CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

CINDY RICHARDS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY

Respondent

DECISION

MEMBER: Michel Doucet 2010 CHRT 24
2010/09/29

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*"). Cindy Richards (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 similar complaints filed against CN. By agreement of the parties, the matter in Denise Seeley v. CN was treated in a different hearing which was heard prior to this one. Although heard together, it was agreed during a case management conference that the complaints of Cindy Richards and Kasha A. Whyte would be rendered in two different decisions.

[5] Although the facts in the Seeley case and in the Richards and Whyte cases are very similar and that the witnesses for CN were the same, except for Cathy Smolynek who only testified in the two latter cases, the evidence submitted in the Seeley case and in the Richards and Whyte cases is, in many regards, different. The witnesses of CN, who had testified previously in the Seeley matter, did not, without necessarily contradicting themselves, repeat exactly the same evidence in the Richards and Whyte cases. Also, documents which had not been presented at the Seeley hearing were filed as evidence in the Richards and Whyte cases. These differences will explain any discrepancies that may exist in the facts of the Richards and Whyte matter when they are compared to the Seeley decision.

A. The Facts

(i) The Canadian National Railway

a) General information

[6] 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.

[7] CN has more than 15,000 employees in Canada. These employees are organised in two distinct 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, also known as "running trades employees", consist of Conductors and locomotive engineers.

[8] CN has over 4,000 "running trades" employees throughout Canada of which 2,400 are Conductors. According to Ms. Stephanie Ziemer, a Human Resources Officer for CN in Vancouver, the figure for Conductors in 2005 would have been slightly higher at 2,500.

[9] In answer to a question from CN's counsel, Ms. Ziemer indicated that CN does not track the number of its employees who are parents. She added that this information is only solicited when the employees enroll for CN's group insurance benefits. She further added that "based on that information roughly 69 percent of our employees are parents." According to her evidence this information would be up to date to May 2009. She added that she "would estimate [the number] as being higher because, not everybody participates in our group insurance benefits, particularly if they have a spouse that has coverage outside of CN in terms of their employment."

[10] Challenged by Counsel for the Complainant about the accuracy of those numbers, Ms. Ziemer explained that they had been gathered by CN's manager of benefits administration in Montreal. CN's counsel then showed counsels for the Complainant and the CHRC what was described by the Complainant's counsel as "a thick bundle of names listed by what appears to be personnel number order." Although this list did identify Conductors and their dependants, counsel for the Complainant added that there was "nothing about the 69 percent figure". She therefore concluded that "someone must have then taken that document and done some calculations." She then asked that the documents where these calculations were done be produced.

[11] Mr. Paquette, counsel for CN, explained that the calculation had been done by "someone" at CN's legal department. He then added that he had "very likely" communicated these numbers to the witness. Asked by the Chair if, when Ms. Ziemer had indicated that the numbers had been communicated to her by someone in Montreal, she meant the legal department, counsel answered "very likely", but he added that the information itself comes from CN's human resources department. He added that it was simply a question of "sitting down and doing the adding one by one."

[12] On cross-examination, Ms. Ziemer indicated that she had not done the calculation herself. She added that the figure of 69% for both group was given to her during a conference call, but she could not remember who the person who gave her the information was. Regarding the "thick bundle of names", Ms. Ziemer indicated that she was seeing this document for the first time at the hearing. Considering the evidence of Ms. Ziemer, the Tribunal will not give much weight to this part of her testimony.

[13] For operation purposes, CN is divided in two main regions, the Eastern region and the Western region. The Western Region includes all of CN's rail terminals from Vancouver, British Columbia, to Thunder Bay, Ontario.

[14] The Crew Management Centre ("CMC") in Edmonton is a very important part of CN operations. It is responsible for all crew callings and deployment for the Western region. It manages the workforce deployment for "running trade" employees and a payroll of 204 million dollars. The CMC has fifty-four (54) employees who report to Elaine Storms, the Director of CMC. Ms. Storms occupied that position in 2005 and she was a key witness for CN at the hearing.

[15] CN also has a "Peoples Department" which includes Human Resources and Labour Relations. Although both fall under the same department, they have very distinct functions. Human Resources deals, amongst other, with human rights complaints, while labour relation will deal with matters arising out of the collective agreement. In 2005, Mary-Jane Morrison was the Human Resources person in charge of the portfolio for running trades employees in Jasper.

b) Running trades employees

[16] 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.

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

[18] In terms of hiring, CN tends to hire its running trades employees in large group. According to Ms. Ziemer, CN did a lot of hiring in the seventies and a "little bit" of hiring in the '80s and in the early '90s. She further added that CN has done "significant hiring" from 2005 straight through to the end of 2009.

[19] 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%.

[20] The cost of training a Conductor is around 50,000 to 80,000 dollars. This amount includes the wages of the employee and of the instructor and also, if necessary, their accommodation. The training takes from four (4) 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.

[21] 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 renewed every three years. If the employee is on the working board, he or she will generally get a notice telling him or her that his or her cards are about to expire and then he or she 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 on his own, although for the rules card, he or she will need the approval of his supervisor.

[22] 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".

[23] An employee can also be "set up", meaning that he will be on the "working board" at his terminal. The decision to "set up" an employee is made by the manager of the terminal. The decision is based on the number of employees needed at the terminal to perform the work that is expected.

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

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

[26] The work schedule of a Conductor is very unpredictable. Depending on which board the Conductor is set on, he or she may know more or less about the kind of work he or she may be called upon to execute. Therefore, all working assignments on road service have totally unpredictable schedules. A Conductor is expected to be available to report to work within two hours of receiving a call from CMC. Once a Conductor reports for duty, he or she will have no idea of when exactly they will return home. They may be gone for a few hours up to almost two days.

[27] Running trades employees work on a mileage basis. The working board is adjusted on a 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 at a certain terminal for the following week.

[28] At all relevant times to this matter, Conductors in the Western Region of Canada were represented by the United Transportation Union ("Union"). 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

[29] In 1992, technological changes allowed CN to do away with the car at the tail end of the train, which is 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 brakeman 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".

[30] A "furlough board" comes into existence when there is a surplus of employees at a terminal, but not enough work for everyone. 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. Only a certain category of employees are allowed to "bid" on the

"furlough boards". These are called "protected" employees, while the "non-protected" employees are not entitled to the "furlough board".

[31] 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.

[32] Other categories of employees include those who were hired prior to June 29th, 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 29th, 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.

[33] 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.

[34] 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. It is this provision that allows CN to "force" unprotected employees to other terminals in the Western region to cover shortages.

[35] 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.

[36] 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.

[37] CN also uses a system which is referred to as "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. According to Ms. Storms, "whitemanning" is the first thing CN turns to in case of a shortage, because it is a lot "cheaper" financially than forcing employees to cover a shortage.

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

[39] 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.

[40] 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.

[41] 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 to report. If he or she fails to report for duty or fails to give "satisfactory reason" for not doing so, he or she will forfeit all his or her seniority rights.

[42] 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 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

[43] The Complainant lives in Jasper, Alberta with her two children. She was originally hired by CN in the province of Quebec, in 1989. In 1992, she was called to fill a shortage in Vancouver and while there was told by somebody at CN that her work opportunities would be better in the Western Region. Therefore, on April 9th, 1992, she applied for a transfer to Vancouver. By doing so, she crossed the seniority district between the Eastern and Western regions and lost the seniority she had accumulated in the Eastern region since 1989. Her new date of seniority was now 1992.

[44] Because she was hired after 1982, but prior to June 29th, 1990, the Complainant, if she had stayed in the Eastern Region, would have been a "Category C" employee which would have meant that she could only be assigned to protect work at an adjacent terminal. The Complainant testified that she did not know this when she decided to transfer to the

Western Region. According to her evidence, at that time CN and the Union were in the negotiation process and no classes of employees had yet been created.

[45] Just after she moved to Vancouver, the Complainant was laid off and forced to protect work in McClennan, Alberta. In the spring of 1993, when she was five (5) months pregnant, she was forced to protect work in Edmonton. Her first child was born on September 8th, 1993 and her second on November 30th, 1994.

[46] In 1995, the Complainant and her husband, a locomotive engineer with CN, desiring more stability for their young family, elected to transfer to Jasper, as this terminal had a shortage of employees at that time.

