CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

CATHERINE HOYT

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY

Respondent

- and -

UNITED TRANSPORTATION UNION

Interested Party

REASONS FOR DECISION

MEMBER: Julie C. Loyd

2006 CHRT 33
2006/08/18

I. INTRODUCTION

[1] The complainant, Catherine Hoyt, alleges that her employer, the Canadian National Railway Company ("CN") failed to accommodate her pregnancy and also failed to accommodate her parental obligations. She contends that CN thereby discriminated against her on the basis of her sex and her family status, in breach of section 7 of the *Canadian Human Rights Act* (the "*Act*" or "*CHRA*").

[2] The complainant's union, the United Transportation Union (the "Union"), sought and received Interested Party status in the proceedings. In its statement of particulars, CN alleges that the Union did not act cooperatively or reasonably with respect to Ms. Hoyt's accommodation. The case managing member ruled that, in light of these allegations, the reputational interests of the Union might be affected by the within proceedings and that, accordingly, it was appropriate to grant the Union the status it sought and to direct that the Union would be allowed to introduce evidence, examine and cross-examine witnesses and present argument on issues where its interests might be affected and on its involvement in the accommodation efforts.

[3] The hearing extended 10 days in April of 2006 and included a site visit to the Walker Yard of the CN Edmonton Terminal. Both the complainant and the respondent participated at the hearing and were represented by legal counsel. The Union participated in the hearing and was represented by counsel. The Canadian Human Rights Commission did not participate.

[4] For the reasons set out below, I have determined that CN did discriminate against Ms. Hoyt by failing to accommodate her pregnancy, and further that CN failed to accommodate her parental obligations. Ms. Hoyt's complaint has therefore been substantiated.

II. BACKGROUND

A. The Complainant

[5] Ms. Hoyt is a third generation railroader. Both of her grandfathers, her father, two uncles and her brother enjoyed careers with CN. She is also married to a railroader.

[6] In July of 1991, Ms. Hoyt was hired by CN. She worked first as a welder's helper in different regions of Ontario and in the spring of 1995 applied for and won a position at CN's Edmonton Terminal. Her family history had taught her that this would be a good career that would provide her and her family a good living, as it had other of her relatives.

[7] A few months after Ms. Hoyt relocated she earned the position of a yard conductor in the Walker Yard of the Edmonton operation. Ms. Hoyt was a yard conductor at the time this complaint was filed.

B. The Respondent

[8] The respondent, CN, operates a railroad and is in the business of transporting goods across the country by rail.

[9] The events relevant to the within complaint took place at CN's Edmonton Terminal. The Edmonton Terminal is comprised of the Walker Yard and three satellite yards, being the Bissell Yard, Cloverbar and the Scotford Yard. Approximately 100 employees work in the yards. Additionally, some of the administration of the Terminal was conducted at the time from the CN building in downtown Edmonton. Approximately 200 employees worked in the downtown administration building.

[10] A brief description of the nature of this facility and some of CN's operations will be helpful to an understanding of the issues relevant to the within complaint.

(i) The Walker Yard

[11] At various points across the country the respondent has facilities that allow trains to be assembled and re-assembled as necessary. The Walker Yard is one such facility. The conductors in the Walker Yard marshal cars. Trains enter the Yard with cars on route to different locations. Perhaps 20 cars on a particular train must continue to the west coast, and another 30 to northern Alberta and so on. Trains must be disassembled and then reassembled so the cars can continue to their ultimate destination.

[12] The procedure used to marshal cars is quite ingenious. The Walker Yard has a hump. The Hump is a hill with a very modest inclination. Trains are pushed up to the crest of this hill and the cars are disengaged either singly or in clusters as they are about to descend down the incline. At the bottom of the Hump are over forty separate tracks. The setting of rail switches allows each car or cluster of cars to be directed on to one or another track.

[13] Once the cars have come to a stop on the track to which they have been directed the cars are then reassembled in advance of their departure. The reassembly is accomplished by yard conductors using yard locomotives to push the cars along the rails until the cars have been strung together in a proper order. Once the cars have been properly assembled they are ready to depart for the next leg of their journey.

[14] The size of the operation in the Walker Yard is remarkable; the Yard and its tracks extend for several miles. The cars entering and then leaving the Yard weigh 30 tons when empty and can weigh 120 to 130 tons when full. Strings of rail cars entering or being made ready to leave the Yard are often a mile long. Every hour of the year cars are pushed along the many tracks of the Yard as they are marshaled into trains.

[15] Safety is a paramount concern at CN, as was evidenced during our site visit. We were issued safety equipment and shepherded very carefully about the site on the tour. Safety is a part of the very design of railroad equipment. As an example, the braking system on trains employs air pressure. The air pressure is not, however, used to apply the brakes; it is used to release them. This design ensures that if air pressure is lost through a failure of the equipment, the train will stop. CN employees describe this as a `fail safe;' equipment is designed so that a failure will result in a safe rather than a dangerous situation.

(ii) The Beltpack

[16] One of the technical advances to be introduced at the Edmonton Yard is the beltpack or Locomotive Control Unit (L.C.U.). A beltpack allows a yard conductor to operate a locomotive like a remote control car. The unit, weighing about 6 pounds, is worn strapped to the body by a harness. It has switches, dials and toggles that allow the yard conductor to start, stop and control both the speed and direction of the locomotive. The beltpack is also equipped with a safety feature. If the beltpack is tipped beyond a 45 degree angle, the beltpack will stop the locomotive after a few seconds unless the unit is reset by the conductor. This is an emergency function designed to prevent injury, or further injury, should a conductor fall or become incapacitated while operating a locomotive. The beltpack is another example of fail safe design.

[17] Prior to the implementation of beltpacks in or around 1995, crews of three people were used to marshal trains. One person, locomotive engineer, was placed in the locomotive itself while the other two would be on the ground at either end of the locomotive. The three communicated by radio. Three man crews were still used in the Walker Yard on occasion at the time relevant to this complaint. When the beltpacks were implemented, CN's general operating instructions directed that each of the two yard conductors would carry a pack and further that the conductor at the `leading end of the movement' was to be controlling the train. The leading end of the movement is the `front' of the train. When the train changes direction, the leading end switches from one end to the other. As the trains often change direction during the marshaling process, the conductors must alternate control between them as direction changes. This procedure is called `pitch and catch.' Upon the train changing direction, one yard conductor `pitches' control of the train to the other.

[18] At the time relevant to this complaint, there was a disagreement at CN over whether it was safe for a two person yard conductor team to be deployed with only one conductor using a beltpack and the other using a two-way radio. The Union believed this would be unsafe. Management disagreed. Minutes of CN's Health and Safety Committee demonstrate that this disagreement was a live issue. CN's general operating instructions at the time required that on a two conductor crew, both conductors were to use beltpacks. The operating instructions also directed that, should one beltpack malfunction, the crew was to retrieve a new pack as soon as reasonably possible.

(iii) CN's Seniority System - The Spare Board

[19] The Respondent runs its operations around the clock. Trains are marshaled twenty-four hours per day, each day of the year. Shift work is a fact of life for a railroader and so is the unpredictability of one's schedule from day to day and from week to week.

[20] The work schedules of yard employees at CN are determined by seniority. Employees with sufficient seniority may receive a regular assignment. These employees are advised each Friday of their schedules for the whole of the upcoming week. Even after receiving a regular assignment, however, an employee might be advised on short notice that his or her services are required in a position senior, or higher in CN's job hierarchy, to that of their regular assignment. These more senior positions, once offered, must be accepted by the employee.

