

Canadian Human Rights Tribunal

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Tribunal canadien des droits de la

BETWEEN:

PATRICIA BUTLER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

NENQAYNI TREATMENT CENTRE SOCIETY

Respondent

REASONS FOR DECISION

T.D. 12/02

2002/10/28

MEMBER: Anne L. Mactavish

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I. THE FACTS

[1] Patricia Butler worked for a number of years in a day-care run by the Nenqayni Treatment Centre Society. Several years into her employment, Ms. Butler injured her back in an accident, and was off of work for several months, while convalescing. Approximately one year after Ms. Butler's return to work, there was a change in the senior management of the Centre. Shortly

thereafter, Ms. Butler was told by the Centre's new Executive Director that she would not be able to work in the day-care until she provided medical evidence that she was fit for work. Ms. Butler never returned to work at the Centre. She says that her employment with the Centre was terminated because of her employer's perception that she suffered from a disability.

A. Patricia Butler's Employment History

[2] Patricia Butler completed Grade 10 in high school. After marrying, Ms. Butler stayed at home for a number of years raising her child. In the late 1980's, Ms. Butler started a home day-care. Several years later, she took a 100-hour course in child care offered by a local women's organization, which course provided training in babysitting, first aid and child safety. Ms. Butler subsequently worked in several other home day-cares. In November of 1994, she began working at the Nenqayni Treatment Centre.

[3] The Nenqayni Treatment Centre is operated by several Bands in the Williams Lake area of British Columbia, and was established to provide treatment and rehabilitation services for First Nations and Inuit people suffering from addictions. It is a relatively small organization, with a full-time staff of about 35, and 5-6 other individuals employed on a casual basis. The Centre is primarily funded through grants from Health Canada, and has an annual budget of approximately \$2 million.

[4] In addition to its other activities, the Centre runs six-week programs providing treatment to families. Both day-care and school facilities are located on site, to care for children while their parents undergo treatment.

[5] Since 1991, the day-care has been supervised by Donna Narcisse. Ms. Narcisse is a certified early childhood education teacher. It appears that during the early and mid-1990's, it was the practice of the Centre to try to always have at least one certified early childhood education teacher on site at all times. Ms. Butler was not a certified early childhood education teacher.

[6] Ms. Butler was hired on a part-time, casual basis. Initially, Ms. Butler worked in the day-care, as well as in building maintenance. As time passed, however, Ms. Butler was primarily called in to work in the day-care. The Centre used casual employees in the day-care when there were more children in care than could be cared for by Ms. Narcisse on her own.

[7] Donna Narcisse was responsible for deciding when additional staff would be called in. The day-care cared for up to nine children at any one time, the children ranging from infants to those four years of age. The staffing needs of the day-care changed constantly, as families joined the programs, completed programs or dropped out. Ms. Narcisse explained that there was no hard and fast rule with respect to the required ratio of staff to children. Rather, she made the decision to call in casual staff based upon several factors, including the number of children in care at any one time, and the ages of the children in question. According to Ms. Narcisse, she would require additional help where, for example, there was a baby in the day-care, along with three older children.

[8] Day-care staff were responsible for ensuring that the children were safe and well cared for. There was a significant physical component to working in the day-care -- employees had to lift children in and out of strollers, playpens and cribs. Staff would also have to lift children up onto a change table, in order to change their diapers.

[9] By all accounts, Ms. Butler was an excellent day-care assistant. Ms. Narcisse and Chris Hornby (another co-worker who worked with Ms. Butler in the day-care) both described Ms. Butler as a warm and caring individual, who was devoted to the children. It was clear from Ms. Butler's testimony that she truly loved her job.

B. Ms. Butler's Accident

[10] On April 23, 1997, Ms. Butler was involved in a dirt bike accident. According to Ms. Butler, while out biking with her husband, she fell backwards off of her bike, and crushed two vertebrae. Ms. Butler was hospitalized for a couple of weeks. Although she did not require surgery, Ms. Butler was bedridden for five months, in order for her back to heal.

[11] Ms. Butler wore a brace on her back for a couple of months after her accident. She also underwent physiotherapy to assist in strengthening her back. Ms. Butler was off of work from April to September of 1997.

C. Ms. Butler's Return to Work

[12] Ms. Butler returned to work in the day-care at the Nenqayni Centre on September 15, 1997. According to Ms. Butler, Donna Narcisse called her at home wanting to know if Ms. Butler was ready to come back to work. Ms. Narcisse explained that there was a large group of children coming to the day-care. Ms. Butler advised Ms. Narcisse that she was ready to come back, and she resumed her part-time, casual employment.

[13] Both Dave Ross and Margaret Clark testified that Patricia Butler would have had to provide medical evidence that she was fit to work when she returned to the Centre in the Fall of 1997. Mr. Ross was the Executive Director of the Centre at the time, and Ms. Clark was the Program Coordinator responsible for the operation of the day-care. Mr. Ross was unsure, however, if he was even working at the Centre when Ms. Butler returned to work, and had no specific recollection of ever seeing a medical certificate regarding Ms. Butler's fitness for work. Although Ms. Clark recalled receiving some kind of confirmation that Ms. Butler was fit for work, no such evidence has been produced. Notwithstanding the fact that the issue of her fitness for work in the day-care is central to this case, Ms. Butler never mentioned being asked for or providing evidence of her physical fitness in the Fall of 1997. On all of the evidence, I am satisfied that Ms. Butler was never asked for any medical information with respect to her back injury or her current physical condition in the Fall of 1997, nor was any such information provided to the Centre at this time.

[14] Although Ms. Butler says that Donna Narcisse called her at home to see if she was ready to come back to work, it is common ground that Donna Narcisse was not working in the day-care in the Fall of 1997. Ms. Narcisse's son had died during the summer of 1997, and Ms. Narcisse was

off of work for several months on what appears to have been a compassionate leave. Ms. Butler says that there were periods during Ms. Narcisse's leave where she was the only staff person working in the day-care. Ms. Butler submits that this is proof of her ability to handle all of the responsibilities associated with her position in the day-care.

[15] As the Program Coordinator, Margaret Clark was Donna Narcisse's supervisor. Ms. Clark confirmed that Patricia Butler was the only staff person in the day-care at various times during Donna Narcisse's absence from work.

[16] The respondent disputes the assertion that Patricia Butler worked alone in the day-care during Ms. Narcisse's absence. Bruce Mack, the Centre's current Executive Director, testified that he could not locate any payroll records indicating that Ms. Butler worked by herself in the day-care at any time *after* September, 1997. However, the Record of Employment issued to Ms. Butler indicates that Ms. Butler returned to work on September 15, 1997, and there is little reliable evidence of anyone else working in the day-care during the last two weeks of September, 1997. ⁽¹⁾ As a result, I accept Ms. Butler and Ms. Clark's testimony, and find that Patricia Butler was the only staff person working in the day-care during the last two weeks of September, 1997.

[17] Chris Hornby testified that she was contacted on September 29, 1997 to see if she would be interested in working in the day-care. She was interested, and began working in the day-care on October 1, 1997. Like Ms. Butler, Ms. Hornby was hired on an on-call, casual basis. Unlike Ms. Butler, however, Ms. Hornby had her early childhood education certification.