[47] In 1997, the Complainant and her husband separated. Their divorce was finalized in 2001. According to the divorce order, they share custody of their two children. The children's primary residence is with the Complainant.

[48] In September 1998, the Complainant was laid off from her position as Conductor with CN. At that time, the local Union representatives in Jasper had a local agreement with CN. That agreement allowed for laid off Conductors who booked on the "emergency board" to be called to work ahead of those employees on the active furlough board. From that time until 2001, the Complainant worked on the Jasper emergency board, responding to calls when needed. The local agreement was changed in 2001, when CN decided that it wanted to be able to call the active furlough board employees before any laid off employees. CN felt that since it was paying a guarantee to the furlough board employees, but not to the laid off employees, it was financially advantageous for the company to use the furlough board employees first before it had to call the laid off employees to perform emergency work. After this change, given the number of employees on the furlough board in Jasper, there was no opportunity for a laid off employee who booked "OK" on the emergency board being called.

[49] The Complainant's rules and medical cards expired around 2003. She testified that she had asked to have her rules recertified, but that her request had been denied by the supervisor in Jasper.

[50] In 2004, the Complainant obtained a new rules card and pre-employment medical clearance. Commencing in June 2005, she again worked the Jasper emergency board. In fact, prior to her termination in July, 2005, she had worked 9 tours of duty.

[51] At the beginning of 2005, the Complainant's eldest child was 11 years old and in grade 6. Her younger child was 10 years old and in grade 5. They were both attending school in Jasper.

(iii) The Vancouver shortage

[52] 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 enough running trade employees locally to cover the work it had. 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, so they were

nineteen (19) short. She added that "it was definitively one of the most serious shortages that I had seen in my career."

[53] To accentuate the seriousness of this shortage, Ms. Storms testified that for the period between February 4th, 2005, to January 15th, 2006, the Vancouver yard had 726 overtime shifts for a total amount of $229,350.30. On cross-examination, she added that these numbers included the overtime done not only by Conductors, but also by locomotive engineers and, she added, possibly by yardmasters.

[54] Ms. Storms also testified that at about the same period the Jasper terminal was in a surplus situation. She explained that when, as it was the case in Jasper, a terminal has a furlough board, is supporting other terminals with "whitemen" and has employees on lay off, it is considered to be in a surplus situation. But she did acknowledge that in 2005, managers were used in Jasper because of train delays. She also added that for "part of 2005" it became busier in Jasper and that after August 6th, 2005, there was no longer any employees on the furlough board there.

[55] 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.

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

[57] 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 29th, 1990. As such, they were subject to Article 148.11(c) of the Collective Agreement.

[58] According to Ms. Storms' evidence, shortages are managed by the Board Adjustment Group at CMC. This Group was at that time under the direction of Joe Lyon who reported directly to Ms. Storms. The Board Adjustment Group dealt with the Vancouver shortage of 2005, but because it was short on staff, crew dispatchers were also involved in contacting the employees who were recalled to cover the shortage.

[59] Ms. Storms 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. She also testified that 2,144 "tours" had been handled by officers during the Vancouver shortage. She further added that this "would be the most usage of officers that I've seen in the west in my career."

[60] In terms of how long this "shortage" might last, Ms. Storms testified 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.

[61] According to the evidence of Ms. Ziemer the shortage was eventually resolved "over a period of a couple of years" by CN "hiring the right amount of employees in order to keep ahead of the amount of attrition and the significant growth in the business." She further explained that Vancouver is a very competitive job market: "Unfortunately the construction industry was booming. We also lost a lot of potential candidates to the boom in the oil and gas industry in Northern Alberta. [...], it was very difficult for us to recruit over those two years [2005 and 2006], and it became cyclical. We didn't have enough successful employees through the recruitment selection process, so we had to readvertise, hold numerous career fairs. We had to advertise over and over again until we had the right amount of employees. And this was cyclical from 2005 through to probably mid-2007."

[62] 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.

[63] Ms. Ziemer also testified as to the housing arrangements for employees reporting to the Vancouver shortage. She explained that there were two hotels available in Surrey, B.C. One of these hotels was situated several blocks from CN's yards. This hotel, according to Ms. Ziemer's recollection, "had large suites with fridges inside and then there was a communal kitchen set up for CN employees." The other hotel was closer to the yard and had suites. Ms. Ziemer added "My understanding is that they had kitchen facilities in the suites as well."

[64] She also testified that CN could approve the rental of a house, an apartment or a condo. She referred to a situation which occurred in Vancouver - although she did not say when - where CN had approved the rental of a property because the price of the rental made more sense economically than paying "$90 a night or $100 a night or a hotel for the 20 or 30 days that an employee would be required to be at the location to protect work

(iv) The Conductors recalled to cover the Vancouver shortage

[65] Forty-seven (47) laid off Conductors in the Western region were recalled to cover the Vancouver shortage in February 2005. Ms. Storms explained that 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 according to the Collective Agreement. At the time of the recall, the Complainant was first on the seniority list of laid off employees at the Jasper terminal.

[66] Of the forty-seven (47) laid-off employees recalled, ten (10) reported to Vancouver and thirty (30) did not report and either resigned or were dismissed. The remaining seven (7) were either excused from reporting or were required at their home terminal.

[67] The forty-seven (47) employees were initially contacted by phone. According to Ms. Storms, when these employees were called they were told that they had fifteen (15) days to report to cover the shortage. She further added that she had instructed her group

not to venture any information about the possible duration of the shortage since they did not have that information.

[68] At the hearing, CN produced Excel Spreadsheets containing information relevant to five employees who, according to its Amended Statement of Particulars, had reported to Vancouver. Counsel for the CHRC requested that CN produce the same information it had provided for these five employees for all of the other forty two employees recalled to Vancouver. These documents were disclosed in the form of Excel spreadsheets and contained numerous pages of information concerning their status during the particular period relevant to these proceedings.

[69] According to the "Respondent List of Exhibits" in this hearing, CN put into evidence the CATS records for five employees. (See Exhibit R-1, Tab 27 through Tab 31 inclusively.) It also put into evidence two other CATS records (See Exhibits R-10 and R-11). Ms. Storms was questioned and cross-examined thoroughly on them by counsels. For its part the Commission put into evidence the CATS records for fifteen other employees. (See Exhibits HR-1, Tab 5 through and including Tab 10 and HR-2, Tab 23 through and including Tab 30).

[70] The remainders of the CATS records disclosed by CN were put into evidence by the complainants' counsel (See Exhibit C-33). These documents were not put into evidence in the format provided by CN. The complainant's counsel, during her cross-examination of Ms. Storms, explained that she had created what she described as "a document in a new format by re-sorting the information contained in the original Excel spreadsheet provided by CN". This new document was re-sorted in such way that it showed which employees recalled to Vancouver were "available" on any given date in the year 2005.

[71] On the last day of the hearing, CN's counsel raised an issue concerning the accuracy of some of the information on the spreadsheets. On January 18th, 2010, more than two months after the hearing, CN filed a motion asking permission to reopen its case to file further new evidence. This motion was dealt with in a ruling which can be found at 2010 CHRT 6.

[72] CN produced the documents and, as noted earlier, decided to put it in through the evidence of Ms. Storms. We can infer from this that CN felt that she had sufficient knowledge of the information contained on these documents to be able to testify to them. We will go over some of the information contained in these documents in some detail, as it was apparent that they were important for all the parties. In order to protect the privacy of the employees concerned, they will be identified by letters which do not correspond to their actual names.

[73] The documents indicate that employee 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, the documents indicate that he only worked on March 24th and then did not work again until April 1st. After this date, he works on April 10th and 11th, but doesn't work after that until April 18th. On July 22nd, 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 after that date until September 22nd. He works again on September 30th and then does not work until October 28th. During the time when he was not working, this employee did not report to the Vancouver shortage.

[74] 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.

[75] 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. 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 and from July 23rd to August 8th. He has another break on September 1st. 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."

[76] Employee P was laid off at North Battleford on February 25th. On March 19th, he took a week vacation and then he was "set up" at his home terminal on March 26th. As already mentioned, when an employee is set up at his home terminal, 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 for this employee was submitted. The employee was again laid off on April 24th, 2005. From that date to the rest of the year, this employee moved around within the Saskatchewan zone "taking a clearance" at other terminals.

[77] 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.