[21] Employees with less seniority have their schedules determined by the spare board. The spare board is a tool that allows the employer to appoint employees to required shifts and assignments. Employees are listed on this board in order of seniority and shifts are assigned in that order. More senior employees on the spare board receive more regular shifts at more favored times of the day and days of the week, while less senior employees receive less regular assignments at less favored times of the day and days of the week.

[22] To secure a particular shift for an employee, or to allow an employee to avoid a particular shift, it will usually be necessary to exempt them from the unpredictable realities of the spare board. This status is called `super seniority.' The Union's consent is required before an employee can receive this status.

(iv) CN's Accommodation Policy

[23] CN has a policy in place for dealing with employees who require accommodation. Its "Accommodation Guide for Managers and Supervisors" identifies that "(c)ourt decisions have required employers to provide accommodation to the extent that this does not create undue hardship" and further, that "(t)he costs incurred must be extremely high before the refusal to accommodate can be justified."

[24] A document entitled "Accommodation Checklist for Managers and Supervisors" outlines the accommodation process to be engaged when accommodation is sought. The checklist directs the Manager or Supervisor to first meet with the employee in respect of the accommodation requirement; to identify the essential requirements of the employee's regular position; to consult with other representatives of CN as necessary and to consult with the Union; to then decide whether the employee's existing job function might be adjusted to accommodate or whether the employee might be assigned different job duties to accommodate his or her requirements or restrictions. Managers and Supervisors are directed to inform the employee of their decisions, to give reasons for those decisions, and to keep careful records of the steps taken in the accommodation process.

III. THE FACTS GIVING RISE TO THE COMPLAINT

[25] In February of 2002, after 11 years of service with the respondent, Ms. Hoyt learned that she was pregnant. She began to experience some pain and discomfort on the job. She was examined by her doctor and the doctor wrote a letter to CN explaining that, as a result of her pregnancy, Ms. Hoyt required some modifications to her job. Ms. Hoyt, the doctor directed, must avoid hazards, avoid particularly strenuous activities and work regular hours. The doctor also directed that she was not to use a beltpack.

[26] On February 18, 2002, Ms. Hoyt gave the doctor's letter to a CN Superintendent who advised her that she should go home on an unpaid leave of absence status until CN had time to consider the matter.

A. CN's First Offer of Accommodation

[27] On February 25, 2002 an Assistant Superintendent provided Ms. Hoyt with a letter detailing the accommodation that CN had designed. CN had proposed that she be placed on an afternoon shift as a yard conductor on the Walker Hump. This position would require Ms. Hoyt to wear a beltpack. In the letter CN asked for further clarification of her medical restrictions and concluded:

At this time are no modify (sic) duties where L.C.S. equipment is not involved. Based on all testing and technical reports the Company's position is that the L.C.S. equipment falls within all regulatory guidelines and does not pose health related problems.

If you feel you can not operated (sic) the L.C.S. equipment the Company will grant you a leave of absence without pay. At this time it is not reasonable practicable (sic) to modify your job function where the L.C.S. equipment is not used.

The reference to L.C.S. equipment is a reference to the beltpack.

[28] Ms. Hoyt was distressed by this offer of accommodation. The Hump position, in her experience, was more rigorous than her regular yard conductor job. In that position a single yard conductor worked alone to disengage cars, singly or in clusters, before the cars began to descend down the track. The position was, in her view, difficult and relentless. The position also required the use of the beltpack. Her doctor had directed that she must not use the beltpack. She called her union. The Union had no knowledge of CN's accommodation proposal.

[29] Ms. Hoyt re-attended at her doctor's office the next day. The doctor provided a more detailed letter explaining why the beltpack was not to be used:

The wearing of a beltpack will cause abdominal pressure and weight on the developing fetus. It will also contribute to backache as the pregnancy progresses. It is best then that the beltpack not be employed for the remainder of the pregnancy.

Ms. Hoyt provided this second letter to CN.

B. CN's Second Offer of Accommodation

[30] After receiving this second doctor's note, CN developed a second plan for accommodation and communicated this second proposal to the Union. CN proposed that Ms. Hoyt work in her former position of yard conductor, but that she would not wear a beltpack and would instead be supplied with a radio. Her co-worker would control the train in both directions. CN also proposed that she would work a regular afternoon shift, and so Ms. Hoyt would require super seniority status. The Union's consent would be required.

[31] The Union reviewed this second proposal and expressed two concerns. The first concern was safety. As mentioned, the Union had long taken the position that it was dangerous to employ only one beltpack in a two conductor crew. The Union also expressed a concern about the super seniority status. It asked CN for an assurance that any employee who lost a shift as a result of this status being conferred on Ms. Hoyt be compensated. CN refused to give this assurance. The Union rejected this proposal primarily on the ground of safety and secondarily on the ground of seniority.

[32] Ms. Hoyt shared the concerns expressed by the Union. She too felt that working as a yard conductor without a beltpack was unsafe. She was also concerned that, should CN place her in a position on the Yard outside her seniority status, she might suffer harassment on the work site. Ms. Hoyt testified that a female colleague of hers had received such an accommodation in the recent past. Ms. Hoyt heard and was required to

defend her colleague from the disparaging comments of other workers as they complained that special treatment was being given to the women. Her colleague's car was vandalized during this time period. Ms. Hoyt was concerned that she now would be the target of these comments.

[33] The Union proposed some other positions that might be used to accommodate Ms. Hoyt, including the following:

- placing her in a `utility' position, being a general helper, on the Yard;
- placing her in a `utility' position on the Hump;
- having her drive a crew van on the Yard;
- assigning her to sedentary work in one of CN's administrative offices;
- assigning her to a three-man crew, which crews did not use beltpacks.

Each of these proposals were rejected by CN.

[34] On March 1, 2002, C.N. wrote to Ms. Hoyt:

The Company undertook an investigation of alternate duties or modifications to your existing duties due to your maternity related circumstances. The result of such investigation concluded that at this time the Company is unable to offer you accommodation.

Your physical restrictions do fall within the parameters of the Assistant Conductor position at Walker yard west tower afternoon assignment, however your seniority does not allow you to hold same within your own right. In order to assign you to one of these positions, the company requires the agreement of the CCROU UTU.

The company discussed the accommodation with the union however they were not willing to enter an agreement that would override the seniority provisions of the collective agreement.

The company will continue looking for available opportunities that fall within your restrictions and advise you accordingly.

If you have any questions or require further information please contact the undersigned at . . .

The reference to the "CCROU UTU" is a reference to the Union.

[35] Ms. Hoyt remained off work on unpaid leave. She did receive some sick benefits during the relevant time period.

[36] Ms. Hoyt wrote to her employer by letter dated March 4, 2002 requesting information. She wanted to be advised of what positions CN had considered for her and who her contact person would be at the Company. She received no response to this request. Ms. Hoyt also filed a complaint with Human Resources Development Canada, alleging her employer violated its accommodation obligations under the *Canada Labour Code*, filed a complaint with the Canadian Human Rights Commission and participated in the grievance process with her Union.

C. CN's Third Offer - The Crew Van Position and Child Care

[37] On May 25, 2002, after being on unpaid leave for three and a half months, the complainant was advised by CN that it had a position for her driving a crew van on the Walker Yard. She would work the afternoon shift from Tuesday through Saturday each week commencing Tuesday, May 28, 2002. Ms. Hoyt accepted the job immediately.