[18] According to Ms. Hornby, she started work mid-way through a six-week program cycle. There were four children in the day-care at the time -- 2 eighteen month old infants, a three year old and a four year old. Ms. Hornby understood that Ms. Butler had been caring for the children by herself, and that she was being hired to assist Ms. Butler, as Ms. Butler could not lift the children in and out of cribs and playpens, or onto the change table.

[19] Ms. Hornby worked in the day-care until Donna Narcisse returned to work in January 1998. Ms. Hornby ultimately replaced Ms. Butler when Ms. Butler ceased working at the day-care in November of 1998.

[20] From September of 1997 until November of 1998 Ms. Butler worked in the day-care on an as-needed basis. Ms. Butler was the primary on-call casual employee used by the Centre. A review of the Centre's payroll records suggests that in this period, Ms. Butler worked approximately 50% of the hours that a full-time employee would have worked.

D. Ms. Butler's Ability to Perform the Routine Duties of a Day-Care Assistant After her Accident

[21] Patricia Butler was very happy to get back to work in the Fall of 1997. She says that she was feeling stronger, and was eager to work. According to Ms. Butler, she gave "110%" to her job.

[22] Ms. Butler's posture had evidently changed as a result of her injury, and she was more hunched over. Ms. Butler acknowledges that when she returned to work, she told Ms. Narcisse

and Ms. Hornby that she had to be careful with her back. She agrees that she would also tell her co-workers when her back got sore.

[23] Ms. Butler testified that she was able to lift very small children, and that the older children could walk on their own, and did not need to be lifted. The only occasion on which she had any problems lifting a child, Ms. Butler says, involved a little boy who was in a body cast, as a result of his having broken his femur. According to Ms. Butler, this child was too heavy for Ms. Butler and Ms. Narcisse to lift together, so they just left him in a stroller all day. Otherwise, Ms. Butler says, she had no difficulties lifting the children in the day-care after her accident.

[24] A number of other employees commented on Ms. Butler's ability to care for the children in the day-care after she returned to work following her accident. Ms. Clark stated that she visited the day-care approximately three times each week. She stated that she never received any complaints about Ms. Butler's performance, and had no concerns about her ability to do the job.

[25] Lillian Duncan testified that she had the opportunity to observe Ms. Butler at work when she helped out in the day-care in the Spring of 1998. According to Ms. Duncan, Ms. Butler's back was just as strong after she returned to work as it was before her accident. Ms. Duncan acknowledged that Ms. Butler's back would get sore if she was required to sit for long periods of time.

[26] Chris Hornby worked with Ms. Butler in the latter part of 1997. Ms. Hornby testified that Ms. Butler could not lift children, other than very small children, without help. If Ms. Butler was required to lift a larger child, Ms. Hornby says, Ms. Butler would ask her for help. Despite Ms. Butler's limitations, Ms. Hornby was of the view that the children were always safe in Ms. Butler's care.

[27] Donna Narcisse testified that after her accident, Ms. Butler had a visible lump on her back, and had difficulty moving around. It was also difficult for Ms. Butler to lift the children. When she worked with Ms. Butler, Ms. Narcisse says that she would do all of the heavy lifting, as she did not want to see Ms. Butler re-injure her back. According to Ms. Narcisse, she did this on her own initiative, and no one asked her to do it. Ms. Narcisse also explained that it was often necessary for day-care staff to hold small children in their arms and walk with them, in order to comfort them. Ms. Narcisse stated that Ms. Butler would sit and rock the children, but that Ms. Narcisse did not think that Ms. Butler could walk with them.

[28] Gloria Narcisse worked with Ms. Butler in the reception area of the Centre for a day in November of 1998. She testified that Ms. Butler told her that she had not been able to lift the children in the day-care.

[29] I prefer the evidence of Donna Narcisse and Chris Hornby with respect to Patricia Butler's ability to perform the duties of a Day-care Assistant to that of Margaret Clark and Lillian Duncan. Ms. Narcisse and Ms. Hornby worked more closely with Ms. Butler than did either Ms. Clark or Ms. Duncan. Both Ms. Clark and Ms. Duncan had their employment with the Nenqayni Treatment Centre terminated shortly after these events. Lillian Duncan's employment was terminated for cause, and her hostility to the Centre was palpable throughout her testimony. Ms.

Duncan, who described herself as a very good friend of Ms. Butler's, was a highly partisan witness, and there were significant inconsistencies in her evidence. I do not accept her testimony that Ms. Butler's back was just as strong after her accident as it had been beforehand. While Ms. Clark was a far more balanced witness, she did not squarely address the issue of Ms. Butler's ability to lift children in her testimony.

[30] While Ms. Butler may sincerely believe at this point that she could lift all but the heaviest children in the day-care, her evidence on this point conflicts with the testimony of Donna Narcisse, as well as with that of Chris Hornby, one of the Commission's own witnesses. I found both Ms. Narcisse and Ms. Hornby to be credible witnesses. Ms. Butler's assertion that she could lift all but the heaviest children must also be viewed in light of her acknowledgment that she told both Chris Hornby and Donna Narcisse that she had to be careful of her back when she returned to work in the day-care. Ms. Butler further agrees that shortly before she left the Centre, she told the Executive Director of the Centre that she was concerned about her back. Gloria Narcisse's testimony that Patricia Butler told her that she had not been able to lift the children in the day-care was not challenged by Ms. Butler.

E. Responsibilities of Day-Care Staff in Emergencies

[31] It is common ground that one of the most important obligations of a day-care worker is to ensure the safety of the children in care. As a result, Ms. Butler's ability to deal with emergency situations is an important aspect of this case.

[32] Several witnesses discussed the procedure to be followed in the event that there was a fire in the day-care. Ms. Butler explained that emergency procedures required that staff be able to lift the children and leave the premises in an expeditious manner. Ms. Hornby explained that during fire drills, the older children would put their boots on, if it was winter time, and would be led outside. Smaller children who were unable to walk were carried outside. Donna Narcisse explained that fire procedures required that the staff get the children out of the Centre as quickly as possible, even if that meant carrying them. Ms. Narcisse was concerned as to whether Ms. Butler would have been able to pick up two children and run out of the day-care in the event of a fire, although she never mentioned this concern to anyone while Patricia Butler was working at the Centre.

[33] It does not appear that there were any other Centre staff working near the day-care who could be expected to help out in the event of a fire. The day-care at the Nenqayni Treatment Centre is in its own building; the nearest building to the day-care being approximately fifty feet away. The day-care occupies the main floor of the building. Heather Walkus, the Executive Director of the Centre at the time of Ms. Butler's departure, testified that the second floor houses a school for the older children of families enrolled in the Family Program and that a teacher would work upstairs in the school.

[34] Ms. Butler was only called into work in the day-care if there were more children in care than Ms. Narcisse could handle by herself. Therefore, in the event that there was a fire in the day-care, it is clear that Ms. Butler would not have been able to rely on Ms. Narcisse to get all of the children out safely. There was a teacher working upstairs in the school, however, that

individual would logically have had to ensure that the school-aged children were evacuated safely, and could not reasonably have been expected to simply abandon the older children in order to go downstairs and assist Ms. Butler.