[78] 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. This employee was eventually "set up" at his home terminal on March 15th, 2005. On April 9th, he was laid off again and then on April 30th,

he was given a leave of absence by his trainmaster. That leave of absence lasted until May 13th when he was again laid off. On June 5th, he was again given a leave of absence until June 19th. On June 20th, he was "set up" in Saskatoon and worked there until July 1st and was laid off again on July 2nd. On July 9th, he was "set up" again in Saskatoon. On November 4th, he took a leave of absence and then on November 13th, he started training as a yardmaster. He trained as a yardmaster until Christmas and then he stayed on the working board until the end of the year.

[79] Ms. Storms testified that this employee was "dodgy" and "making himself unavailable". She added that when he was "set up" at this home terminal, he didn't have to report to cover the shortage, but when he was laid off in early April he should have reported, but did not. When asked by CN counsel why he had not been discharged for failing to report, she answered: "I can't speak to that. His manager ... could have done something. I don't know exactly why, like I said, I think it just fell through the cracks. Because he was working, we didn't obviously keep very good tabs on him." Finally, on December 25th, 2005, this employee was "set up" in Saskatoon. On cross-examination, Ms. Storms added that his supervisor thought that he might need this employee, so "he was not releasing him".

[80] 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 leave. After that, he stayed at his home terminal for the remainder of the year.

[81] Employee E was on laid off status when the recalled procedure started. Initially, when they started contacting employees for the shortage, the staff at CMC would just write notes in their work records as they were making the calls. But, because the shortage was so large, things were getting a little awkward 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. The last entry was for May 19th, 2005. After that, the list was discontinued. By that time Ms. Storms explained that "most of the 47 recalled employees had responded or been dealt with."

[82] The entry on these charts for March 16th, 2005, indicates that employee E had "*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 <u>given a compassionate LOA</u> until further notice - per Ron Smith - due to personal issue*." [The emphasis is mine.] Ms. Storms explained that Ron Smith was the manager of the running trade employees for the Manitoba zone. Ms. Storms indicated that she knew a bit more about this employee's situation, because she had talked with his supervisor after the Seeley hearing. In response to questions put to her by CN's counsel, she explained that Employee E's situation was very similar to employee U. He also had a terminally ill parent and that would explain the

entry of May 19th, 2005, which 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, at that time 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 resigns on October 19th.

[83] When asked on cross-examination why this employee had never reported to Vancouver, Ms. Storms testified that his supervisor had indicated that the employee had not reported to Vancouver because "he was training him to be a supervisor, but that ultimately he resigned." This answer is not consistent with the answer she had given previously to CN's counsel, when she had stated that the situation of this employee was similar to that of Employee U.

[84] Employee FG was shown on CN's Amended Statement of Particulars as having resigned, but at the hearing, Ms. Storms testified that this was a mistake. This employee had been recalled to the Vancouver shortage and he reported there on March 22nd, 2005. But from that date until September 21st, 2005, the employee was on "sick leave". He was granted what is described as "*a leave of Absence under the Family Leave Act*". When asked to explain what the "*Family Leave Act*" was, Ms. Storms answered that she did not know. A quick research, did not allow the Tribunal to identify any legislation bearing the name "Family Leave Act". This employee resigned his position with CN on May 6th, 2006.

[85] Employee O is showed in CN's Amended Statement of Particulars as having reported to Vancouver and to be still employed by CN. But, the documents produced at the hearing indicate that this employee did not report to Vancouver. He stayed in his home province, which according to Ms. Storms "was using all of the employees that were there."

[86] Employee QR was covering a shortage at Hornepayne when the recalled procedure started, so he did not have to report to Vancouver right away. After he finished covering the Hornepayne shortage, he did report to Vancouver but during the period of November 8th, 2005 to December 20th, 2005, he only worked three days. Before November 8th, he seemed to have been working pretty steadily. Ms. Storms testified that she could not speak for the period starting on November 8th, but she did add that there was still a shortage in Vancouver at that time.

[87] Another employee, Employee M, reported to Vancouver on March 25th, 2005, but between that date and the end of 2005, the documents indicate that he only worked thirty four (34) shifts. More specifically, between September 17th and December 31st, he only worked ten (10) shifts. The documents show that this employee was absent a significant amount of time. The documents also indicate that between November 30th and December 31st, 2005, this employee was absent without leave. Ms. Storms testified that she had no idea of the reason for this absence. She added that only his supervisor could give a reason. This employee was not dismissed.

[88] Employee A went to Vancouver for approximately two (2) months. On May 14th, 2005, he was transferred to Kenora. Ms. Storms testified that the supervisor who made the decision to set him up in Kenora "expected or projected" that there would be work for this employee at the terminal. But again, the documents indicate that from May 17th, 2005 to August 4th, 2005, this employee worked three (3) shifts in Kenora and that from November 1st to the end of December, he worked only seven (7) shifts. Ms. Storms testified that she could not speak for the reason why the supervisor at Kenora had decided to set this employee up, but she agreed that this "person was not working very much."

[89] Employee C reported to Vancouver on March 15th, 2005. He did work in Vancouver but was also marked as "available" on many occasions. On May 16th, 2005, he is set up in Kenora. From May 17th to July 9th, 2005, he worked three (3) days at that terminal and from October 20th to December 12th, 2005, the documents indicate that he did not work at all. Ms. Storms confirmed this information in her testimony.

[90] Employee DE was also recalled to Vancouver on March 15th, 2005. He had a fairly regular pattern of work while in Vancouver. On June 18th 2005, he is transferred and set up in Terrace, but while there he does not work until September 23rd, date at which he is again transferred to Vancouver.

[91] Another employee IJ was called to cover the shortage at Vancouver but did not have to report because he was then covering a shortage at another location. From March 17th to May 16th, while covering that shortage, the documents indicate that he only worked one (1) day (April 26th, 2005). From May 20th to May 27th, he was set up at his home terminal in Thunder Bay. From June 3rd to June 24th, he reported to Vancouver, but again the documents show that he is not working for several days. From July 16th to September 1st, he has a fairly steady pattern of work. On September 7th, he leaves Vancouver for Sioux Lookout, where he only works four (4) days up until October 27th, 2005. After that he is set up first at Brandon and then at Fort Francis.

[92] Employee O did not report to Vancouver for various unexplained reasons. He is set up at his home terminal but the document show that during the period up to December his pattern of work at the terminal is very unsteady. Ms. Storms testified that this information "sounded accurate" and she added that "it would be up to the terminal to release this employee and lay him off. If the terminal set him up and he is not working, there is not much CMC can do about it."

[93] Employee W reported to Vancouver on April 14th, 2005. From that date until July 29th, he worked eighteen (18) days. July 29th, 2005, was his last day in Vancouver. On July 30th, this employee is transferred to his home terminal. He gets set up there but does not work from August 13th to September 19th. He works on September 20th, but then does not work again before November 12th, when he is transferred to another terminal for seven (7) days. He returns to his home terminal on November 19th, where he does not work until the end of the year. Ms. Storms testified that she does not know why this employee was not working.

[94] In CN's Amended Statement of Particulars, employee BC is indicated as having resigned. But according to the documents submitted at the hearing it is indicated that this

employee "*will be on Great West Life - long term insurance benefits*." According to Ms. Storms, the dispatcher at CMC probably talked to this employee's supervisor. The employee was excused from reporting to Vancouver.

[95] What the Tribunal concludes from this evidence is that many of the employees recalled to cover the shortage in Vancouver either did not report and were not terminated or if they did report they were shown as being "available" for work on various days, but did not work.

(v) The Complainant's recall to work

[96] Before addressing the facts regarding the Complainant's recall to cover the shortage in Vancouver, the Tribunal notes that in her cross-examination Ms. Storms indicated that she did not personally keep a file specific to the Complainant's situation. She added that Joe Lyon, CN's Manager Operations, Crew Management Centre, Western Operations, and also the manager of the Board Adjustment Group, who reported directly to her, would most likely have kept the correspondence in a "Vancouver shortage file" and that the Complainant's letters would have been filed in her Personal Record files at CN. Mr. Lyon was not called as a witness, so it was impossible for the Tribunal to verify this information.

[97] The Complainant testified that on March 17th, 2005, she received a letter from CN dated February 28, 2005. This letter was informing her that she was being recalled to the working board and required to protect a shortage of yard employees in Vancouver. The letter further instructed her that if she was unable to report to Vancouver within fifteen (15) days after being recalled, she was to contact the trainmaster in Vancouver. Upon receiving the letter, the Complainant contacted Mr. Spanos, the Trainmaster in Vancouver, and tried to explain to him her situation and how devastated her family was by the news, but she added that he did not seem interested; all he wanted to know was when she would show up in Vancouver.