[38] The Hoyts had a two-year old child at home. Before her pregnancy gave rise to her need for accommodation, Ms. Hoyt described that her schedule was quite variable. She worked off the spare board and received two-hour notice of her assignment to day,

afternoon or midnight shifts. If her husband was at work, she would call friends and neighborhood teenagers to look after her daughter. The caregiver would attend at the Hoyt's home. Her daughter was never cared for outside her own home.

[39] When she learned of her new schedule, Ms. Hoyt knew that she would have to arrange child care for her daughter. She also knew that she would require care for her daughter every Saturday as her husband's position at CN and his seniority status meant that he was required to work almost every Saturday.

[40] Back in February of 2002, when she first learned she was pregnant and was advised by her doctor that she required accommodation, Ms. Hoyt assumed that she would receive a regular shift and would need to arrange child care. She contacted a woman in a nearby town who ran a home day care. This woman, married to a railroader, was familiar with the lives of families in that industry and was willing to accommodate their rather unusual child care needs, accepting children day or night, seven days a week. Ms. Hoyt secured a spot for her daughter at this facility. She was not accommodated promptly as she had expected. When she called this same facility in late May, she learned that they were no longer able to accept her daughter.

[41] Ms. Hoyt contacted other people, mostly neighborhood teenagers, who had provided service to her in the past. She was, in the short period of time between May 25 and 28, able to secure child care for her daughter, except for three Saturdays in June.

[42] When she returned to work on May 28, 2002, Ms. Hoyt advised CN of her child care problem. She asked as an accommodation that her schedule be altered so that she would not be required to work Saturdays for those three weeks. Assistant Supervisor, Rick Sherbo, advised her that he would see what he could do.

[43] On June 4, 2002, Ms. Hoyt went back to Mr. Sherbo's office to see what arrangement had been put in place. She was advised that CN would accommodate her by allowing her to take unpaid leave for those days.

[44] Ms. Hoyt became upset. She had a verbal altercation with Mr. Sherbo before her shift was scheduled to start. Upon leaving his office she realized that she was unfit to work. She was very upset and felt unable to safely drive the crew van. She left work and while driving home started experiencing shortness of breath and some physical pain in her abdomen. She was worried about her own health and the health of her fetus. She had experienced medical difficulties during her first pregnancy. She drove directly to the hospital. She was observed, undertook some tests and was discharged the same day. The next day she attended at her doctor and was advised that the stress she was continuing to experience around the accommodation of her pregnancy was endangering her health and might harm her fetus. She was directed to stay off work for a month.

[45] Ms. Hoyt remained at home as directed. Her application for Worker's Compensation Benefits was contested by CN and was unsuccessful. She received some sick benefits.

[46] In early July of 2002, Ms. Hoyt returned to work driving the utility van and continued to carry out that function until she left on maternity leave. Her second child was born in the fall of that year.

IV. ANALYSIS

[47] Section 7 of the *CHRA* identifies that it is a discriminatory practice to refuse to employ or to continue to employ an individual, and to differentiate adversely in relation to any individual on a prohibited ground of discrimination.

[48] The onus is first on the complainant to establish a *prima facie* case of discrimination. Upon the complainant discharging this onus, the evidentiary burden shifts to the respondent to establish that the measure adopted or decision made was based on a *bona fide* occupational requirement and that accommodation would impose undue hardship (section 15(1)(a) and 15(2), *CHRA*).

A. Has the Complainant Demonstrated a *Prima Facie* Case of Discrimination on the Basis of Sex?

[49] A *prima facie* case of discrimination 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 favor, in the absence of an answer from the respondent-employer."(*O'Malley v. Simpson-Sears Ltd.* [1985], 2 S.C.R. 536 at para 28).

[50] Discrimination on the basis of pregnancy is discrimination on the basis of sex (see section 3(2) of the *CHRA* and *Brooks v. Canada Safeway Ltd.* [1989] 1 S.C.R. 1219).

[51] I find on the evidence of the complainant that a *prima facie* case of discrimination on the basis of sex has been made out. In particular, the complainant's evidence demonstrates that CN refused to continue to employ her and that CN differentiated adversely in relation to her on a prohibited ground of discrimination.

(i) Refusal to Employ or to Continue to Employ

[52] Ms. Hoyt became pregnant. She began experiencing some pain and discomfort at work. She went to her doctor. Her doctor examined her and in a letter made four clear and simple directions. She brought the letter to CN. She was told to go home and was placed on unpaid leave status.

[53] CN made two offers of accommodation to Ms. Hoyt in February of 2002. Ms. Hoyt rejected the first proposal and the Union, with her support, rejected the second.

[54] The accommodation proposals made by CN engage the Supreme Court of Canada's analysis in *Renaud* [1992] 2 S.C.R. 970 at para. 39 and reminds us that where an employer has communicated a proposal that would fully accommodate an employee's needs or restrictions and that is reasonable in the circumstances, the employer's duty is satisfied. It then becomes the duty of the employee and, in a collective bargaining environment, the duty of the Union, to accept and to facilitate the implementation of the proposal. If an employee's need for accommodation is fully and properly satisfied, the employer will not be required to demonstrate that the accommodation amounted to undue hardship.

[55] The Federal Court of Appeal has also considered this issue. Pelletier JA writing *per curiam* in *Hutchinson v. Canada (Minister of Environment)*, [2003] 4 F.C. 580 at para. 75, noted that where the conduct of an employer can be demonstrated to have taken reasonable steps and to have made reasonable proposals that would meet an employee's limitations, the employee has not been adversely treated and a *prima facie* case will not be made out.

[56] I find that neither of CN's proposals accommodated Ms. Hoyt's requirements.

[57] CN's first accommodation proposal was directly contrary to at least one of the medical restrictions identified by her doctor. She was told by her doctor not to use a belt pack. The position required the use of the beltpack. Ms. Hoyt also believed that the position would be unduly strenuous and so in violation of a second of her doctor's directions. This offer was not of a nature contemplated by *Renaud;* it did not accommodate the restrictions identified by her doctor.

[58] CN's second accommodation proposal also failed to accommodate Ms. Hoyt. While this proposal, if implemented, would have met each of the restrictions identified by Ms. Hoyt's doctor, the proposal gave rise to other significant concerns: safety and seniority.
[59] The Union took the position that this proposal would make Ms. Hoyt unsafe on the Yard. Ms. Hoyt, an experienced yard conductor, shared that concern. CN's general operating instructions required both conductors wear a beltpack when employed on a two conductor crew. CN's proposal would exempt Ms. Hoyt alone from this workplace direction. As mentioned previously, safety is a priority at CN. Safety measures are a part of the equipment and part of the culture of this industry. The safety concern was reasonable in the circumstances and represented another of Ms. Hoyt's needs for accommodation. The position offered did not meet this need and so did not fully meet Ms. Hoyt's requirement for accommodation.
[60] Discrimination can arise from both conduct that creates practical disadvantage and from the messages that such conduct can convey (*Vriend v. Alberta* [1998] 1 S.C.R. 493 at para. 100). The message conveyed by this proposal is palpable. If implemented, the proposal would mean that Ms. Hoyt - only Ms. Hoyt - only the pregnant woman - would be navigating the Walker Yard, among its 40 tracks, the moving rail cars weighing 30 to 130 tons and stretching as much as a mile long, without the equipment, the protection, that the general operating instructions afford every other employee on a two conductor crew. The message that the implementation of this proposal would send is *prima facie* discriminatory.
[61] This proposal also created for Ms. Hoyt a reasonable apprehension that she would be exposed to further discrimination should she be given super seniority status. This concern was based on the recent experience of a colleague, who suffered inappropriate comments from co-workers and other mischief. This concern of Ms. Hoyt's was another element of her need for accommodation and CN's second proposal did not meet this need.
[62] Having rejected the offers of accommodation, Ms. Hoyt remained on unpaid leave for three and a half months. Ms. Hoyt was not sick. She was not injured. She was a healthy woman in the early stages of pregnancy. I find that the *prima facie* case is made out. Between mid February and late May of 2002 the complainant was a victim of discrimination because her pregnancy was not properly accommodated.

