years. She said that she basically worked for tips and had no salary or was paid cash. She also added that because of the young age of her children she had not looked for other work during this period. The Complainant's evidence in regards to her efforts to mitigate her damages was not very convincing and at best demonstrated that during this period she did not make great effort to find alternative revenues.

[185] Taking this into consideration, I conclude that it would be reasonable to reduce the amount awarded for lost of wages by thirty percent (30%).

(iv) Pain and suffering

[186] Section 53(2) of the *CHRA* provides for compensation for pain and suffering that the victim experienced as a result of the discriminatory practice, up to a maximum of \$20,000.

[187] The Complainant testified that the whole situation was “deeply disturbing” and that it had “upset her very much”. She further added “I lost my career. I was discarded because I had kids.” She said that following the July 2005 letter of termination she was depressed: “I was shocked and deeply affected. My family noticed the changes. I was irritable. I felt violated and that I had been treated with no regards.”

[188] Her husband also testified that after she was fired, the Complainant was “hurt, upset and irritable”.

[189] No medical evidence was produced to substantiate these claims. Nevertheless, I agree that CN’s conduct and nonchalant attitude towards her situations was disturbing for the Complainant and that it must have upset her. Taking, this into consideration, I order CN to pay to the complainant \$ 15,000 in compensation for her pain and suffering.

(v) Wilful or Reckless Conduct

[190] Section 53(3) of the *CHRA* provides for additional compensation where the Respondent has engaged in the discriminatory practice wilfully or recklessly up to a maximum of \$20,000.

[191] I agree that CN’s conduct in this case was reckless. CN had adopted an accommodation policy, in the form of the *Accommodation Guidelines*, which set out the procedures to be followed with respect to any employees who required accommodation. This policy clearly identified “family status” as one of the ground for discrimination. Yet, CN and the senior managers

involved in this case decided that they did not need to be concerned with family status and ignored their responsibilities under the policy. They didn't make any efforts to try to understand the Complainant's situations, ignored her letters, decided to treat her case as just a "child care issue" and to cherry-pick which ground of discrimination should give way to accommodation and which should not. This course of action was, in my view, reckless.

[192] The Tribunal orders CN to pay to the Complainant the sum of \$20,000, in additional compensation under section 53(3) of the *Act*.

(vi) Costs and Interest.

[193] In his closing arguments, counsel for the Complainant sought an award for legal cost. Since the close of this case, the Federal Court of Appeal has rendered a decision in *Canada (Attorney General) v. Mowat*, 2009 FCA 309, in which the questions were whether the Tribunal had the authority to award costs and whether the authority could be found in paragraph 53(2)(c) of the *Act* which authorizes the Tribunal to compensate a complainant for any expenses incurred as a result of the discriminatory practice.

[194] After an analysis of Human Rights Codes in various provinces that allowed an award for cost and after analysing the purported intent of Parliament, the Federal Court of Appeal concluded at paragraph 95:

The quest is to determine whether Parliament intended to endow the Tribunal with the authority to award costs to a successful complainant. For the reasons given, I conclude that Parliament did not intend to grant, and did not grant, to the Tribunal the power to award costs. To conclude that the Tribunal may award legal costs under the guise of "expenses incurred by the victim as a result of the discriminatory practice" would be to introduce indirectly into the Act a power which Parliament did not intend it to have

[195] Taking into consideration the decision of the Federal Court of Appeal, the Tribunal cannot accede to the Complainant's request that CN be ordered to pay her legal cost.

[196] In regards to interest, interest is payable in respect of all the awards in this decision (s. 53(4) of the *CHRA*). The interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank Rate (Monthly series) set by the Bank of Canada. With respect to the compensation for pain and suffering (s. 53 (2)(e) of the *CHRA*) and the special compensation (s. 53(3)), the interest shall run from the date of the complaint.

“Signed by”

Michel Doucet

OTTAWA, Ontario
September 29, 2010

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

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