[98] On March 18th, 2005, the Complainant wrote to CN advising it that she had received the letter of February 28th, on March 17th, 2005. She asked for the thirty (30) days notice allowed pursuant to Article 115 of the Collective Agreement. She also explained that she was a single mother of two school-aged children and that the news of being forced to Vancouver had "caused a great deal of anxiety for everyone involved." Her letter was addressed to "CN" and copied to the UTU Local in Jasper and to Joe Lyon, Colin Pizziol, Trainmaster Jasper, and George Spanos.

[99] Ms. Storms testified that she didn't recall having seen this letter. She added that she knew by then that the Complainant had issues with child care and that it is why she had talked to Joe Torchia, CN's Director of Labour Relation, about the people who could not report and the Complainant was part of this group. She further added that it would have been normal to tell the Complainant to take this matter up with her supervisor, but she could not recall if that had been done or not.

[100] For his part, Mr. Torchia testified that he was familiar with this letter. He believes he either received a copy of the letter or was informed of its content by CMC. His interpretation of this letter was that the Complainant was asking for more time to report

and that was it. He then told Ms. Storms to grant the Complainant an extension of time to report.

[101] There was no response from the Company to the Complainant's letter and no evidence of anybody from CN informing her that she had been granted an extension of time to report.

[102] Mr. Torchia further testified that at about the same time, he received a call from Bryan Boechler, the General Chairperson of the Union, in respect to the Complainant, Kasha Whyte and Denise Seeley. He said that Mr. Boechler had indicated that these employees were having "child care issues" and he requested that they be granted more time to report to Vancouver. Mr. Torchia testified that he believes that, at that point, an extension had already been granted.

[103] The spreadsheets prepared by the CMC regarding the recall do not support Mr. Torchia's evidence. On the sheet dated "March 18/05 as of 13:00" a notation in the row for the Complainant states: "*Message at residence to get medical done - wants 15 days*." The notation marked in the row for K. Whyte reads "*15 days to report. 30 requested - OK to March 29th per A. Nashman*" and in the row for D. Seeley, the notation states "*16 days to report, 30 requested - OK to April 6th per A. Nashman.*"

[104] In a letter dated April 25th, 2005, the Complainant was instructed by Mr. Lyon to advise CN, by May 6th, 2005, whether or not she would be reporting for work in Vancouver. The letter further advised the Complainant that failure to do so would result in her forfeiting her seniority and her services with the Company being "dispensed with." Ms. Storms testified that she did not recall being involved in the drafting of this "standard letter out of her office." She added that she was aware at that time that the Complainant "had child care issues" and that her "understanding was that [she] was not going to report."

[105] On May 1st, 2005, the Complainant wrote to Mr. Torchia requesting a compassionate leave of absence from protecting the shortage in Vancouver. In her correspondence, she states, *inter alia*, :

I would ask that you would please consider the following, regarding the recent notification to protect the shortage in Vancouver, as this is a plea for compassion... I am a single mother of two school age children. My daughter is in grade 6 and will be reaching a major milestone in her life, she will graduate from the elementary school, where she has enjoyed her entire education, with her friends she has grown up with... My son is in grade 5 and is enjoying one of the best academic year of his education, where his improvement is substantial, he too is highly involved.... It should be noted that this is not an issue of finding appropriate child care. In accordance with the ruling of the Queen's Bench Court of Alberta, I provide primary residence for the two aforementioned children, with joint custody with their Father who lives in Jasper. This carries stipulations regarding taking my children away from their father, especially out of the province, including a ninety day written notice so it has time to be ruled upon by a judge. Their father takes a very active role in their lives and will not stand by and let me take the children away, especially with a court order providing for his rights. According to legal

counsel, it would be highly unlikely that a judge would rule to uproot the children due to the instability of this situation...In your deliberation regarding this particular situation, I would ask for your compassion for my children as well as for two of your employees [herself and her husband]...based on the aforementioned reasons I would ask that CN grant me a compassionate leave of absence, from protecting the shortage in Vancouver, due to my legal requirements to remain in Jasper.

[106] Mr. Torchia testified that when he received this letter he contacted CMC and instructed them to grant the Complainant an extension of time. He added that at this time, he was aware that three (3) employees at the Jasper terminal were looking for "accommodation" for "very similar reasons". He added that he had received another letter prior to this one from Kasha Whyte and that is how he had been made aware of the situation. He said that he came to the conclusion, although he had never spoken with them, that what they needed was more time to make arrangements.

[107] Mr. Torchia's evidence in regard to speaking to Ms. Storms is consistent with the information on the CMC spreadsheets. In his evidence, he said that he had given the Complainant and the two other women a 30 day extension. The notations on the spreadsheets for "May2/05 at 17:00", "May 19/05 at 10:30" and May 19/05 at 17:00", indicate for all three women "*Child care - temporarily on hold per Joe Torchia*."

[108] According to Mr. Torchia, it is unusual for these types of questions to go directly to him. He added that employees making these kinds of request would normally address them to their supervisor. The supervisor would handle these demands directly and they would rarely rise to "his level". But, on cross-examination, he testified that even if the Complainant had gone to her supervisor the result would have been the same, because the supervisor would have had to come to either Mr. Morris or himself for approval.

[109] Ms. Storms testified that she does not recall having read the letter of May 1st, although a copy had been sent to Mr. Lyon. She added that she may have discussed it with Mr. Torchia, but she can't recall the specifics of this conversation. She also indicates that she was not aware that the Complainant had an issue with a custody order.

[110] Since she had heard nothing further from Mr. Torchia and since CMC was calling her to take emergency trip, the Complainant assumed that her suggestion of staying in Jasper and doing emergency work had been accepted. As noted previously, the Complainant had booked "OK" for emergency trips in June 2005 and she had been called for nine (9) tours of duty during that period.

[111] Mr. Torchia testified that in the last week of May or at the beginning of June 2005, he was at a meeting with Albert Nashman, CN's general manager of the Western Operation Centre, and Bryan Boechler, General Chairperson for the UTU. Although the meeting was about different issues, at one point Mr. Boehcler requested another extension for the Complainant and the other two employees. According to Mr. Torchia, he and Mr. Nashman granted a further extension until July 2nd, 2005. From Mr. Torchia's understanding, it was clear that this was the last extension that would be granted. On cross-examination, he testified that he was not aware if this decision had been conveyed to the Complainant. He further added that CN had "accommodated" the Complainant by

granting her more time to report. He said that the possibility of granting a "compassionate leave of absence" never crossed his mind. He explained that a "leave of absence" was normally granted for reasons which were "appropriate to the operational requirements of CN". He added however that he was not aware that some employees recalled to Vancouver had been granted leave of absence by their supervisors.

[112] Mr. Torchia also testified on cross-examination that it was "not fair" to conclude that he had not applied CN's accommodation policy in this matter. He added that the Complainant had "family status issues" and that he had "accommodated" these by extending her time to report to Vancouver. He further added that the Complainant had been given more time to make arrangements, but that she hadn't and was therefore "terminated".

[113] On June 27th, 2005, the Complainant was informed by a letter from L. Gallegos, Manager Operation at CMC, that she must report to Vancouver by July 2nd, 2005. She was further advised that if she failed to report her seniority rights would be forfeited and her position with CN terminated. This letter also made reference to a telephone conversation on June 22nd, 2005, between the Complainant and Elaine Storms. During that conversation, Ms. Storms also informed the Complainant that she had to report to Vancouver by July 2nd, 2005 or her employment would be terminated.

[114] The Complainant recalled this telephone conversation. She said that she told Ms. Storms that there must be a mistake and she asked her to speak to Joe Torchia about her situation. The Complainant thought that her situation had been dealt with because CN was allowing her to cover the emergency board in Jasper. The Complainant testified that she thought that this was the answer to her request for a compassionate leave of absence. Following the letter of June 27th, 2005, the Complainant was not allowed to cover anymore work on the emergency board.