(ii) Differentiating Adversely

[63] There is also evidence that Ms. Hoyt was treated differently and adversely compared to other employees not sharing her personal characteristic of pregnancy.
[64] Marvin Sawatzky gave evidence at the hearing. Mr. Sawatzky, a CN conductor and locomotive engineer, injured his ankle three days before Ms. Hoyt made her request for accommodation. Mr. Sawatzky got a note from his doctor, took it to CN and was told to come in the next day. He first worked in the administration office and was later given a position driving a crew van. His shift was Monday to Friday commencing at 7:30 a.m. While Mr. Sawatzky was paid for the full shift, he left the work site after lunch each day to attend physiotherapy. He went home after his appointment. Mr. Sawatzky returned to his regular assignment in early May.
[65] Ms. Hoyt's husband, who worked as a conductor at CN among other positions he performed for this employer, became unable to use the beltpack nine days after Ms. Hoyt's need for accommodation arose. A problem with the pack's harness was causing Mr. Hoyt to experience back pain. Like Mr. Sawatzky, Mr. Hoyt delivered a doctor's note

to CN outlining his requirement for accommodation. He was told to come in the next morning. Mr. Hoyt joined Mr. Swatzky in an administration office on the yard doing administrative work. He was later re-assigned to a point protection position that entailed his operating a locomotive on a three-person crew. Three-person crews do not use beltpacks. He returned to his regular assignment in early April 2002 after CN had successfully made adjustments to his harness. Mr. Hoyt was not assigned to a two-conductor crew with a radio instead of a beltpack.

[66] CN could not, however, find accommodation for Ms. Hoyt beyond the proposals made. She sat at home.

[67] This differential treatment itself makes out a *prima facie* case of discrimination (*Saskatchewan (Human Rights Commission) v. Canadian Odeon Theatres Ltd*. (1985), 6 C.H.R.R. D/2682 at D/2689). CN's failure to afford reasonable accommodation to Ms. Hoyt between mid-February and late May, 2002, particularly when other employees were accommodated seamlessly, is sufficient evidence to make out a *prima facie* case of discrimination. The onus now shifts to CN to justify its conduct on a balance of probabilities.

B. CN's Justification

[68] CN's justification is that it had made a reasonable proposal of accommodation that met its legal duty to accommodate and that Ms. Hoyt and the Union failed to discharge their duty to accept the reasonable accommodation. The Union was further at fault because it did not communicate its rejection of the proposal until late April, 2002. Finally, there were no other positions at CN that could be offered to Ms. Hoyt until the crew van driver position became available. CN's evidence on the issue of justification is as follows.

[69] CN's objectives when it attended to Ms. Hoyt's request for accommodation were twofold. First, they preferred to keep employees engaged in their craft as much as that was possible. Second, they preferred to engage employees only in viable accommodative positions, meaning positions valuable to CN's operations.

[70] When the complainant's request for accommodation and doctor's note were first received, CN assistant supervisor, Rick Sherbo, made some inquiries of other CN departments to see if they had anything available for `a pregnant woman.' He found nothing. CN was downsizing its administrative positions at the time and CN had recently eliminated some positions created to accommodate employees as the positions had been found to be of no value to the company.

[71] Mr. Sherbo shared the doctor's note with his superior, Mr. Valliere. They were of the opinion that beltpack use posed no medical concerns to a pregnant woman. The two were also unclear about the restrictions regarding hazards and overly arduous activities. They decided to offer Ms. Hoyt a beltpack position on the Walker Hump. They felt this position to be less strenuous than a position on the yard. They also decided to ask for clarification from Ms. Hoyt's doctor regarding her restrictions. This position would satisfy CN's objectives in accommodation.

[72] Upon receiving the second doctor's note, Mr. Sherbo and Mr. Valliere discussed the matter again. The second position, that Ms. Hoyt would work on a two-conductor crew without a beltpack, was settled on as it would meet CN's accommodation objectives and satisfy the restrictions identified by the doctor. `This is basically what we came up with

as viable accommodation,' testified Mr. Sherbo. CN took this proposal to the Union. The Union, as we know, rejected the proposal.

[73] Mr. Sherbo then wrote the March 1, 2002, letter to Ms. Hoyt advising her that the Union had rejected their proposal of accommodation and that there were no other positions available at CN to accommodate Ms. Hoyt's pregnancy.

[74] The alternative solutions proposed by the Union were dismissed because in CN's view they were `not viable.'

[75] Mr. Sherbo said that he continued, from time to time, to make inquiries about available positions. He found none. He also advised that after March 1, 2002, the matter `went upstairs.' He was unaware of decisions made or CN's reasoning behind decisions made after that date.

[76] In mid-March, 2002, a month after Ms. Hoyt made her first request for accommodation and a month after she had been sent home on unpaid leave, Susan Blackmore, a CN human resources officer, became involved in the file. CN asked Ms. Blackmore to try to convince the Union to change its mind and to consent to the second proposal of accommodation. CN felt the accommodation was a `good and viable' solution. She spoke to a union representative and followed up with correspondence asking for a response. Ms. Blackmore testified that she was hopeful that the Union would change its position and that while she awaited a response she made a few informal inquiries of other departments to see if there were any positions available. She found no position for Ms. Hoyt. Ms. Blackmore described that `at CN there are limited opportunities to accommodate.' At the end of April, the Union presented a formal policy grievance on Ms. Hoyt's behalf. It was only then, she testified, that she realized that the Union would not change its position.

[77] At the end of May 2002, Ms. Hoyt was offered the crew van position. CN's witnesses did not know when and how the crew van position became available. That decision was made by Mr. Valliere. He was not called as a witness.

C. Was CN's Conduct Justified? Was it a *BFOR*?

[78] Section 15 of the *CHRA* directs that where an employer's conduct is based on a *bona fide* occupational requirement (*BFOR*), the conduct will not be a discriminatory practice.

[79] To meet its evidentiary burden, an employer must demonstrate that it discharged its duty of reasonable accommodation short of undue hardship (*Ontario v. Simpson Sears* [1985] 2 S.C.R. 536, see also *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990) 12 C.H.R.R. D/417).

[80] The Supreme Court of Canada decision in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)* [1999] 3 S.C.R. 3 *(Meiorin*), sets out the content of an employer's duty to accommodate and the analysis by which an employer's efforts must be assessed.

[81] To establish this justification, that is, a *BFOR*, the employer must prove:

(1) that the standard was adopted or a decision made for a purpose rationally connected to a legitimate work related purpose (*Meiorin, supra* at para. 58);

(2) that the standard adopted or the decision was made in an honest and good faith belief it was necessary to fulfill this work related-purpose (*Meiorin, supra* at para. 60);

(3) that the standard adopted or decision made was on the evidence reasonably necessary to accomplish this work related purpose (*Meiorin, supra* at para. 62).

(i) Rational Connection

[82] To satisfy the first arm of the test in *Meiorin,* the employer must demonstrate that a decision made is rationally connected to a work-related purpose. The focus in this first step is not the validity of the particular decisions made, but rather the validity of the more general purpose.