F. Findings Regarding Patricia Butler's Ability to Perform Essential Aspects of her Job

[35] On all of the evidence, I am satisfied that Ms. Butler had ongoing problems relating to her back injury after she returned to work in the Fall of 1997, and that these problems interfered with her ability to perform key tasks associated with the position of Day-care Assistant. In particular, Ms. Butler was unable to lift children, other than small infants.

[36] I am further satisfied that Ms. Butler's physical limitations should have raised legitimate concerns about her ability to respond to emergency situations, such as a fire in the day-care, at the time of her return to work in September of 1997.

[37] The issue of whether Ms. Butler's physical limitations could have been accommodated, so as to allow her to continue to work in the day-care will be addressed further on in this decision.

G. The Situation at the Nenqayni Treatment Centre

[38] 1998 was a year of considerable change at the Centre. Dave Ross had been the Executive Director of the Centre for some nine years when health reasons unexpectedly caused him to resign from his post in June of 1998. Although Mr. Ross described the financial position of the Centre in June of 1998 as being "as good as it had ever been", it is evident that there were concerns with respect to the financial situation of the Centre, and that consideration was being given to ways in which the Centre could be run in a more cost-effective manner.

[39] Financial statements for the Centre were produced for the first and second quarter of 1998 which indicate that the Centre was in a surplus position. However, it appears that grants were received from Health Canada on a periodic basis, and that the quarterly statements reflect the fact that grants had been received during each quarter for expenditures to be incurred during the remainder of the fiscal year. In other words, the quarterly statements are nothing more than a 'snapshot' of the financial position of the Centre as of a specific point in time, and do not reflect the overall financial condition of the Centre. I accept the testimony of Bruce Mack that the Centre was in a difficult financial position at this time, having an accumulated deficit by the end of 1998 of \$58,630.

[40] Mr. Ross' testimony regarding the financial position of the Centre must also be viewed in light of the testimony of another of the Commission's witnesses. Ms. Clark testified that in mid-1998, the Centre was operating in a deficit position. Overtime and other expenses were curtailed, and staff were asked to review the various programs offered by the Centre in order to identify areas where improvements could be made to the financial condition of the Centre. The Board of Directors of the Centre began considering a reorganization of the structure of the Centre in order to be able to free up more resources for client services. Management consultants were retained in order to review the organizational structure and staffing needs of the Centre, and staff cuts were recommended.

[41] The day-care was identified as one potential source of revenue, and consideration was given to opening the day-care to children from the neighbouring Soda Creek reserve. In order to be able to care for children from outside the Centre, provincial regulations evidently required that the day-care be licenced by provincial authorities. The Centre therefore began looking at having the day-care provincially licenced, although no concrete steps in this regard were taken at this time.

H. Heather Walkus' Arrival at the Nenqayni Treatment Centre

[42] Heather Walkus was hired as the Executive Director of the Nenqayni Treatment Centre in the Fall of 1998. Ms. Walkus testified that she was hired to implement many of the changes that had been identified by the Board of Directors, including the elimination of a number of positions in order to reduce salary costs.

[43] What followed was a period of considerable turmoil at the Centre. On November 7, 1998, Margaret Clark's employment as Program Co-ordinator was terminated. Nine other individuals, not including Ms. Butler, were let go around this time.

I. Heather Walkus' Initial Meetings with Centre Staff

[44] Heather Walkus testified that when she began working at the Centre, she made a point of meeting with each staff member, in order to find out what each of them did, and to discuss any concerns that the staff may have had with respect to the Centre. According to Ms. Walkus, in the course of her initial meeting with Ms. Butler, Ms. Butler indicated her unhappiness with the number of hours that she was working at the day-care, as there were not a lot of children needing care at the time. Ms. Butler also expressed concern about the prospect of the day-care becoming provincially licenced, and the implications that licencing would have for her as a non-certified childcare worker. Ms. Walkus says that Patricia Butler also mentioned her back injury, and the difficulties that she was having lifting the children, although Ms. Walkus says that Ms. Butler played down the extent of her difficulties in this discussion.

[45] Ms. Walkus says that she was interested in upgrading the qualifications of all of the staff at the Centre, and that in the course of this discussion, she suggested to Ms. Butler that she look into acquiring her early childhood education certification. It was going to become mandatory for day-care staff to have their early childhood education certification once the day-care became provincially licenced. ⁽²⁾

[46] Ms. Butler recalls a meeting with Heather Walkus soon after Ms. Walkus began working at the Centre in the course of which the possibility of Ms. Butler pursuing her early childhood education certification was discussed. She also recalls telling Ms. Walkus about her back injury. This was a quiet time in the day-care, according to Ms. Butler, and she knew that if she wanted to keep working at the Centre, other work was going to have to be found for her. Ms. Butler says that she raised this issue with Ms. Walkus, and Ms. Walkus said that she would try to find work in other areas of the Nenqayni Treatment Centre for Ms. Butler.

[47] Ms. Walkus testified that she met with Patricia Butler a second time. According to Ms. Walkus, Ms. Butler had picked up brochures for the early childhood education certification program at the University College of the Cariboo. Ms. Walkus produced a brochure, which she says is either the one that Ms. Butler brought to the meeting, or one just like it. Ms. Walkus says that Ms. Butler had a number of concerns about her ability to qualify for the program. One concern was the requirement that applicants be able to successfully complete a medical examination. The brochure stipulates that applicants must be in good physical and emotional health, explaining that:

As this program requires students to complete practicums that involve active involvement with children, lifting, emergency restraint or response, applicants may be refused admission to this program if the medical report reveals fitness problems.

According to Ms. Walkus, she suggested that Ms. Butler should see her doctor in order to find out if she would be able to pass the medical.

[48] Ms. Butler recalls picking up a brochure for the early childhood education certification program while she was still working at the Centre, although she says that she does not recognize the one produced by Heather Walkus. Although Ms. Butler recalls discussing the possibility of her enrolling in the certification program with Ms. Walkus, she does not recall telling Ms. Walkus that she did not think that she would be able to pass the medical examination. Ms. Butler testified that she thinks that she would have passed such an examination.

[49] In the course of these discussions, Ms. Walkus says that she began to develop concerns for the safety of the children entrusted to Ms. Butler's care, as well as for Ms. Butler herself. Ms. Walkus was concerned that Ms. Butler could re-injure her back in attempting to lift a child, or could drop the child. Further, Ms. Walkus was concerned about the implications that Ms. Butler's back injury could have for her ability to respond appropriately in case of an emergency in the day-care.

[50] Ms. Walkus says that she also met with Donna Narcisse and Chris Hornby in this period. Ms. Walkus says that both Ms. Narcisse and Ms. Hornby mentioned Patricia Butler's back injury, and that both expressed frustration at having to do all of the lifting of children.

[51] Donna Narcisse confirmed having met with Heather Walkus shortly after Ms. Walkus began working at the Centre. Although Ms. Narcisse denied complaining to Ms. Walkus about Ms. Butler, she was not sure if she had mentioned anything to Ms. Walkus about Ms. Butler's problem lifting children. Although Patricia Butler states that Heather Walkus never visited the day-care when she was working there, Donna Narcisse said that Ms. Walkus did come to the day-care, and would have been able to see for herself who was performing what tasks.