[115] Ms. Storms testified that she was aware at this point that the Complainant had an issue relating to her children. She indicated that she did not know the details of the situation. She added that she remembered parts of the telephone conversation of June 22nd, 2005. She testified that the Complainant had told her that she could not report to Vancouver because of "child care issues". She further testified that she did not recall specifically if the Complainant had made a request for more time, but if that had been the case she would have referred her to her supervisor and to the Union. Ms. Storms also indicated that if the Complainant had indicated that she had an arrangement with Mr. Torchia, she would have called him and if he had indicated that he had allowed more time, she would have granted more time. But she further added that in her conversation with Mr. Torchia, he had clearly mentioned that the provisions of the Collective Agreement had to be applied in this case.

[116] On cross-examination, Ms. Storms added that CN had a number of employees with "issues with children at home", but she could not recall how many besides the Complainant, Kasha Whyte and Denise Seeley. She further added that "it was kind of a general theme because so many people have children." During his cross-examination, Mr. Torchia testified that no other cases based on family issues, other than these three, had been brought to his attention. No other entries on the CMC spreadsheets, other than those

for the Complainant, Denise Seeley and Kasha Whyte, mentioned "family issues" or "child care issues" to explain the failure to report to the shortage. Mr. Torchia also added that during his conversations with Ms. Storms he had not been informed that other employees had been exempted from reporting to Vancouver.

[117] On June 22nd or 23rd, 2005, in an email in response to Ms. Storms' email recapping her telephone conversations with the Complainant, Mr. Torchia wrote: "*As far as I am concerned they* [the complainant, Kasha Whyte and Denise Seeley] *have been given enough time to sort out their personal affairs. If they wish to extend any further they will have to arrange with their supervisor.*" Brian Kalin, who was Mr. Pizziol's supervisor wrote on the same day: "*There are no further extensions. I agree with Joe - they've had several months to get their affairs in order. It's decision time for them now.*". Brian Kalin was not called as a witness, so we have no details of what he knew about the Complainant circumstances. There is also no evidence that anybody from CN informed the Complainant that she should be dealing with her immediate supervisor, Mr. Pizziol, about her request to be excused from reporting to Vancouver.

[118] Also of interest in the email chain that CN produced at the hearing is an email which Mr. Torchia testified as being from Albert Nashman. Mr. Torchia added that it had perhaps been pasted on from another email but he wasn't sure. He also could not make out the date of this email. This email stated: "*I talked to Boechler last night. Told him that we are not going to continue to delay this process. They have an obligation per the collective agreement to protect. I told him what are we suppose to tell the next group that says they don't want to go. If he wants to file a grievance then so be it.*" (The underlining is mine.)

[119] The content of this email seems to be inconsistent with Mr. Torchia's prior evidence to the effect that he had made the decision that there would be no further extensions during the meeting at the end of May or in the first week of June with Mr. Nashman and Mr. Boechler. Yet this email seems to suggest that it is Mr. Nashman who had made this decision. Mr. Nashman was not called as a witness.

[120] On July 2nd, 2005, the Complainant wrote to Peter Marshall, CN's Senior Vice-President for Western Canada. She again requested that CN consider her situation and grant her a compassionate leave of absence. She included in this letter a copy of her correspondence to Mr. Torchia. No response was received from Mr. Marshall or from his office.

[121] On July 4th, 2005, CN wrote to the Complainant advising her as follows:

This letter will confirm as per Article 115 and 148 of Agreement 4.3 your seniority rights are forfeited and your services with the Company have been dispensed with. Your employment file is now closed.

[122] Ms. Storms testified that she does not remember if she had spoken with the Complainant's supervisor before terminating the Complainant's employment, but she did add that as a general rule, the employer does not proceed with such a decision without talking first to the supervisor. She added that if she had not personally done so, Mr. Lyon

would probably have spoken to the supervisor. Neither Mr. Pizziol, the Complainant's supervisor, nor Mr. Lyon were called as witnesses.

[123] Ms. Storms added that she had followed Mr. Torchia's and Mr. Albert Nashman's directions to terminate the employment of the Complainant.

[124] After her termination, the Complainant kept hoping that CN would review its position. She testified that in early 2006, she noticed that the Jasper yard was progressively growing short of employees. She therefore decided to write again to Mr. Marshall on February 6th, 2006, indicating that she was "ready, willing and able and would gladly return to work in Jasper to help alleviate this shortage."

[125] On February 16th, 2006, Mr. Marshall answered :

Upon receipt of your letter, I reviewed your file and it is my understanding that your services were terminated under the terms of the collective agreement as a direct result of your failure to comply with the terms and conditions of that collective agreement. I appreciate the fact that you are now ready, willing and able to work and reinstatement would be considered provided you agree to abide by the terms and conditions of the collective agreement. I cannot, however, guarantee that you would work exclusively in Jasper. Your work location would be determined by your seniority and our work force requirement. Further, I understand that you currently have an active grievance regarding your termination and reinstatement would be conditional upon withdrawal of the grievance.

[126] Following her termination, the Complainant requested that her Union process her grievance to arbitration. On April 12th, 2006, Arbitrator Picher rendered his award which was reported in *Canadian Railway Office of Arbitration & Dispute Resolution* ("*CROA*"), Case no. 3550. In his award the arbitrator states, *inter alia*:

For the reasons more exhaustively explained and expressed in CROA & DR 3549, the Arbitrator cannot accede to the position advanced by the Union. There is nothing in the collective agreement to suggest that the Company must carefully weigh the personal and family obligations of an employee and that those obligations might effectively trump the cornerstone rights and obligations relating to seniority and the order of recall of employees in a bargaining unit as provided for under the collective agreement. There is no responsible basis upon which a board of arbitration can effectively conclude that an individual's personal circumstances not only explain their failure to report for work upon a recall, but excuse them indefinitely, perhaps for years, from the same work obligations as apply to other employees, including other single parents, or married parents with comparable family obligations. In effect, what the grievor requests would be tantamount to an amendment of the collective agreement by the Arbitrator and the creation of a form of super-seniority based on personal circumstances. For reasons touched upon in the prior award, there is nothing in the collective agreement which would contemplate the possibility of any such result. On the contrary, the Arbitrator is bound to apply the seniority and recall provisions of the collective agreement as fashioned by the parties themselves. In addition, it should be noted that the Union does not seek, through this grievance, relief for any alleged violation of the Canadian Human Rights Act.

(The underlining is mine.)

[127] *CROA No. 3549* refers to the arbitration award in the Kasha Whyte matter. In this award, the arbitrator stated, *inter alia* :

In this grievance the Union does not plead any obligation of accommodation to the grievor under the provisions of the Canadian Human Rights Act, nor any other legislation. It submits that, in effect, the Company unreasonably failed to provide the grievor with a leave of absence to allow her to avoid the recall to Vancouver by reason of her personal circumstances.

[...]
After a careful review of the facts, the Arbitrator has considerable difficulty with the submission of the Union. Firstly, I must agree with the Company that in fact the grievor did not request a leave of absence. What she sought was a form of super-seniority which would allow her, unlike other employees, to remain laid off at Jasper, with no obligation to protect work elsewhere, while continuing to receive periodic calls to work from the emergency list at Jasper, as she had previously done. A leave of absence connotes a departure from the workplace, virtually for all purposes, whether for an indefinite period or for a period that is fixed. Those are not options which were being requested by Ms. Whyte... The grievor in the case at hand was not asking for an adjustment or accommodation in her work schedule. She was asking, in effect, for relief against one of the most fundamental obligations of the collective agreement, namely the obligation to protect work on her seniority territory in the event of a shortage of employees at any location.

[...]

I would have some difficulty in concluding that the Company was unreasonable or arbitrary in refusing to effectively grant to the grievor an amendment of her collective agreement obligations which might extend indefinitely, perhaps as long as ten years, while she would continue to have the special protected status as an employee who could only be compelled to work in Jasper.

[...]

This grievance brings to the fore what must be recognized as a constant in any employment relationship, namely the tension between personal and family obligations and obligations to one's employer. Myriad circumstances might influence an employee's personal or family obligations: care for a child, care for an aged parent or another close relative or care for a spouse with a serious medical disability. Other personal circumstances might include parole or community service obligations after sentencing, close involvement with a church or social group, civic volunteering or competitive sports activities, to name but a few.

A railway is, by its nature, a twenty-four hour, seven day a week enterprise. Persons who hire on to work, particularly in the running trades, know or reasonably should know that their hours of work will be irregular and that they will, on occasion, be compelled to change location to protect work as needed. In exchange for meeting those onerous

obligations railway employees have gained the benefit of relatively generous wage and benefit protections.