[83] The decisions made by CN in its attempts to accommodate Ms. Hoyt were, first, to send her home on unpaid leave until they considered the doctor's note; next to offer her a position on the Walker Hump; and next to offer her a position as a conductor on the yard without wearing a beltpack. CN could find no other positions to accommodate Ms. Hoyt until late May, 2002.

[84] CN gave two reasons for the decisions made regarding Ms. Hoyt's accommodation. CN preferred to keep employees working in their craft where that was reasonably possible. CN also preferred to have employees working in jobs that were viable, meaning valuable to its operations.

[85] I find these general overall purposes, being a desire to maintain employees in their craft, and that of economic viability, to be reasonable, and the decisions rationally connected to CN's stated objectives.

(ii) Honest and Good Faith Belief

[86] Step two of the *Meiorin* test is the subjective element of the test. The employer must demonstrate that it adopted a particular standard with "an honest and good faith belief that the decision was necessary to accomplish its objective." The employer must also demonstrate that it had "no intention of discriminating against the claimant.' (*Meiorin, supra*, at para. 60).

[87] I find that CN has not discharged its onus at this second step of the analysis.

[88] CN is a large and sophisticated employer. CN has both a Risk Management and a Human Resources Department with many employees engaged on a daily basis with matters of accommodation. Human Resources employees represent their employer in arbitrations of workplace grievances, respond to complaints made by employees under the *Canada Labour Code* and complaints filed under the *CHRA*. CN has ample resources and it is appropriate to deem that this employer understands the content of its duty to accommodate as that duty has been prescribed under the Act and articulated by this Tribunal and our courts.

[89] CN has accommodation policies that set out a reasonable, if superficial, articulation of the content of the duty to accommodate and sets out the processes to be employed by CN supervisors and managers when considering accommodation requests. CN failed to follow much of its own accommodation policy when dealing with Ms. Hoyt's request for accommodation.

[90] In all of the circumstances I find that CN did not believe or was reckless to believe that its decision was reasonably necessary and did not believe, or was reckless to believe that it was not discriminating against Ms. Hoyt in its accommodation efforts.

[91] As identified earlier in these reasons, the offers of accommodation made to Ms. Hoyt did not meet her need for accommodation. Further, as I will explain in more detail below, CN's efforts to accommodate Ms. Hoyt fell woefully short of meeting its duty to

accommodate her as that duty is explored below and failed to properly follow its own accommodation policy. CN knew or ought to have known that it was engaging in a discriminatory practice. CN fails this second arm of the test.

(iii) Reasonable Necessity

[92] The third step of the *Meiorin* test requires the employer to prove, on a balance of probabilities, that the decision, or decisions, made are reasonably necessary to accomplish its work-related objectives. The decision will be reasonably necessary if the employer is able to demonstrate that it cannot accommodate an employee without experiencing undue hardship (*Meiorin, supra*, at para. 62, see also *Hutchinson, supra*, at para. 70 and *Audet v. CN*, 2006, CHRT 25, at para. 50).

[93] CN made two proposals of accommodation which would serve its objectives of keeping Ms. Hoyt in her craft and ensuring she worked a position that was valuable to CN's operations. I found earlier that neither of these proposals met Ms. Hoyt's reasonable needs for accommodation. The first did not meet the medical restrictions enumerated by her doctor. The second gave rise to significant safety concerns and a concern that a super seniority status would cause Ms. Hoyt to suffer further discrimination. The Union also reasonably rejected this proposal.

[94] CN concluded that it could offer no other position to Ms. Hoyt and that she would remain home on unpaid leave. Was this decision reasonably necessary in the sense contemplated in *Meiorin*? I find that it was not.

[95] We are directed in this third arm of the test, to look first at the process or procedures adopted to assess the issue of accommodation, and second, to look at the substantive content of the decision made (*Meiorin, supra*, at para. 66).

[96] An employer must demonstrate that the process or procedures adopted to assess the issue of accommodation were appropriate. An employer must be sensitive to and respectful of the skills, capabilities and potential contributions of employees requiring accommodation (*Meiorin, supra*, at para. 64 see also *Audet, supra*, at para. 51); an employer must investigate alternative approaches to accommodation that might be less discriminatory, and demonstrate that any alternative approach considered was rejected only for appropriate reasons (*Meiorin, supra*, at para. 65 see also *Audet, supra*, at para. 62); an employer must be innovative and practical in assessing accommodation issues. I find that CN did not meet these process requirements.

[97] I find that CN was not sensitive to or respectful of Ms. Hoyt's skills, capabilities and potential contributions. CN did not take steps to discover Ms. Hoyt's actual skills and abilities. CN did not even meet with Ms. Hoyt in any meaningful way during this time period, even though its own accommodation policy directs that the employee be met with as a first step in the process. CN prepared no detailed profile of Ms. Hoyt's skills and abilities to assist CN in its canvass. Ms. Hoyt was a healthy woman with a lot to give her employer. We know she had welding experience and, as a long time employee of CN, much knowledge of its operations. What other skills and capabilities might she have? This step of information gathering is crucial to the accommodation process and this step was ignored by CN. Without a true appreciation of who Ms. Hoyt was and what she could do to help the company, it is unlikely that an employer will be able to properly attend to other of its procedural obligations.

[98] I find that CN failed to demonstrate that it had carefully considered any alternative approaches to the accommodation of Ms. Hoyt. CN did not demonstrate that it had itself

generated and considered any alternatives to the proposals made. This is notwithstanding the directions in its own accommodation policy that inquiries be made, alternatives considered carefully and that records be kept of every step of the process. There were no records introduced in evidence. Further, CN dismissed the proposals submitted by the Union. At least some of the positions proposed would have kept Ms. Hoyt in her craft or a position fairly closely related to her craft and so would have met CN's first objective in accommodation. The reason CN dismissed these proposals was that they were, in its view, not viable. CN led no evidence that it made careful consideration of each of these proposals, or that it considered carefully the costs of implementing any of these proposals, or evidence that the cost would be undue. CN did not demonstrate that its rejection of the Union's proposals was based on appropriate considerations.

[99] CN's efforts to accommodate Ms. Hoyt, beyond making the two proposals discussed earlier, was limited to telephone inquiries. Contrary to the direction in CN's accommodation policy, no records were kept of these inquiries and so we are unable to know the breadth, depth and persistence of this search. Ms. Blackmore testified that she made telephone inquiries of other departments after she became involved in the matter in mid-March of 2002. Mr. Sherbo's evidence was that he too phoned various CN departments looking for accommodation for an employee `who was pregnant.' He would also make these inquiries in person on some occasions. This type of informal canvass falls far short of the obligation identified in *Meiorin*. It is also demeaning to Ms. Hoyt and underscores the importance of the prior step of information gathering and its critical relation to the preservation of her human dignity.

[100] With these telephone inquiries CN was looking for available positions, meaning job vacancies, taking the position that if there were no vacancies, CN was unable to offer accommodation to an employee.

[101] While this very narrow approach to a search for accommodative positions would meet CN's work-related objective of viability, it does not, without more, meet its duty to accommodate. McLachlin J. observes in *Meiorin* that ". . . it may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent." She goes on to describe, however, that for a standard to be justifiable under human rights legislation, "(it) must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship (*Meiorin, supra*, at para. 62)." CN did not demonstrate that this narrow approach to accommodation was the best it could do short of undue hardship.

[102] Employers must be innovative in their search to accommodate an employee. They must be flexible and creative. CN did not demonstrate adequate innovation, flexibility or creativity.