[52] Ms. Hornby was not asked whether she met with Heather Walkus, although she stated that she had never complained about having to lift children for Patricia Butler. It is not at all clear from Ms. Hornby's testimony whether she was working at the Centre in late 1998.

[53] However one chooses to characterize Ms. Walkus' discussions with Centre employees, I am satisfied that soon after she started working at the Centre, Ms. Walkus became aware that Patricia Butler had suffered a back injury, and was continuing to have difficulties lifting the children in the day-care. I further find that this raised a legitimate concern in Heather Walkus' mind as to the safety of the children in Ms. Butler's care.

J. The Attempts to Identify Alternate Positions for Patricia Butler

[54] Shortly after Patricia Butler met with Ms. Walkus, Ms. Walkus assigned Ms. Butler to work in a variety of other positions within the Nenqayni Treatment Centre. Ms. Walkus says that she did this because there was no work for Ms. Butler in the day-care at this time, and because of her safety concerns regarding Ms. Butler's ongoing ability to care for small children.

[55] Ms. Butler is vehement in her assertion that Ms. Walkus moved her into these various other positions unilaterally, and that there was absolutely no consultation with Ms. Butler beforehand. Ms. Butler's testimony in this regard must, however, be viewed in light of her testimony that she was aware that there were no children in the day-care at this time, and that she knew that if she was to continue working at the Centre, she would have to work in other areas. Ms. Butler further agrees that Ms. Walkus suggested that Ms. Butler try working in the Youth and Family Inhalant Program (YFIP), and that she agreed to do so. When the job in the YFIP did not prove satisfactory to Ms. Butler, she stated that Ms. Walkus said that she would try to find something else for Ms. Butler. Ms. Walkus subsequently identified several other opportunities for Ms. Butler, none of which proved suitable.

[56] Ms. Butler also stated that she was content working in the day-care, and said that if there wasn't enough work for her there, Ms. Walkus could have just sent her home. Ms. Butler's testimony in this regard is difficult to reconcile with her earlier testimony regarding her desire to work more hours, and her concern about the lack of opportunity for work in the day-care.

[57] In light of the foregoing, I am satisfied that Ms. Butler advised Ms. Walkus of her concerns regarding the lack of available work in the day-care, that Ms. Walkus did consult with Ms. Butler before moving her into alternate positions within the Centre, and that Ms. Butler agreed to try these positions. Each of the alternate positions provided to Ms. Butler will be considered in turn.

(i) The Youth and Family Inhalant Program Position

[58] Ms. Walkus asked Ms. Butler if she would be interested in teaching hygiene to the young women enrolled in the YFIP, and Ms. Butler agreed to try it. Ms. Butler testified that the brief time that she spent in the YFIP was "a disaster". According to Ms. Butler, when she arrived to provide the training, the girls were asleep in bed, and were not ready to be trained. At one point during her time in the YFIP, Ms. Butler says, one of the girls tried to jump onto her back. Ms. Butler says that she was not suitable for or trained to work in the program, and that she did not want to work there.

[59] Ms. Butler advised Ms. Walkus that she did not want to work in the YFIP. After a discussion with Ms. Butler, Ms. Walkus says that they agreed that the YFIP was not a suitable

placement for Ms. Butler. Ms. Walkus then attempted to find something else for Ms. Butler to do at the Centre.

(ii) The Kitchen Position

[60] Ms. Butler spent a day or two working in the kitchen at the Nenqayni Treatment Centre. Ms. Butler worked serving food, chopping vegetables and washing dishes. Ms. Butler said that the sink in the kitchen was too low, and that it hurt her back when she washed dishes.

[61] Ms. Butler worked in the kitchen under the supervision of Tillie Mitchell. Ms. Mitchell testified that she had Ms. Butler perform light duties in the kitchen, such as preparing salads, filling the salt and pepper shakers and napkin dispensers. Ms. Mitchell could not recall if Ms. Butler did any dishwashing, but said that Ms. Butler regularly complained about her back hurting.

[62] Ms. Butler says that she told both Ms. Mitchell and Ms. Walkus that she did not want to work in the kitchen, and that she wanted to go back to the day-care. As there was still no need for casual staff in the day-care, Ms. Walkus says that she tried to find another position for Ms. Butler in order to allow her to keep working.

(iii) The Maintenance Position

[63] Ms. Butler had worked in building maintenance as well as in the day-care during her early career at the Nenqayni Treatment Centre. Ms. Walkus suggested that Ms. Butler try working there again. Ms. Butler says that she was able to do the job without any difficulties, although she had difficulties moving the vacuum cleaner, because of her back. She was able to get another maintenance employee to assist her with the vacuum cleaner.

[64] It is uncontradicted that after trying the maintenance position, Ms. Butler told Ms. Walkus that she did not want to work the night shift in maintenance, and that she was not able to move maintenance equipment.

(iv) Baby-Sitting the Teenager

[65] Ms. Walkus testified that there was a teenaged boy at the Centre who had broken his leg. When the other positions did not work out for Ms. Butler, Ms. Walkus asked her to spend time with the boy, to read to him, entertain him and help him with his school work. Ms. Butler says that she had no problems caring for the boy, and that she stayed with him for a day or two, until another staff member was assigned to care for the boy. Ms. Butler did not offer any explanation as to why another staff member replaced her.

[66] Ms. Walkus says that although there was the potential for several weeks of work for Ms. Butler, she made it clear that she did not want to stay with the boy in the cast, and that she wanted to go back to work in the day-care. Ms. Walkus says that Ms. Butler would frequently leave the boy unattended and go back to the day-care, although Ms. Butler denies this. Ms. Walkus also says that Ms. Butler claimed that she did not feel comfortable with the boy, and was

unable to assist the boy's mother in taking him to the bathroom, because of the need to lift him. Ms. Butler continued to complain about her back, says Ms. Walkus.

[67] On all of the evidence, I am satisfied that Ms. Butler made it clear to Ms. Walkus that she did not want to care for the teenaged boy, and that this is why another staff member replaced her.

(v) The Reception Job

[68] On November 6, 1998⁽³⁾ Ms. Butler went to work answering the telephone in the Centre's reception area. This was the last placement offered to Ms. Butler at the Nenqayni Treatment Centre. Ms. Butler says that she was not provided with any training on the phones, and was in the position for less than a day.

[69] Gloria Narcisse had been the Centre's receptionist, although Ms. Walkus had moved her into more of an office manager-type position. Ms. Narcisse says that she was working in the reception area on November 6, 1998, and that she showed Ms. Butler how to work the telephone system. According to Ms. Narcisse, the phone system was a simple one, with only 4-5 lines. Ms. Narcisse says that she was working near Ms. Butler during the day, and was available to help her if she had any difficulties.

[70] Ms. Narcisse says that Patricia Butler told her that she had been unable to work in the kitchen or in maintenance because of her back injury. Ms. Narcisse also testified that Ms. Butler stated that she had not been able to lift any kids in the day-care. Nevertheless, Ms. Narcisse says, Ms. Butler said that she wanted to go back to work in the day-care. Ms. Narcisse says that Ms. Butler did not mention being in any discomfort while working in the reception area, but that she did complain that the reception job was boring. It was very clear to Ms. Narcisse that Ms. Butler did not want to work in the reception area.