On what basis can a board of arbitration, charged with interpreting and applying the terms of the collective agreement, conclude that the conditions of single parenthood can effectively trump the obligations of employment negotiated by the parties within the terms of their collective agreement? In a world where single parenthood is not uncommon that is not an inconsiderable question. As a general matter, boards of arbitration, including this Office, have confirmed that with respect to issues such as childcare the onus remains upon the employee, and not the employer, to ensure that familial obligations do not interfere with the basic obligations of the employment contract.

It is, of course, open to the parties to negotiate language within their collective agreement to provide possible relief from obligations of employment which would otherwise be borne by single parents or, for that matter, married parents with special needs. Likewise, Parliament or provincial legislatures could promulgate clear legislation to oblige employers to take such factors into account in the administration of contracts of employment and collective agreements. But as matters stand, the Arbitrator can find no discriminatory practice in the policy of the Company. It essentially requires all parents, whether single or married, to respond to their core employment obligations regardless of their personal or family circumstances. It obviously does occur, as in the case of the grievor, that extensions of time and other accommodations may be considered where hard personal circumstances are demonstrated. But in the end, all employees subject to the obligations of parenthood are treated the same, without discrimination based on the status of parenthood. In my view it would be highly inappropriate, when neither the parties nor Parliament have enacted such protection, for an arbitrator to extract from a provision such as article 115.4 and the phrase « satisfactory reason » for not responding to a recall, an effective annulment of an employee's most fundamental collective agreement obligation to be at work, in a manner tantamount to granting a form of super-seniority. If neither the parties themselves nor Parliament has ploughed any such new furrow, it is plainly not for an arbitrator to do so, bound as any board of arbitration is to apply the collective agreement as it stands. The conferring of what, in effect, would be indefinite and qualified partial parental leave is for the parties to negotiate or for the appropriate legislators to promulgate, should that be appropriate or desirable.

(The underlining is mine.)

[128] In reading arbitrator Picher, the Tribunal cannot but repeat what it said in *Johnstone v. Canada Border Services*, 2010 CHRT 20, regarding this award.

[227] In *Whyte* the onus was put entirely on the employee to bear any burden associated with working for a twenty-four hour, seven day a week enterprise such as a railway. The decision finds that "in exchange for meeting those onerous obligations railway employees have gained the benefit of relatively generous wage and benefit protections." This suggests that an employer can discriminate as long as it pays well, and without a definition as to what `relatively generous' means or what comparative is being used.

[129] On April 1st, 2006, the Complainant filed her grievance with the CHRC.

B. ISSUES

[130] The issue raised in this case is as follows: has CN discriminated against the Complainant in the context of her 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*

[131] 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.)

[132] 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.

[133] 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	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,

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.	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.

[134] 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 completer 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.

[135] 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*

[136] 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.)

[137] 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, in this case, 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?

[138] 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.

[139] 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."

[140] 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.

[141] 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."

[142] 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)

[143] 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.

[144] 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.)

[145] 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.

[146] 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.

[147] 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.)

[148] 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).

[149] 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[220]

[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.

[150] 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.)

[151] 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).

[152] 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.)

[153] 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.)

[154] The BCHRT in *Farlardeau* 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.

[155] 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.

[156] 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".

[157] 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.

[158] According to the award, 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.)

[159] 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."

[160] 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.)

[161] 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.

[162] 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 ground, 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.)

[163] 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.

[164] 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."

[165] 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.

[166] 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*.

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

[168] 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?

[169] After considering all the evidence, the Tribunal, applying the *Hoyt* approach, concludes that the Complainant has made out a *prima facie* case of discrimination on the basis of family status. As a result of her family obligation she lost her employment while other employees did not.

[170] The evidence establishes that the Complainant is divorced and that she has the primary custody of her two children who in July of 2005 were 10 and 11 years old. The

Divorce Order and custody agreement stated that the two parents would have joint and shared custody of the children, the Complainant providing the primary residence for them. It was further ordered that neither party was to reside outside Jasper with the children, without giving the other party ninety (90) days written notice of the move.

[171] In 2005, the Complainant was on lay-off status with CN. In February 2005, she was asked by CN how long it would take her to report to a shortage in Vancouver. As already noted, the custody order obligated her to provide ninety (90) days notice should she want to relocate her children away from their father. Given the unknown length of time the shortage would last and the difficulties involved in uprooting her children from their schools, their father, friends and community, she testified that it was impossible for her to go to Vancouver to cover the shortage.

[172] The Complainant wrote to CN explaining her family situation and the difficulties related to her family status. She told CN that she could not report to Vancouver and asked for a "compassionate leave of absence." On March 18th, 2005, she again wrote to CN explaining that although the thirty (30) days would be adequate for a notice to her present employer, her difficulties and unique circumstances as a single mother would not allow her to report to Vancouver. In another letter dated May 1st, 2005, she explained the circumstances of her family and child care situation directly to Mr. Torchia and stated that to move her children to Vancouver was not an option.

[173] The evidence establishes that Conductors on the railway have an unpredictable work schedule and yet the Complainant had made the necessary arrangements to fulfill the full range of her duties as a Conductor, including being on a 2 hour call 7 days a week, for work out of Jasper. The only issue for her was that she could not leave her family in Jasper at the time of the Vancouver shortage.

[174] The Complainant never received any answer to any of her letters. CN's witnesses testified that parental responsibilities such as child care were not a "satisfactory reason" to not 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."

[175] On cross-examination, Mr. Torchia recognized that the Complainant concerns were legitimate and that they did deserve accommodation. But, for him what the Complainant needed was more time to sort out her affairs and that is what he had granted her. He also added that it was "unfair" to conclude that he had not applied CN's Accommodation Policy: "They [the Complainant, Kasha Whyte and Denise Seeley] had family issues and I accommodated them by extending the time they had to report to Vancouver. They were accommodated to make arrangements. They didn't and were terminated." Interestingly, he also added: "In the case of the two Complainants [Cindy Richards and Kasha Whyte], I felt that they had "satisfactory reasons" and that is why I granted them an extension of time when I found out about them." This was not the position adopted by CN before the arbitrator.

[176] 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 situation as a single parent of two 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 CN officials. CN's witnesses testified that such a request should have been made to the employee's supervisor who in this case was Colin Pizziol, the trainmaster in Jasper. Unfortunately, Mr. Pizziol was not called as a witness and CN's other witnesses could not testify to how he had dealt with this situation. 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 her situation with her.

[177] In regards 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 this 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?

[178] 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 *Meiorin*. In that decision, the Supreme Court of Canada standardized the test applicable to discrimination and rejected the old distinction between direct and indirect discrimination.

[179] Once the Complainant has established a *prima facie* case of discrimination, 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* :

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.

Was the standard adopted for a purpose rationally connected to the performance of the job?

[180] The "neutral rule" in question here is the requirement to report for work in Vancouver to cover the shortage. In her closing argument, Complainant's counsel stated that she did not challenge that the ability of CN to require unprotected employees to be forced to cover shortage was rationally connected to its stated purpose of being able to move workers quickly to those locations which were short to allow it to keep its trains moving. She added that the rule itself includes the ability of a Conductor to not go when forced if there is a "satisfactory reason".

Did the employer adopt the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?

[181] Again the Complainant does not challenge the honest and good faith belief that from an operational point of view CN needed the ability to force unprotected employees to cover shortages. The evidence from both the Union representatives and CN was that these provisions were negotiated as part of the Collective Agreement. CN witnesses also testified that once the Furlough Boards were established, it did not expect to get many volunteers to cover shortages and that is why it negotiated the ability to force unprotected employees on lay off to address that problem.

Has CN established that it could not accommodate the Complainant without undue hardship?

[182] 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?

[183] 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. (*Meiron*, 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 général 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."

[184] 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 method 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 be innovative yet practical when considering accommodation options in particular circumstances.

[185] 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] 2 S.C.R. 561. The Tribunal does not accept this interpretation of the decision in *Hydro-Québec*. On the contrary, the Tribunal finds this decision to be consistent with previous decisions of the Supreme Court on the issue of accommodation. 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." (par. 17.) (See also *Jonhstone v. Canada Border Services*, supra, at para. 218.)

[186] CN argues that if accommodation was required under the *CHRA*, "reasonable accommodation" was provided when they granted 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.