[103] I find the decision in *Saunders v. Kentville (Town)* [2004] N.S.H.R.B.I.D. No. 9, to be instructive. In that case, a Nova Scotia Board of Inquiry considered the complaint of a police officer alleging that she was not accommodated by her detachment because of her sex/pregnancy. Chair Deveau employed a *Meiorin* analysis in the context of a small police force in Nova Scotia. The Chair found that even in this small force of 12 to 14 officers, and even where accommodation would be awkward and inconvenient, the employer failed to discharge its duty to accommodate as it made little effort to assemble a number of duties and functions on a temporary basis in searching for ways of accommodating the claimant. The employer, he found, had a duty to fully and completely

explore opportunities for light duties to the point of undue hardship. The employer had not proven that it had done that.

[104] CN is a much larger operation. CN had approximately 100 employees working in the yards of the Edmonton Terminal at the relevant time and another 200 or so employees working in the downtown administration building. With so many job functions being carried out at the Edmonton Terminal, surely an employer who is properly innovative and flexible could attempt to create, modify or re-package one or more of these job functions to accommodate Ms. Hoyt in a manner that met its work-related objectives. CN led no evidence that it had engaged in this type of inquiry.

[105] Moving beyond the process employed by CN in considering its accommodation of Ms. Hoyt and viewing the substance of the decisions made, it is clear that CN failed to demonstrate that its decisions were justified in the manner contemplated by *Meiorin*. CN led no evidence to suggest that it would suffer undue hardship by extending to Ms. Hoyt an alternative position as accommodation. As this Tribunal has recently observed, an employer must demonstrate undue hardship `in real, concrete terms' (*Audet, supra*, at para. 106). I find that CN has not demonstrated that on receiving Ms. Hoyt's first request for accommodation it was impossible to find her a position the next day, as it did for Mr. Sawatzky and Mr. Hoyt.

[106] CN has failed to discharge its evidentiary burden under section 15(1)(a) of the *CHRA*; it has not demonstrated that it would be impossible for it to accommodate Ms. Hoyt's pregnancy without suffering undue hardship.

D. Did the Union Obstruct CN's Attempts to Accommodate Ms. Hoyt?

[107] CN alleged in their statement of particulars that the Union obstructed its attempts to accommodate Ms. Hoyt. First, the Union refused its consent to the two-conductor/one beltpack position. Second, the Union did not communicate its position until April of 2002 and, as a result, Ms. Hoyt's accommodation was delayed.

[108] I find that the Union did not obstruct the accommodation efforts. First, the Union did not act improperly in rejecting CN's proposed accommodation. I noted earlier that the safety and seniority concerns expressed by the Union and shared by Ms. Hoyt were elements of her reasonable need for accommodation. In these circumstances, the Union's rejection of CN's proposed accommodation was not improper. Further, the Union's duty to facilitate accommodation arises only when its involvement is required to make accommodation policy and "no other reasonable alternative resolution of the matter has been found or could reasonably have been found (*Renaud, supra*, at para. 50)." I found earlier that CN had failed to demonstrate that there were no alternative positions that Ms. Hoyt could have been offered.

[109] I find further on the evidence that the Union did not obstruct CN's accommodation attempt by reason of delay in communicating its position to CN. The Union reasonably rejected CN's second offer of accommodation immediately and repeatedly. The Union, through different of its officers, rejected CN's proposal on February 26, February 28 and March 1, 2002. The Union made several proposals of alternate positions that might be offered to Ms. Hoyt. Each of the Union's proposals were rejected by CN. No further action was taken by CN to accommodate Ms. Hoyt until late May, 2002. I have earlier found that CN has failed to demonstrate that it could not have accommodated Ms. Hoyt promptly. She should have been back to work.

[110] Approximately a month after Ms. Hoyt had first asked for accommodation, CN engaged Ms. Blackmore to try to convince the Union to change its mind. Ms. Blackmore testified that she understood that the Union was considering her request and that she hoped the Union would change its mind. Ms. Blackmore and CN waited. Ms. Hoyt remained at home.

[111] The Union's evidence was that its position that it was unsafe for a two-conductor crew to be deployed with only one beltpack was a position of very long standing and, further, that it had never considered changing its position in relation to Ms. Hoyt's proposed accommodation. The Union's evidence is that the delay in responding to Ms. Blackmore's inquiries is that it was searching for more information before finalizing its grievance.

[112] CN argues that the Union's delay in responding to Ms. Blackmore's request that it reconsider its position, created or contributed to the delay in accommodating Ms. Hoyt.

[113] CN's evidence that it thought the Union could be convinced to change its position and was in fact considering such a change in position regarding Ms. Hoyt's accommodation seems somewhat disingenuous given the history of the matter. The Union had long disagreed with this proposed position. Further, Union officers clearly rejected the proposal three times between February 26 and March 1, 2002.

[114] It is not necessary for me to find whether CN did or did not have a *bona fide* belief that the Union was considering changing its position between mid March and late April. I have found that this proposal was neither reasonable nor reasonably necessary. I have further found that CN knew or ought to have known this. Ms. Hoyt should have received accommodation well before Ms. Blackmore became involved in mid-March, more than a month after Ms. Hoyt was placed on unpaid leave.

[115] I find that the Union did not interfere with CN's accommodation efforts.

E. Has the Complainant Demonstrated a *Prima Facie* Case of Discrimination on the Basis of Family Status?

[116] It is a discriminatory practice under the *CHRA* to `differentiate adversely in relation to any individual on a prohibited ground of discrimination (section 7(b)).' Ms. Hoyt alleges that in addition to suffering discrimination on the basis of sex, she suffered discrimination on the basis of her family status.

[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* T.D. 09/02)

[119] A different articulation of the evidence necessary to demonstrate a *prima facie* case is 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. The Court of Appeal found that the parameters of family status as a prohibited ground of discrimination in the Human Rights Code of British Columbia must 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." 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.

[120] With respect, I do not agree with the Court'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.

[122] The evidence particularly relevant to this component of the complaint arises when Ms. Hoyt was given the position of crew van driver in late May, 2002. These facts however are part of the larger story and do not represent a discrete and separate complaint. To receive a proper apprehension of the family status component of this complaint, we must view the facts relevant to this second allegation as part of a continuous transaction between Ms. Hoyt and CN around the issue of her previous request for accommodation.

[123] Ms. Hoyt had secured day care for her daughter in February, anticipating that CN would accommodate promptly the restrictions identified by her doctor. She found a facility that could accommodate the unusual requirements of railroad families. CN did not accommodate her promptly. When CN did finally call on May 25 directing that she report to work on May 28, Ms. Hoyt called that day care facility and learned that there were no longer any spaces available. She called other sitters she had engaged in the past, being mostly neighborhood teenagers. These teenagers were not available as they were in school during the week until the end of June. In the three days' notice provided by CN, she was able to make arrangements for her daughter's care, except for three Saturdays in June.

[124] When asked why she had not made a more systematic search for a day care placement, Ms. Hoyt described that it would be difficult to find a facility open on Saturdays or open as late as she would require, given that she was assigned an afternoon shift which would require, her to work from 3:00 p.m. to 11:00 p.m. Further, she described that even if she could find a facility, it would not be possible for her to properly check out the agencies or to take the time to acquaint herself and her daughter with the facility. Her two-year old daughter, as mentioned earlier, had never been cared for outside her own home and Ms. Hoyt did not want to put her abruptly in an unfamiliar place with unfamiliar people.

[125] When she asked for an accommodation, and in particular asked that she work a shift that would allow her to avoid Saturdays for those three weeks, CN rejected the proposal. CN advised that it would allow her to take unpaid leave for these three Saturdays.