[71] Heather Walkus' office was just off of the reception area in the Centre's main building. According to Ms. Walkus, she heard the phones ringing, with no one at the desk to answer them. Ms. Walkus went down to the day-care and found Ms. Butler there. According to Ms. Walkus Ms. Butler told her that she did not want to work in the reception area, and that it was too hard on her back. Ms. Butler initially stated that she could not recall doing this, and subsequently emphatically denied leaving her post in reception to return to the day-care. Ms. Butler did not explain why she stopped working in the reception area, although she admitted that she did not want to work there.

K. Findings Regarding the Attempts to Identify Alternate Positions for Patricia Butler

[72] Although the evidence surrounding the alternate positions offered to Ms. Butler is confusing, having regard to the evidence as a whole, I find that Ms. Walkus' decision to try Ms. Butler in a variety of alternate positions was taken both as an attempt to accommodate Ms. Butler's physical limitations, as well as in an effort to provide Ms. Butler with work, at a time when the day-care did not have a sufficient number of children in it to warrant calling Ms. Butler in to work.

L. Patricia Butler's Departure from the Nenqayni Treatment Centre

[73] The sequence of events regarding what happened next is also confusing. It is common ground that Ms. Butler was not called in to work at the Nenqayni Treatment Centre after her abortive attempt at working in the Centre's reception area on November 6, 1998. Ms. Butler says that she received a telephone call from Heather Walkus, during which Ms. Walkus told Ms. Butler that Ms. Butler's back was a liability to the Centre, and that she was being let go. At different points in her testimony and in the documentation that she prepared with respect to her complaint, Ms. Butler stated that this call took place on November 11, November 17, or November 23. While the date of the call is not terribly important, based upon subsequent events, I am satisfied that the call must have occurred on or before November 17.

[74] According to Ms. Butler, Ms. Walkus explained that she had been in contact with the Worker's Compensation Board, and that there was a concern about Ms. Butler's back injury. Ms. Walkus told Ms. Butler that she would have to provide medical evidence with respect to her ability to do the job, if she was to return to work at the Centre. Ms. Butler seemed to suggest that this was the first time that she had been asked for a medical certificate.

[75] Ms. Walkus explained that after the job in the reception area did not work out, she had run out of options for Ms. Butler. Ms. Walkus contacted the Worker's Compensation Board, who advised her that the Centre should not put Ms. Butler in a position where she was at risk of re-injuring her back.

[76] Ms. Walkus testified that she told Ms. Butler in early November that she would need medical evidence as to what Ms. Butler could and could not do before she would be able to work at the Centre again. Ms. Walkus says that she asked for information from Ms. Butler's doctor as she simply did not know where she could put Ms. Butler, without risking further injury to her back. Ms. Walkus also reiterated her concerns regarding Ms. Butler's ability to work in the day-care, insofar as the safety of the children was concerned. Ms. Walkus testified that she intended to use the information obtained from Ms. Butler's doctor to assist in determining what needed to be done to accommodate Ms. Butler.

[77] Ms. Walkus says that she told Ms. Butler that the Centre was expecting a large group of children in the future, and that, as a result, she wanted Ms. Butler to get the medical information to her within the next couple of weeks. Ms. Walkus explained that she asked that Ms. Butler provide the medical information within this time period, as she wanted to have Ms. Butler available to work in order to assist in dealing with this group of children.

[78] Ms. Walkus testified that a week or two later she got a message to call Ms. Butler. Ms. Walkus says that she returned Ms. Butler's call, and that they discussed the fact that there was still no work in the day-care. Ms. Walkus also reiterated her concern that none of the other placements that she had identified for Ms. Butler had worked out. Ms. Walkus agrees that she told Ms. Butler that she had been in contact with the Worker's Compensation Board, stating that she had been advised that the Centre was responsible for ensuring Ms. Butler's safety, and could not knowingly put her back in a position where she was at risk of further injury to her back. Ms. Walkus says that she explained this to Ms. Butler, and again told Ms. Butler that she would have

to produce a medical certificate advising the Centre as to what Ms. Butler could and could not do. Once she did that, Ms. Walkus said, they would be able to sit down and figure out where they would put Ms. Butler. Ms. Walkus advised Ms. Butler that until Ms. Butler provided such a certificate, she would not be called back to work at the Centre. Ms. Walkus says that Ms. Butler indicated that she wanted to claim Employment Insurance benefits. Ms. Walkus told Ms. Butler that the Centre would be issuing of a Record of Employment for Ms. Butler, in order to allow her to collect EI benefits. ⁽⁴⁾

[79] On November 18, 1998, Ms. Butler went to see her doctor, Dr. Gooch, and obtained a note regarding her fitness to work in the day-care. Ms. Butler testified in chief that she saw Dr. Gooch on her own initiative, and that Ms. Walkus never asked her to get a medical certificate. In cross-examination, however, Ms. Butler acknowledged that Ms. Walkus told her that the Centre needed medical evidence that Ms. Butler was fit for work.

[80] Ms. Butler then stated that she called the Centre twice in order to try to reach Ms. Walkus, to tell her that she had obtained a medical certificate. Later in her testimony, Ms. Butler testified that she tried to reach Ms. Walkus by phone on three occasions during the month of November. Ms. Butler initially said that each time she called, the phone was answered by Gloria Narcisse. She subsequently testified that she left one message for Ms. Walkus with Janese Budnarek. In documents filed by Ms. Butler with the Commission, Ms. Butler was less categorical, stating that she *may* have spoken to Ms. Budnarek. Mr. Mack testified that Janese Budnarek was not working at the Centre in November of 1998, although she was there in December of that year.

[81] Ms. Butler says that the first time that she called for Ms. Walkus, she spoke to Gloria Narcisse about her Record of Employment, and then asked Ms. Narcisse to have Ms. Walkus call her. When Ms. Walkus did not return her call, Ms. Butler says that she called twice more, leaving messages for Ms. Walkus to call her.

[82] Ms. Walkus says that she only received one message from Ms. Butler, and that she returned that call. At that point Ms. Butler had not yet obtained a medical certificate. Gloria Narcisse recalled getting one call from Ms. Butler, during the course of which Ms. Butler asked about the status of her Record of Employment. Ms. Butler told Ms. Narcisse that her doctor had said that there was nothing wrong with her back, and that she wanted Heather Walkus to call her. Ms. Narcisse says that she passed the message on to Ms. Walkus, but did not know if Ms. Walkus had returned Ms. Butler's call. Ms. Narcisse recalls taking one other message from Ms. Butler regarding Ms. Butler's desire to speak to Ms. Walkus.

[83] It is uncontroverted that Ms. Butler never spoke to Ms. Walkus after she saw Dr. Gooch, and that she never provided Ms. Walkus with a copy of Dr. Gooch's note.

[84] Ms. Butler was asked why she did not try to get a copy of Dr. Gooch's note to the Centre, when she was unable to reach Ms. Walkus by phone. Ms. Butler explained that she did not have access to a fax machine, and did not want to go out to the Centre herself because of difficulties that other employees had encountered after their employment was terminated. Ms. Butler could not explain, however, why she did not simply mail a copy of Dr. Gooch's note to Ms. Walkus, other than to say that she "messed up big time".