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

[188] CN argues that providing extra time to the Complainant to report to Vancouver was all that it was required to do. However, the evidence clearly shows that this 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 various letters. The evidence also shows that the decision was made without anybody from CN discussing it with the Complainant.

[189] The evidence establishes that the Complainant wrote to Mr. Torchia and to other senior managers at CN setting out the details of her family situation and her assessment of why her family duties and responsibilities prevented her from reporting to the shortage in Vancouver. She also specifically requested a compassionate leave of absence. The Complainant had further clearly indicated that she was ready and willing to cover all aspects of her job as a Conductor in Jasper where she had the necessary child care and family supports.

[190] 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 the evidence of Mr. Storms and of Mr. Torchia that they did not feel 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 have been raised. Unfortunately, as stated earlier, Mr. Pizziol, the Complainant supervisor, was not called as a witness and neither was Ms. Mary-Jane Morrison, the person responsible for Human Resources in Edmonton in 2005. According to CN counsel, Mr. Pizziol does not work for CN anymore and Ms. Morrison was unavailable for personal reasons.

[191] 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*.

[192] The evidence of Mr. Torchia is that he was aware of the Complainant's situation and that he had come to the conclusion that what she needed was more time to sort out her affairs. He never had any discussion with the Complainant, nor did he delegate the matter to another manager so that he could discuss the Complainant's request with her. He felt that he knew what she needed and that he had given her what she needed.

[193] For her part, Ms. Storms, who was monitoring the CMC spreadsheets, knew that the Complainant's situation had been labeled "child care issue". In her evidence she suggested that many of the employees recalled had also raised child care issues and that it

was becoming a general theme. However, no other employees, other than the Complainant, Denise Seeley and Kasha Whyte, had child care noted on the spreadsheets and Mr. Torchia testified that he knew of no other cases but these where "child care issues" had been raised.

[194] Since it was her department who was supervising the information concerning the recalled employees, Ms. Storms had the opportunity to initiate CN's Accommodation Policy in the case of the Complainant, but she did not. Interestingly, Ms. Storms testified that she had initiated an accommodation in the case of another employee who had also been recalled to cover the shortage in Vancouver. That employee had a terminally ill parent and she gave him a leave of absence. She was also aware from a review of the CMC spreadsheets that other employees had been excused from reporting to Vancouver due to disability and for various other unexplained personal reasons.

[195] In an email dated June 23rd, 2005, Ms. Storms summarized her telephone discussions with the Complainant and with Ms. Whyte. She mentioned that the Complainant had child care issues and that Ms. Whyte had a son who was ill and that she had custody issues. She also mentions in the email that both had written to Mr. Torchia. However, she also wrote that if the Complainant and the two other women decided not to protect the shortage in Vancouver, their employment files would be closed and their seniority forfeited. This email was sent to Ms. Gallegos, and copied to Mr. Nashman, Mr. Torchia, Kenneth Sherman and Brian Kalin (Mr. Pizziol's supervisor). None of these managers thought that it might be appropriate, in the face of the Complainant's situation, to initiate the Accommodation Policy.

[196] The evidence also indicates that CN did not apply its own accommodations guidelines and policies in the Complainant's case. 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*."

[197] 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*."

[198] The policy also defines the process to be followed in case of a request for accommodation where one of the enumerated grounds 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.

[199] Ms. Ziemer testified that the Policy is aimed at doing an individualized assessment of the employee's situation, since every situation is different. In the case of the Complainant it is clear that no individualized assessment was done.

[200] 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 questions about the policy or its procedure consult. Ms. Morrison was not a witness at the hearing. Instead, CN called as a witness Stephanie Ziemer, the Human Resources Officer in Vancouver. Ms. Ziemer testified as to her understanding of what "family status" covered as a ground of discrimination. She explained that from her perspective as a human resources manager, "family status" means that an employer cannot discriminate against somebody who has a family, either a parent who has children or any individual that is a member of a family. She further added "certainly family status, from my understanding [...] would not incorporate any kind of or individualized parental obligations. These are very individualized and personal preferences that people have, and certainly I never saw it as coming under our policy to being involved in these types of individualized parental preferences."

[201] On cross-examination, Ms. Ziemer was asked to explain what she meant by "individualized parental preferences." She stated: "Whether or not you want to be at home to put, you know, your child to bed. Whether or not you want to attend every sporting event with your child. I mean, those are all things that we'd like to do as parents, but they would not be sufficient to initiate the accommodation process." She did add though that taking care of an ill child, having issues regarding a custody order or being a single parent would be a different thing and that it might open the door to discussions. She agreed that it was CN's expectation that single parents, if they want to be railroaders, have to manage their affairs so that they can perform their working obligations. But, she also added that if something unusual came along, for example, being asked to go cover a shortage, that might also open the door to discussions.

[202] Once the door is opened, the process provides that there should be a meeting between the employee and is supervisor, so that the latter can get a feeling of what is the problem. Ms. Ziemer acknowledged that the simple exchange of letters at this stage would not be as efficient. At that meeting the supervisor should ask for more information about the reasons for the request and discuss possible solutions.

[203] Ms. Ziemer testified that she had no hands on implication or any personal knowledge of the Complainant's situation. She also added that Human Resources is not always involved in these cases. Whenever possible, they are resolved at the local level. She further stated that CN had trained its managers well enough that they have the abilities to make a good management decisions, protecting the operation and making, where necessary, small adaptations or small adjustments to the working conditions of the employee.

[204] Ms. Ziemer gave various examples of situations where CN had accommodated employees on the basis of "family status", starting with her own situation. She explained that her husband had been severely injured in a skiing accident. For a period of ten weeks, he could not move his arm or upper body. During this period, she explained that she was allowed not to travel and was given a flexible working schedule. She also testified to the accommodations given to an individual in Vancouver so he could be available for his son who was involved in illegal activities, including gang-related activities and to a Conductor whose daughter had a significant psychological breakdown. This employee was allowed to work closer to home for a rather lengthy period of time. She added that CN had also accommodated a market manager upon her return from parental leave because her child had a severe eating disorder. This employee was given additional time off upon completion of her parental leave.

[205] On cross-examination by Counsel for the CHRC, Ms. Ziemer was reminded of two other examples that she had referred to in the Seeley hearing. One of these was an accommodation for an employee which allowed him to be absent from the working board every second weekend because he only had visitation rights for 48 hours every two weeks. The other was an accommodation granted to an employee who was involved in a lengthy custody battle in Court. This person was given additional time off for this reason.

[206] She further testified that most of these cases had been dealt with at the local level. She further added that supervisors are trained to pick up on that type of request. But, she stated "unfortunately we can't supervise what they're doing out there in the field in terms of putting the actual teachings to use. We would like to think that they are well conversant in our policies, well trained. But whether or not that Supervisor A at Location B would be able to pick up on the issue coming forward, I can't say definitively that that would happen."

[207] According to Ms. Ziemer, although there are no mechanism to evaluate the application of the policy, CN's expectations is that the front line supervisors are doing the right thing in terms of the policy, are living up to the policy and are abiding by the intricacies of the policy. She added that when the policy is not followed, Human Resources usually hears about it through various correspondences, or from their counterparts on the labour relations side. As a general rule, CN is operating on the notion that its supervisors are following the policy in terms of what they have been taught and what CN's expectations are.

[208] Ms. Ziemer also testified on cross-examination that the process described in the accommodation policy would start as soon as an employee came forward and reported a problem or special need, although she added that that would not necessarily always lead

to a decision that accommodation is necessary. When asked by Complainant's counsel why this process had not been initiated in the Complainant's case, she answered that she did not know, because she had not been involved in this case. She also added that usually the employee goes to his or her immediate supervisor as the first step.

[209] Mr. Torchia testified that he had not met with the Complainant, because this would ordinarily be done by the Complainant's supervisor. He added that he did not know for "a fact" whether her supervisor had met with her, but he would "assume he did" because he had a telephone conversation with him and he was aware of the situation.

[210] On cross-examination, he testified that he had received training with regard to the duty to accommodate "many years ago, in the early nineties". For her part, Ms. Storms testified that she did not recall receiving any training on CN's accommodation policy. She added that she knew about the policy and that if she had some concerns about it she would talk to somebody in Human Resources. Ms. Storms further added that she never really used the accommodation policy, because CMC does not get many requests for accommodation. She did acknowledge though that there were times where CMC had accommodated employees because of serious illnesses in the employee's family or because somebody needed time off for personal reasons.