[126] CN appears to deny that Ms. Hoyt was adversely treated. It was CN policy to assist parents facing circumstances that left them without child care. Rather than discipline an employee for missing a shift for this reason, CN would allow the employee time off without pay for a few shifts to allow them to make necessary arrangements. CN was treating Ms. Hoyt the same as they treated all other employees with child care concerns. The fact that CN treated Ms. Hoyt the same way that it treated other employees who had child care concerns does not mean that Ms. Hoyt was not adversely treated.

[127] CN had failed to accommodate Ms. Hoyt for three and a half months. She was left home on an unpaid leave of absence. By the time CN finally did make the crew van position available, Ms. Hoyt had lost the day care arrangement she had put in place earlier. She was unable to secure alternate care for three weeks. She was offered yet more unpaid leave of absence. In these circumstances, I find that it was *prima facie* discriminatory for CN not to accommodate the modest requirement arising from its wrongful prior conduct.

[128] One is also struck by the difference in treatment extended to Mr. Sawatzky, the employee who drove the crew van before her. He drove the van Mondays to Fridays. Mr. Sawatzky also left early to attend at physiotherapy every day and was paid for those attendances. His needs were met with abundance. Why were Ms. Hoyt's needs for accommodation not met?

[129] I find that the *prima facie* case has been made out. Ms. Hoyt demonstrated on the evidence that she was a parent and that she was incurring the duties and obligations of parenthood. Ms. Hoyt made an attempt to secure, in a very short period of time, good quality child care that would not cause undue distress to her young daughter. She was largely successful and was left with a need to be accommodated for three days. CN's direction that she could stay home those Saturdays, but that she would not be paid, meant that she was unable to participate equally and fully in employment with her employer.

F. CN's Justification

[130] CN's justification for denying Ms. Hoyt's request that she work Monday to Friday for three weeks in June was that Superintendent Valliere had done some research and determined that the Tuesday to Saturday shift was the most viable shift to CN as cabs were particularly busy on Friday and Saturday and so were more often late to pick up crew members. Late crews cost money.

G. Was CN's Conduct Justified? Was the Conduct a *BFOR*?

[131] Turning to the section 15(1)(a) analysis as enunciated in *Meiorin*, I find the first two arms of the test are made out by CN. First, the decision to create a Tuesday to Saturday shift was rationally connected to CN's work-related objective of productivity. Mr. Valliere determined that the Tuesday to Saturday shift was the crew van shift that would provide the most value to CN. Second, I find that the decision was made in the good faith belief that it was necessary to achieve this objective and that there was no discriminatory animus.

[132] I find however that the employer has not discharged its onus under the third arm of the test. No evidence was led that CN would have suffered undue hardship had it adjusted Ms. Hoyt's schedule. Ms. Hoyt would, for three weeks, be working a Sunday or a Monday, days when a crew van was not as valuable to CN. Alternatively, CN would have incurred the cost of engaging another employee to drive the crew van on Saturdays or to direct that the employees requiring transportation call a taxi, as CN did when there were no crew vans in operation. CN led no evidence of the costs involved and has not demonstrated that undue hardship would have been incurred. I find that CN has not discharged its onus in this regard.

H. Finding of Discrimination

[133] For all these reasons, I find that Ms. Hoyt suffered discrimination on the basis of her sex and her family status in breach of section 7 of the *CHRA* by reason that the respondent failed to accommodate her, and that CN has not established that its failure to accommodate Ms. Hoyt's sex and her family status was justified based on a *bona fide* occupational requirement, pursuant to section 15 of the *CHRA*. Ms. Hoyt's complaint has therefore been substantiated.

V. WHAT REMEDIES ARE SOUGHT?

A. By the Complainant

(i) An Order that CN Review its Accommodation Policy

[134] Ms. Hoyt requests an order, pursuant to section 53(2)(a) of the *CHRA*, that CN take measures in consultation with the Canadian Human Rights Commission, to redress its failure to properly accommodate its employees.

[135] I heard evidence during the hearing about CN's history of accommodating employees. CN's evidence identified some `success stories' and the Union's evidence and the evidence of Ms. Hoyt identified some less successful stories. I was provided with grievance arbitration decisions but heard from no employees other than Ms. Hoyt about their experiences when in need of accommodation. I was urged by counsel for the complainant to make a finding of systemic discrimination at CN and to grant the remedy requested on the basis of that conclusion. I find, however, that the evidence before the Tribunal was not of a quality adequate for me to draw any conclusions that there are systemic problems with CN's accommodation processes, or to order a remedy based on such a finding.

[136] I do, however, find that the order requested by the complainant should be granted. First, while CN has an accommodation policy, it was not followed. The policy contemplates a careful and consultative relationship between CN and its employees in need of accommodation. CN is first to meet with the employee, to discover what their needs are, to consider options, to document all steps taken and to disclose to the employee the steps taken and the reasons for decisions made. The evidence is clear that CN did not follow these directions when considering Ms. Hoyt's accommodation.

[137] The evidence also demonstrates that CN, through its employees charged with facilitating accommodation, adopted an approach to Ms. Hoyt's accommodation that falls alarmingly short of its duty to accommodate. I am satisfied that the CN accommodation policy does not articulate with sufficient clarity the content of an employer's duty to accommodate and the process directives made in *Meiorin*. I am also convinced that CN has failed to take the steps necessary to ensure that its employees who dealt with Ms. Hoyt's accommodation request understand the content of the employer's duty and follow the process directives in *Meiorin*. It is for these reasons I find that this request for remedy is justified.

[138] I order, pursuant to section 53(2)(a) of the *CHRA*, that CN cease the discriminatory practice and that CN take such measures, in consultation with the Canadian Human Rights Commission, on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in the future, and in particular that CN take such measures as are necessary to ensure that the Respondent and its employees charged with facilitating accommodation understand the content of the employer's duty to accommodate pregnant employees and the procedures to be employed when facilitating same.

(ii) Compensation for Lost Wages and Benefits

[139] Pursuant to section 53(2)(c) of the *CHRA*, I order CN to compensate Ms. Hoyt for all wages and benefits that she has lost from February 18, 2002 until the date she returned to drive the crew van in July of 2002. I am advised that Ms. Hoyt has received some monies from CN as partial compensation for wage loss during this period and direct that the compensation be adjusted accordingly.

(iii) Compensation for Pain and Suffering

[140] Ms. Hoyt testified about the emotional impact that CN's conduct created for her. Ms. Hoyt described feeling bewildered at first. She had assumed CN would discharge its legal duty to accommodate her. She then felt betrayed by her employer, felt unvalued and depressed. Our courts have recognized the centrality of one's employment to one's sense of identity, self-worth and emotional well-being *(Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 at 368). It is sad but not surprising to hear of the pain caused to Ms. Hoyt by the conduct of her employer. The anxiety and distress of being left at home without any accommodation, without any communication from CN, not even after she had written a letter asking for information, was exacerbated as time dragged on. Ms. Hoyt worried that the time off work would disqualify her from receiving Employment Insurance maternity benefits. CN's conduct took a heavy toll on Ms. Hoyt, a toll visited on her at a time that might otherwise have been a happy time for her and her family as they planned for and dreamed about a new child.

[141] Ms. Hoyt suffered significant distress on her return to CN upon accepting the crew van driver position. When she learned that CN again refused to reasonably accommodate her and insisted that, after three and a half months of unpaid leave, her accommodation for child care issues would be three more days of unpaid leave, Ms. Hoyt became very agitated and upset. Her symptoms were acute enough to cause her to go to the hospital very shortly after her altercation with Mr. Sherbo. Her doctor directed that she remain off work for one month as the distress she suffered, and was likely to continue to suffer, at

the workplace as a result of CN's most recent discriminatory position, would compromise her own health and that of her unborn child.