[85] It is common ground that Ms. Walkus and Ms. Butler had one discussion which I have found occurred on or before November 17, 1998. Given the numerous conflicts in Ms. Butler's own testimony, I do not accept her contention that she tried to reach Ms. Walkus three times after that, and that Ms. Walkus did not return her calls. On balance, I find that Ms. Butler called the Centre once, or at most, twice, after visiting Dr. Gooch.

[86] However, the fact that Ms. Butler may have called the Centre does not mean that Ms. Walkus necessarily got the message. Margaret Clark, one of the Commission's own witnesses, testified to the problems that she had encountered getting her messages while she was working at the Centre. According to Ms. Clark, people had told her that they had called her two or three times, without her ever getting any messages. Ms. Butler herself acknowledged that the Centre was in chaos in late 1998. I am mindful of Gloria Narcisse's testimony that she had a telephone discussion with Ms. Butler in the course of which Ms. Butler mentioned having visited the doctor, and that Ms. Butler asked Ms. Walkus to call her. Ms. Narcisse stated that she left a message for Heather Walkus to call Ms. Butler. It was not clear from Ms. Narcisse's testimony, however, whether Ms. Walkus ever received the message.

[87] Ms. Walkus was categorical that she never got a message to call Patricia Butler after her initial discussion with Ms. Butler on November 17. I found Ms. Walkus to be a generally credible witness,⁽⁵⁾ and in all of the circumstances, I accept her testimony in this regard.

M. The Weight to be Ascribed to Dr. Gooch's Note

[88] Dr. Gooch's note advises that Ms. Butler's back was not causing her any difficulty at work, and that she was fit to work at her regular job in the day-care. Consideration must be given at this juncture to the weight to be ascribed to the contents of Dr. Gooch's note, in light of the fact that Dr. Gooch was not called to testify in this hearing.

[89] At the time Commission counsel sought to introduce the note, counsel for the respondent objected to its introduction, in the absence of the author. I ruled that the note could be identified by Ms. Butler as the note that she obtained in November of 1998, but that it could not be used for the truth of its contents unless Dr. Gooch was called to testify. I indicated that Ms. Butler was not qualified to provide a medical opinion, and that although the Canadian Human Rights Tribunal is not bound by the strict rules of evidence, it is required to respect principles of fairness. It was my view that it would be very unfair to the respondent to admit what purports to be medical evidence in through the back door, where that evidence goes to a central issue in this case, in circumstances where the respondent would have no opportunity to challenge the contents of the note through cross-examination of the author.

[90] I refer to the note as 'purporting' to be medical evidence because we have no information with respect to Dr. Gooch's qualifications or area of expertise. The note itself suggests that Dr. Gooch is not a medical doctor.⁽⁶⁾ Further, while Ms. Butler says that Dr. Gooch examined her, we have no way of knowing what kind of an assessment Dr. Gooch may have performed, or the extent to which he simply relied upon Ms. Butler's characterization of her ability to do the job.

[91] Despite my ruling, the Commission chose not to call Dr. Gooch, who I understand no longer lives in Williams Lake, nor did the Commission ask to have the hearing adjourned, so that arrangements could be made for Dr. Gooch to testify.

[92] For these reasons, I am not prepared to ascribe any weight to the contents of Dr. Gooch's note.

N. The Grievance Procedure

[93] The Nenqayni Treatment Centre's personnel policy includes a process allowing former employees to grieve their dismissal by the Centre. Grievances must be filed within 30 calendar days of discharge, or by the next meeting of the Centre's Board of Directors, whichever comes first. Although the grievance is to be filed with the Centre's Executive Director, the policy provides that an impartial committee of the Board of Directors will be established to deal with the grievance.

[94] Although Ms. Butler takes the position that Ms. Walkus terminated her employment with the Nenqayni Treatment Centre, it is common ground that while Ms. Butler was aware of her right to do so, she did not file a grievance. It was in response to questions regarding her failure to mail Dr. Gooch's note to Ms. Walkus or to file a grievance with respect to Ms. Walkus' actions that Ms. Butler commented that she had "messed up big time".

[95] On February 5, 1999, Ms. Butler filed her complaint with the Canadian Human Rights Commission.

O. Ms. Butler's Letter to Dorothy Phillips

[96] Heather Walkus left her position as the Executive Director of the Nenqayni Treatment Centre on April 14, 1999. On April 27, 1999, Patricia Butler wrote a letter to Dorothy Phillips, the President of the Board of Directors and Acting Executive Director of the Centre. Ms. Butler's letter indicates that it is being written "for [Ms. Phillips'] information". After recounting the treatment that she says that she encountered at the Centre, Ms. Butler advises Ms. Phillips that her doctor had verified that she was fit for work. Ms. Butler's letter concludes by stating that: "I feel that I was wrongfully dismissed. My injury cannot be used against me in my work and I would like my job back." A copy of Dr. Gooch's note was not included with the letter.

[97] According to Ms. Butler, this letter was not intended to be a grievance, and she was not seeking to have Ms. Phillips review her termination. Ms. Butler never received a response to this letter.

[98] Ms. Butler's April 27 letter was written almost five months after Ms. Butler left the Centre, and two months after she filed her human rights complaint. A review of the letter as a whole discloses that the letter represents an attempt to initiate discussions with respect to the settlement of Ms. Butler's human rights complaint. In the circumstances, I do not think that it can be viewed as a request for accommodation raised in the context of a work relationship, nor as a response to

Ms. Walkus' request for timely medical information.

II. LAW

[99] Ms. Butler's complaint is brought under section 7 of the *Canadian Human Rights Act*, which makes it a discriminatory practice to refuse to hire or continue to employ an individual, or to treat an employee in an adverse differential manner, because of a prohibited ground of discrimination.

[100] Section 3 of the *Act* identifies 'disability' as a prohibited ground of discrimination. Human rights jurisprudence has interpreted such provisions to prohibit discrimination based on *perceived* disabilities, as well as actions taken on the basis of actual disabilities.⁽⁷⁾

[101] Pursuant to section 15(1)(a) of the *Act*, it is not a discriminatory practice to treat an employee in a differential fashion, where the differential treatment in issue is based upon a *bona fide* occupational requirement. In order for an employer to establish the existence of a *bona fide* occupational requirement, it must be proven that the accommodation of the needs of the individual in question would impose an undue hardship on the employer, having regard to health, safety and cost.⁽⁸⁾

[102] The Supreme Court of Canada has recently had occasion to revisit the approach to be taken in cases such as this in its decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*⁽⁹⁾ ('Meiorin') and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*⁽¹⁰⁾ ('Grismer'). The historic distinction between direct and indirect discrimination has now been replaced by a unified approach to the adjudication of human rights complaints.⁽¹¹⁾ Under this unified approach, the initial onus is still on a complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.⁽¹²⁾

[103] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy has a *bona fide* justification. In order to establish such a justification, the respondent must now prove that:

- i) it adopted the standard for a purpose that is rationally connected to the performance of the job;
- ii) it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of that legitimate work-related purpose; and
- iii) 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 an individual employee

sharing the characteristics of the claimant without imposing undue hardship on the employer.⁽¹³⁾

[104] Where a disabled employee requires accommodation in order to allow her to do her job, distinct obligations rest with each of the employee and her employer. Indeed, the search for accommodation has been described as "a two way street".⁽¹⁴⁾ Being in charge of the workplace, it is the employer who will ordinarily be in the better position to determine what modifications to the workplace can be made.⁽¹⁵⁾ However, there is a corresponding duty on the employee to facilitate the search for accommodation. As a consequence, in assessing whether the duty to accommodate has been fulfilled, it is also necessary to scrutinize the conduct of the employee.⁽¹⁶⁾

III. ANALYSIS

A. Was Patricia Butler Disabled?

[105] Ms. Butler has framed her complaint on the basis of perceived disability. Before evaluating the evidence in the context of the *Meiorin* analytical framework, a threshold issue arises as to whether Ms. Butler was in fact disabled, or was merely perceived as such by Ms. Walkus.