[211] She further testified that although she remembered having read the policy, she was not very familiar with it and did not have a detailed knowledge of it. She did not know if anybody else at CMC had had training on the policy. On cross-examination from counsel for the CHRC she answered that to her knowledge none of the dispatchers and/or members of the Board Adjustment Group, who were primarily responsible for contacting the employees recalled to cover the shortage in Vancouver, had any training regarding CN's accommodation policy. Asked to explain how they would recognize an issue of accommodation if one came up, Ms. Storms answered that they knew that CN accommodates people and that sometimes they are aware of an employee's situation. The general rule would be for them to refer an employee with special request to his supervisor.

[212] 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 to 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.

[213] In her letter to Mr. Torchia, the Complainant suggested as a possible accommodation that she be granted a compassionate leave of absence for the duration of the Vancouver shortage. The evidence indicates, based on the return to Jasper of another employee who had been forced to Vancouver, that this would have been around March 2006. If the leave of absence had been granted, the Complainant would not have provided

services to CN and she would not have earned any wages. CN did not submit any evidence to establish how the granting of a leave of absence would have caused it an undue hardship.

[214] Even if I was to accept the evidence that CN had provided some form of "accommodation" by granting the plaintiff 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 states 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).

[215] 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.

[216] 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?

[217] 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.

[218] The only evidence that this assessment of other form of accommodation might have occurred is the evidence that the Union had suggested canvassing the employees in Jasper to see if anybody would volunteer to cover the shortage instead of the Complainant, Kasha Whyte and Denise Seeley. But, since nobody came forward, the canvassing stopped. There is no evidence that CN did an individualized assessment of the Complainant's situation or investigated any alternative form of accommodation

[219] I will now deal 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.

[220] 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 69% of [CN's] workforce are parents." The methodology used by CN to produce this evidence was severally put to test at the hearing by the Complainant's counsel. But beside the methodological problems, the Tribunal concludes that 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.

[221] 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 upon 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.

[222] CN did not produce any evidence that it was overwhelmed with requests for accommodation from people in the Complainant's situation. 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.

[223] 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.

[224] In the instant case, CN has 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 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."* No evidence of this nature was submitted at the hearing.

e) Conclusion

[225] 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.

[226] The evidence also establishes that the Complainant was put at a disadvantage because of her special needs and requirements. CN's managers never met with her. They never allowed her the opportunity to present and explain her needs, nor did they ask any questions to fully understand her request. They never sought any advice from their own Human Resources Department. If they had, they would certainly have been told to initiate the policy considering Ms. Ziemer's evidence that the policy is initiated as soon as a employee comes forward and reports a problem or a special need and her evidence that

taking care of an ill child, having issues regarding a custody order or being a single parent would at least open the door to discussions.

D. REMEDIES

[227] 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

[228] 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 be offered in an effort to eliminate discriminatory attitudes and assumptions related to family status as a ground of discrimination.

[229] 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. Some evidence has also indicated that the policy has not been revised since the Tribunal's decision in *Audet v. Canadian National Railway*, [2006] CHRT 25 and *Hoyt*, supra. At the most, according to Cathy Smolynek, CN's Senior Director of Occupational Health Services, some process changes were made in the disability area of the Policy.

[230] I have referred in my decision to the *Accommodation Guidelines* and have determined that the 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.

[231] 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, retain appropriate persons to conduct workplace training for manager, human resource staff, CMC employees and any other employees deemed necessary on issues of discrimination and human rights and particularly on accommodation on the ground of family status.

(ii) Reinstatement

[232] 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.

[233] In order to provide this remedy in the present case, the Complainant must therefore be returned to her job without lost of seniority. The Tribunal therefore orders CN to set up the Complainant as a Conductor at the Jasper terminal, after she has, if necessary, updated her rules and medical certificates.

[234] There are three possible starting dates that the Tribunal could reasonably fix for the Complainant reinstatement. The first date suggested is July 2nd, 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.

[235] 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 recall and had reported to Vancouver, was set up in Jasper. Since only four employees from Jasper, the Complainant, Denise Seeley, Kasha Whyte and this other employee, had been recalled and told to report to Vancouver it might be reasonable to expect that the they would also have been set up in Jasper around March 2006. Ms. Storms testified that "because the Complainant seniority is very close to [that of the employee who was set up] it is safe to say that they would have been recalled to Jasper at that time as well."

[236] Finally, evidence was produced that in March 2007, CN hired new Conductors 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.

[237] With the admission of Ms. Storms, it is safe to conclude that the Complainant would most likely have been set up in March 2006, had she not been terminated and this date is therefore the one retained for her reinstatement.

[238] 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 on July 2nd, 2005.

(iii) Compensation for lost wages

[239] The complainant seek 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, 2006 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.

[240] In 2006, the Complainant's income was $18,233.96. During that period the Complainant was holding two jobs, that of waitress and the one at the building centre. In 2007, she got a promotion to Assistant Manager at the building centre and her earnings were then of $33,172.58. In 2008, she held the same position with earnings of $37,365.44. In July 2009, she got another promotion to the position of Manager. Since July, she is making $17.00 an hour and working forty hours a week. For the first months of 2009, she was earning $15.50. She receives no other benefits at this job.

[241] For mitigation purposes, these amounts should therefore be deducted from the amount of her lost wages.

[242] As to the claim for lost wages from July 2nd, 2005 to March 1st, 2006, there was no evidence that the Complainant would have been working during that period. Even if she would have been allowed to remain on the emergency board, there was no evidence submitted that would allow the Tribunal to set this amount so the Tribunal makes no order for that period.

(iv) Pain and suffering

[243] 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.

[244] The Complainant testified that between the time when she was informed that she was being forced and the date she was fired, the situation wasn't very difficult for her because she sincerely believe that everything would be resolved. But after she was fired, things were difficult for her and her children because she did not know what was going to happen. She added that the decision to fire her was very difficult for her. She felt that she was very close to being set up and that now that opportunity had vanished. She described the decision to fire her as "a mind blowing situation" and "huge blow financially and family wise." She added that she was basically "in denial" and that she "did not think that it was possible". She "felt rejected like in when you're losing a spouse, a partner".

[245] Although no medical evidence was produced to, the Tribunal concludes that CN's conduct and nonchalant attitude towards her situations was disturbing for the Complainant. Taking this into consideration, the Tribunal orders CN to pay to the Complainant $15,000 in compensation for her pain and suffering.

(v) Willful or Reckless Conduct

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

[247] CN had an accommodation policy, which set out the procedures to be followed with respect to any employees who reported any problem or a special need. 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 needed 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. They ignored her letters and decided to treat her case as just a "child care issue". They felt that they knew, without ever speaking to the Complainant, what was better for her and what she needed. This course of action was, in my view, reckless.

[248] In the circumstances, I order CN to pay to the Complainant the sum of $20,000, in additional compensation under section 53(3) of the *Act*.

(vi) Compensation for expenses

[249] In her closing arguments, counsel for the Complainant sought an award for legal cost. The question whether the Tribunal had the authority to award costs and whether that 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, was dealt with by the Federal Court of Appeal in *Canada (Attorney General) v. Mowat*, 2009 FCA 309, a decision rendered in the closing days of the hearing.

[250] After an analysis of Human Rights Code in various provinces that allowed an award for cost and after analyzing 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.

[251] 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.

[252] The Complainant and Kasha Whyte have submitted out of pocket expenses which amount to $336.68, each being accountable for half this amount. Under the provision of paragraph 53(2)(*c*) of the *Act*, CN is ordered to reimburse half this amount to the Complainant.

(vii) Interest

[253] 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 and for the lost of earning if will run from the date of reinstatement.

"Signed by"

Michel Doucet

OTTAWA, Ontario

September 29, 2010

PARTIES OF RECORD

TRIBUNAL FILE:	T1356/8608
STYLE OF CAUSE:	Cindy Richards v. Canadian National Railway
DATE AND PLACE OF HEARING:	September 22 to 24, 2009 October 8 and 9, 2009 Jasper, Alberta October 22, 2009 Ottawa, Ontario October 26 to 30, 2009 November 12 and 13, 2009 Jasper, Alberta
DECISION OF THE TRIBUNAL DATED:	September 29, 2010
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