[142] I find that Ms. Hoyt experienced significant pain and suffering. I order, pursuant to s. 53(3) of the *CHRA*, CN to pay Ms. Hoyt $15,000.00 in compensation for this pain and suffering.

(iv) Special Compensation

[143] The complainant asks for special compensation. Under the *CHRA* the Tribunal has the power to award a maximum of $20,000.00 upon finding that a respondent has engaged in a discriminatory practice wilfully or recklessly (section 53(3)). I have found that CN knew that it was engaging in a discriminatory practice, or was reckless to believe it was not. Special compensation is accordingly appropriate and I award $10,000.00.

(v) Legal Costs

[144] The complainant asks for an order directing that the respondent pay the legal costs incurred by her during the course of this proceeding. Section 53(2)(c) empowers the Tribunal, where it finds that a complaint is substantiated, to make among other orders, an order that the respondent compensate the victim for `any expenses incurred by the victim as a result of the discriminatory practice.'

[145] The question of whether section 53(2)(c) empowers this Tribunal to make awards of legal expenses has been the subject of some manner of controversy in the Federal Court. Two decisions find that the Tribunal does have such jurisdiction (*Canada (Attorney General) v. Thwaites* (1994) 21 C.H.R.R. D/224, *Canada (Attorney General) v. Brooks* [2006] FC 500(TD)). One decision finds that the Tribunal does not have such jurisdiction *(Canada (Attorney General) v. Green* [2004] 4 F.C. 629 (T.D.).

[146] The Federal Court decisions upholding the Tribunal's jurisdiction observe that there is no reason to restrict the ordinary meaning of `any expenses incurred' so as to exclude legal costs incurred by a victim. That lawyers and judges might attach a particular significance to the term `costs' provides no basis to argue that the ordinary meaning of `expenses incurred' excludes legal costs (See *Thwaites*, per Gibson, J.).

[147] This Tribunal has asserted the jurisdiction to award costs. Chairperson Mactavish (as she then was) employed a purposeful approach to the question of the Tribunal's jurisdiction (*Nkwazi v. Canada (Correctional Service*), [2001] C.H.R.D. No. 29). Agreeing with the conclusion in *Thwaites* reached by employing a conventional statutory interpretation, Chairperson Mactavish noted that human rights legislation, given its fundamental and quasi-constitutional status is to be given a liberal and purposive construction not only in respect to the rights protected under such statutes, but in respect of the remedial powers conferred (*Nkwazi*, at para. 13; see also *Canadian National Railway Co. v. Canada* [1987] 1 S.C.R. 1114 at 1136; *Robichaud v. The Queen*, [1987] 2 S.C.R 84).

[148] I agree that a conclusion that the Tribunal has the jurisdiction to make costs awards is sustainable and appropriate under a conventional construction of the legislation. Moreover, such a conclusion is demanded by the liberal and purposive construction that the *CHRA* properly attracts.

[149] I also agree with Chairperson Mactavish that, `where a complaint is substantiated, the task of the Tribunal is to attempt, insofar as may be possible, to make whole the victim of the discriminatory practice, subject to principles of forseeability, remoteness and mitigation' (*Nkwazi, supra*, at para. 17). And I further agree that the *CHRA*, in

conferring remedial jurisdiction makes it clear that the Tribunal has the power to make the remedial orders that are appropriate having regard to the circumstances of each individual case (*Nkwazi, supra*, at para.18).

[150] First, there can be no question that it is possible for CN to make Ms. Hoyt whole regarding her legal expenses. CN's witnesses confirmed that the company is doing very well financially. A newspaper article was filed as an exhibit in the proceedings. The article from the Toronto Star and dated April 21, 2006, identifies that CN posted a first quarter profit of $362 million in 2006.

[151] Secondly, I find no issues arising with regard to forseeability or remoteness that might properly limit an award of legal costs. I have found that CN knew or ought to have known that it was engaging in a discriminatory practice. Ms. Hoyt's legal costs arose as a result of the discriminatory practice. It should have been entirely foreseeable to this sophisticated employer that an employee subjected to the kind of conduct disclosed on the evidence of this case, would retain counsel and incur legal expenses.

[152] Third, I am unaware of any facts that might suggest that the issue of mitigation might have application here such that it might properly limit an award of legal costs. I did not find that the complainant or her counsel took unreasonable positions or unduly protracted these proceedings. I am unaware of any offer of settlement that might have been extended by CN in advance of the hearing. If an offer of settlement was tendered exceeding the remedies ordered, such offer might go to the issue of mitigation. Should there have been an offer of settlement of the nature described, I invite further submissions from counsel.

[153] I find in the circumstances that, subject to evidence of an offer to settle as mentioned above, the complainant should be reimbursed her legal expenses and I order that CN will reimburse the complainant for her reasonable legal expenses. I would encourage the parties to endeavour to agree on an appropriate amount in this regard, but will remain seized of the matter in the event that no agreement is possible.

(vi) Interest

[154] Interest is payable in respect of all the awards made in this decision pursuant to section 53(4) of the *Act*. 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, per Rule 9(12) of the *Tribunal's Rules of Procedure*. With respect to the compensation for pain and suffering and the special compensation, the interest shall run from the date of the complaint.

(vii) Retention of Jurisdiction by the Tribunal

[155] The Tribunal will retain jurisdiction to receive evidence, hear further submissions and make further orders, if the parties are unable to reach an agreement with respect to any issues arising from the within decision and in respect of the interpretation or implementation of the remedies ordered. Should the parties require direction on any remedial matter other than the section 53(2)(a) order, they may do so no more than 60 days after the date of this decision.

B. Relief Requested by the Interested Party

(i) Legal Costs

[156] The Union, an interested party, seeks reimbursement for its legal costs. I find that the Tribunal does not have the jurisdiction to make such an award. Section 53(2)(c)

confers jurisdiction to make an award that the respondent compensate `the victim' in respect of expenses incurred `by the victim as a result of the discriminatory practice.' I find that whether under a conventional construction or liberal and purposive construction of this section of the *Act*, this Tribunal's jurisdiction to award remedies arises only where a discriminatory practice is found to have occurred and then only to the victim of the discriminatory practice. The Union feels aggrieved by the allegations made against it by CN. The Union however, does not allege that it was a victim of discriminatory practice.

(ii) Declaration

[157] The Union seeks a declaration by the Tribunal that it was not at fault in the actions taken regarding Ms. Hoyt's accommodation. I find that I do not have the jurisdiction to make such a declaration in favor of an interested party. I have dealt with the conduct of both CN and the Union in the body of this decision. This will have to suffice.

"signed by"
Julie C.Loyd

OTTAWA, Ontario
August 18, 2006

PARTIES OF RECORD

TRIBUNAL FILE:	T1036/1705
STYLE OF CAUSE:	Catherine Hoyt v. Canadian National Railway
DATE AND PLACE OF HEARING:	April 3, 4, 5, 6 and 7, 2006 April 24, 25, 26, 27 and 28, 2006 Edmonton, Alberta
DECISION OF THE TRIBUNAL DATED:	August 18, 2006
APPEARANCES:	

Leanne Chahley	For the Complainant
(No one appearing)	For the Canadian Human Rights Commission
Joseph Hunder	For the Respondent
Michael Church	For the Interested Party