[106] I have found that Ms. Butler had ongoing pain and weakness in her back, resulting from her dirt bike accident, which limited her ability to lift. In my view, this constitutes a disability within the meaning of the *Canadian Human Rights Act*.

B. Is There a *Prima Facie* Case of Discrimination?

[107] It is common ground that Heather Walkus told Patricia Butler that she would not be called into work at the Nenqayni Treatment Centre until she produced medical evidence regarding her fitness for work. This is adverse differential treatment, based upon concerns relating to Ms. Butler's back injury, and constitutes *prima facie* discrimination on the basis of Ms. Butler's disability.

C. Has the Nenqayni Treatment Centre Discharged its Burden?

[108] Having found a *prima facie* case of discrimination on the basis of disability, the onus shifts to the respondent to establish that the ability to lift children is a *bona fide* occupational requirement for a day-care assistant. There are three elements which must be established in order to demonstrate the existence of a *bona fide* occupational requirement. Each of these elements will be considered in turn.

(i) Rational Connection

[109] In order to prove the existence of a *bona fide* occupational requirement, the respondent must first establish that requiring that its day-care employees be able to lift children is rationally

connected to the function they perform. The focus at this stage is not on the validity of the standard in issue, but rather on the validity of its more general purpose. ⁽¹⁷⁾

[110] It is common ground that one of the primary responsibilities of day-care workers is to ensure the safety of the children entrusted to their care. As a result, I am satisfied that a requirement that day-care workers be able to lift children safely, and be able to get the children out of harm's way in the event of an emergency such as a fire, is rationally connected to the business of a day-care.

(ii) Good Faith

[111] The second element that must be demonstrated by the respondent is that it adopted its fitness requirement in good faith, in the belief that it is necessary for the fulfilment of a legitimate work-related purpose. If the fitness requirement was not thought to be reasonably necessary or was motivated by discriminatory considerations, then it cannot be justified.

[112] Both the Commission and Ms. Butler maintain that the respondent was not acting in good faith when Ms. Walkus asked Ms. Butler for medical evidence of her fitness for work. Ms. Butler asserts that Ms. Walkus did not like Ms. Butler, and wanted to get rid of her so that Ms. Walkus could give Ms. Butler's job to one of her friends. According to Ms. Butler, Ms. Walkus used Ms. Butler's back injury as a pretext to get rid of her. The evidence does not support Ms. Butler's contention. No one suggested that Ms. Hornby (who replaced Ms. Butler in the day-care) was a friend of Ms. Walkus', or that Ms. Hornby even knew Ms. Walkus before Ms. Walkus began working at the Centre.

[113] It should also be noted that if true, Ms. Butler's allegation would undermine her human rights complaint. Paradoxically, while complaining about discrimination, Ms. Butler seems to be suggesting that the real reason for the termination of her employment was non-discriminatory, and that the issue of Ms. Butler's fitness for work was pretextual.

[114] In arguing that the respondent was not acting in good faith, the Commission points to the fact that Ms. Butler performed the job of day-care assistant for a year after she returned to work following her accident, "with little difficulties", and without any complaints from her co-workers or supervisors. It was only after Heather Walkus became the Executive Director that Ms. Butler's back injury became an issue. The Commission contends that Ms. Walkus did not know the nature of Ms. Butler's injury, or her prognosis. Ms. Walkus did not know whether Ms. Butler had been hospitalized, whether she had undergone physiotherapy, or how long it took Ms. Butler to recover. The Commission also points to what it says were the respondent's actions after the termination of Ms. Butler's employment as further evidence of bad faith on the part of the respondent. Specifically, the Commission refers to Ms. Walkus' alleged refusal to return Ms. Butler's calls and the fact that Ms. Phillips never responded to Ms. Butler's April 27, 1999 letter.

[115] There is no doubt that the fact that Ms. Butler worked in the day-care for a year before any issue was raised as to her ability to perform the job is the source of much of the conflict giving rise to this complaint. It is clear that Ms. Butler really cannot understand why a concern was raised about her back a year after she came back to work, when, in her mind, there had never

been any problems. Nevertheless, I have found that Ms. Butler did have ongoing problems relating to her back injury after she returned to work in the Fall of 1997, and that these problems interfered with her ability to perform key tasks associated with the position of Day-care Assistant. I have further found that Ms. Butler's physical limitations should have raised concerns about her ability to respond to emergency situations, such as a fire in the day-care.

[116] The requirement that day-care assistants be able to safely lift children is not something that Ms. Walkus trumped up in order to get rid of Ms. Butler. In this regard, it is noteworthy that the University College of the Cariboo requires that students enrolling in the early childhood education certification program be in good physical health, and be able to lift children and handle emergency restraint and response.

[117] Given these findings, I am satisfied that Ms. Walkus acted in good faith when she became concerned about Ms. Butler's ability to work safely in the day-care. The fact that Ms. Walkus did not know the details of Ms. Butler's accident, hospitalization, period of recovery or treatment is, in my view, immaterial. The fact is that soon after she started working at the Centre, Ms. Walkus was made aware that Ms. Butler was unable to lift any but the smallest children. This raised legitimate concerns for Ms. Walkus about Ms. Butler's ability to lift children safely, and to respond adequately in the event of an emergency.

[118] I have not been persuaded that Ms. Walkus refused to return Ms. Butler's calls after Ms. Butler got the note from Dr. Gooch, and thus cannot find that the fact that Ms. Butler's calls were not returned is evidence of bad faith on the part of Ms. Walkus. Insofar as Ms. Phillips' failure to respond to Ms. Butler's April 27 letter is concerned, I have found that Ms. Butler's letter represented an attempt to initiate discussions with respect to the settlement of Ms. Butler's human rights complaint, rather than a request for accommodation or a response to Ms. Walkus' request for timely medical information. While Ms. Phillips' failure to respond may demonstrate a lack of courtesy on her part, I am not persuaded that it is evidence of a lack of good faith on the part of the respondent.

(iii) Accommodation and Undue Hardship

[119] Finally, the onus is on the respondent to establish that the ability to lift children is reasonably necessary to accomplish its goal of providing a safe environment in which to care for children, in the sense that it cannot accommodate persons with back injuries, such as Ms. Butler, without incurring undue hardship.

[120] The Commission contends that the Centre acted in an arbitrary fashion, insofar as Ms. Butler was concerned. In support of this submission, the Commission points to the fact that Donna Narcisse suffered from arthritis in her knees, causing her to walk with a limp. Be that as it may, there is nothing in the evidence to suggest that Ms. Narcisse's arthritis interfered with her ability to perform her job, or that it raised any concerns with respect to the safety of the children in the day-care. The same cannot be said of Patricia Butler's back injury.

[121] As has been previously noted, the search for accommodation is a two way street, with both the employer and the employee having certain responsibilities. In this case, Ms. Walkus became

aware of Ms. Butler's disability, and became concerned about the implications that Ms. Butler's inability to lift had for the safety of the children, as well as for Ms. Butler herself. These concerns were heightened when Ms. Butler proved either unwilling or unable to perform the duties associated with any of the various alternate positions offered to Ms. Butler, when there was no work for her in the day-care. Before putting Ms. Butler back to work in the day-care, Ms. Walkus asked Ms. Butler to provide information from her doctor with respect to Ms. Butler's physical limitations. It seems to me that this was an eminently reasonable next step in the search for accommodation. Who better to advise the parties as to what Ms. Butler could and could not do than Ms. Butler's own doctor?

[122] It is common ground that Ms. Butler never provided the Centre with the medical information requested by Ms. Walkus. While it would have been preferable if Ms. Walkus had followed up with Ms. Butler, when Ms. Butler failed to provide Ms. Walkus with a medical certificate regarding her fitness for work, Ms. Walkus' actions in this regard must be assessed in light of what was going on at the Centre at the time. By all accounts, in the latter part of 1998 and early 1999, the Centre was in complete turmoil. A significant percentage of the Centre's workforce had been let go, and the Centre was facing numerous legal actions from these employees. Ms. Walkus clearly had other things on her mind.

[123] Ms. Butler was aware of the crisis unfolding within the Centre. She was also aware that she was not going to be put back to work at the Centre until such time as she provided Ms. Walkus with information from her doctor with respect to her fitness for work. Her explanation for her failure to do so was that she had never been through anything like this in the past, and that she had "messed up big time." With the greatest of respect, this is really not an adequate explanation.

[124] The fact that Ms. Walkus asked Ms. Butler to get the medical report to Ms. Walkus within a couple of weeks, as a large group of children was expected to be arriving at the Centre, is evidence, in my view, of a genuine desire on the part of Ms. Walkus to try to get Ms. Butler back to work in the day-care, if at all possible. That she was unable to do so was attributable to Ms. Butler's failure to fulfill her responsibility to facilitate the accommodative process.

IV. ORDER

[125] For the foregoing reasons, this complaint is dismissed.

"Original signed by"

Anne L. Mactavish

OTTAWA, Ontario

October 28, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T675/6301

STYLE OF CAUSE: Patricia Butler v. Nenqayni Treatment Centre Society

PLACE OF HEARING: Williams Lake, British Columbia

July 8-11, 2002

DECISION OF THE TRIBUNAL DATED: October 28, 2002

APPEARANCES:

Patricia Butler On her own behalf

Salim Fakirani For the Canadian Human Rights Commission

Patricia Schmit, Q.C. For the Nenqayni Treatment Centre Society

1.¹ Lillian Duncan was a counselor in the Family Program in 1997. Ms. Duncan testified that Dave Ross and Ms. Clark asked Centre staff to help Ms. Butler in the day-care when Donna Narcisse was off of work. However, Ms. Duncan says that she thought that this occurred in the Spring of 1998, that is, *after* Ms. Narcisse returned from leave. Further, rather than addressing the situation where Ms. Narcisse was away from the Centre for an extended period of time, Ms. Duncan described occasions where staff would be asked to fill in when Ms. Narcisse was unable to come to work on a given day. Neither Ms. Clark, who had supervisory responsibility for the day-care in the Fall of 1997, nor Mr. Ross mentioned asking staff to help Ms. Butler during the period that Ms. Narcisse was on leave. Further, for reasons that are explained later on in this decision, I did not find Ms. Duncan to be a particularly reliable witness.

2.² Provincial licencing regulations require that at least one certified early childhood educator be on the premises at all times. Although it appears from the regulations that day-care assistants can also be employed, as long as they work with a certified employee, the Centre was evidently going to require that all day-care staff be certified. Bruce Mack explained that this was in fact

what happened, and that since becoming a licenced facility, the Centre has only hired certified early childhood educators, in order to provide maximum flexibility in staffing.

3. ³ Ms. Butler testified that her last day at the Centre was November 6, 1998, although she subsequently stated that it was November 16, 1998. Ms. Butler's Record of Employment indicates that the last day Ms. Butler worked at the Centre was November 6, 1998, and I accept that November 6, 1998 was Ms. Butler's last day of work.

4. ⁴ A Record of Employment was subsequently issued to Ms. Butler on November 28, 1998. Ms. Walkus addressed the timing of the issuance of the Record, stating that she had asked Ms. Butler to provide a medical report within a week or two, that the time had passed, and no report had been provided. Ms. Walkus therefore understood that Ms. Butler was not returning to the Centre. The Record of Employment indicates "Other" as the reason for its being issued. Ms. Walkus explained that the reason was noted as "Other" in order to facilitate Ms. Butler's EI claim.

5. ⁵ Although not pursued in final argument, one of the principal bases for the Commission's contention that Ms. Walkus was not a credible witness appears to be the suggestion that she may have misrepresented her Indian status at the time that she worked at the Centre. Ms. Walkus is evidently entitled to regain her Indian status as a consequence of the Bill C-31 amendments to the *Indian Act*. Ms. Walkus testified that she has submitted her application to regain her status, but that it had not yet been processed. The Commission elicited testimony from several witnesses which seemed to suggest that Ms. Walkus claimed to be a status Indian when she was not. I am not persuaded that this evidence should call into question Ms. Walkus's credibility. Quite apart from the fact that the characterization of her status in the period between the time that her application was filed and the formal granting of status is open to some interpretation, more importantly, it was never put to Ms. Walkus squarely in cross-examination that she had misrepresented her status.

6. ⁶ Dr. Gooch practiced at the Atwood Clinic in Williams Lake. Although a number of the others practicing at the clinic have the "M.D." certification after their names, Dr. Gooch does not. His name has a "M.B." and a "Ch. B." after it. No explanation was provided as to the significance of these abbreviations.

7. ⁷ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665. See also *Via Rail Canada Inc. v. Canada (Human Rights Comm.) (No. 2)* (1999), 33 C.H.R.R. D/127 (CHRT).

8. ⁸ Section 15 (2)

9. ⁹ [1999] 3 S.C.R. 3

10. ¹⁰ [1999] 3 S.C.R. 868

11. ¹¹ Although the 1998 amendments to the *Canadian Human Rights Act* pre-date the Supreme Court of Canada decisions in *Meiorin* and *Grismer*, this unified approach is reflected in the wording of section 15 (8) of the *Act*.

12. ¹² *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985], 2 S.C.R. 536 at 558.

13. ¹³ *Meiorin*, supra. at para. 54.

14. ¹⁴ *Emrick Plastics v. Ontario (Human Rights Commission)*, (1992), 16 C.H.R.R. D/330 at para. 21.

15. ¹⁵ *Renaud*, supra., at p. 992.

16. ¹⁶ *Renaud*, supra., at p. 994.

17. ¹⁷ *Meiorin*, supra., at para. 59