T.D. 7/93
Decision released on April 20, 1993

THE CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DONNA MARIE BROWN
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL REVENUE
(CUSTOMS AND EXCISE)

Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL: CARL E. FLECK, Q.C. - Chairman
PATRICIA HAYES - Member
AASE HUEGLIN - Member

APPEARANCES: Donna Marie Brown, on her own behalf

Ms. Rosemary Morgan, Counsel for the
Canadian Human Rights Commission

Mr. Robert Venier, Counsel for the Respondent

DATES AND LOCATION OF HEARING: May 4, 5, 6 and July 13, 14, 15, 1992
Toronto, Ontario

COMPLAINT

In this case the Complainant Donna Marie Brown was hired in May 1981 by the Respondent Department of National Revenue (Customs and Excise) as a Customs Inspector at Pearson International Airport, Toronto. She is married and has a family. As a result of certain events arising from her pregnancy in 1984 and following the birth of the said child, she filed a complaint with the C.H.R.C. on July 17, 1985 which is referred to as Exhibit HR-1 in this proceeding. The complaint alleges discrimination by the Respondent on two separate grounds, namely sex or pregnancy and family status as set out in s. 3 of the C.H.R.A. Both of these grounds were filed under s. 7 of the Act as the discrimination arose under the context of employment.

These sections set out in their full context are recited as follows:

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

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex. 1976-77, c. 33, s. 3; 1980-81-82-83, c. 143. s. 2.

and,

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. 1976-77, c. 33, s. 7."

This case essentially has two branches therefore as a result of the two grounds of discrimination, the first of which arose in the summer of 1984 when the Complainant became pregnant and experienced difficulty with the pregnancy. The Complainant alleges for reasons more particularly described hereafter that the Respondent failed to accommodate her with respect to this medical condition. Her child was born in December, 1984.

The second branch of the complaint arises during the period of time following March 1985 when her maternity leave expired and she again requested of the Respondent accommodation for day shift because of an

inability to arrange for adequate daycare. It is the position of the Complainant that this request was denied and she was accordingly required to extend her maternity leave under the terms of the collective agreement governing her employment and that this extension called "care and nurturing leave" is unpaid.

ISSUES

The issues arising out of these complaints may be summarized as follows:

1. The Complainant alleges, and it is conceded by the Respondent, that there was a "neutral employer rule", that is Customs Investigators work alternating shifts and everybody is subjected to this rule. The Complainant takes the position that that was a reasonable and neutral employer rule, affecting all persons regardless of sex, race or creed. The Complainant, however, argues on the authority of the Alberta Human Rights Commission et al v Central Alberta Dairy Pool, [1990] 2 S.C.R., p. 489 (hereinafter referred to as the "Alberta Dairy Pool") case and because the Complainant was pregnant that in the aspect of sex, she was adversely affected by the neutral employer rule and that the Respondent has a corresponding duty to accommodate her reasonable request.

It is submitted by the Complainant that the Alberta Dairy Pool case finds that the accommodation must be reasonable accommodation up to the point of undue hardship.

2. In the second part of the complaint, it is the position of the Complainant that although there was in writing a neutral employer rule, there was a practical reality existing in the work environment, namely that people were accommodated when they requested day shifts for medical and for non-medical reasons. The Complainant takes the position that she was treated differently because of who she was as well as the fact that she was pregnant.

It is a fair summary of the Respondent's position that although it conceded there was a neutral employer rule which tended to discriminate against pregnant employees, the Respondent both with respect to the complaint allegations of sex and family status, did in fact accommodate the Complainant to the point of undue hardship.

With respect to accommodation, the Respondent takes the position that with an organization the size of the Respondent the time consumed making eventual accommodation through administrative change was reasonable.

In addition to the accommodation provided, the Respondent takes the position that the Complainant was provided the following additional accommodations:

A. She was entitled to exchange shifts with other willing employees;

B. She was entitled to use her sick leave when because of complications arising from her pregnancy she was not able to work the night shift;

C. If she could not take sick leave, she was entitled to come in and would be docked a day's pay, but her employment would not be in jeopardy.

In the result therefore, the Respondent pleads to the complaint that there was full and appropriate accommodation.

With respect to the accommodation for care and nurturing, the Respondent takes the position that this was fully satisfied and that the

Complainant did not make adequate efforts to obtain day care and the onus for obtaining same was on her.

EVIDENCE

The Complainant Donna Marie Brown testified as to her background prior to joining the Respondent. She was a member of the Metro Toronto Police Force from 1973 until 1977 when a serious car accident precluded her career as a police officer. She then worked as a private investigator with the Ontario Housing Corporation until she took the position as a Customs Inspector with Canada Customs in May of 1981. In summary, her pre-employment history prior to 1981 equipped her with substantial work experience and expertise in crime prevention and dealing with the general public including various minority groups in the context of law enforcement.

Following her employment with the Respondent in 1981 and up until 1984, she took additional in-house training with respect to powers of a peace officer and her previous experience with firearms gave her

considerable expertise in weapons permits. Initially, she was assigned to International traffic involving the clearing of passengers at terminals and ultimately was assigned to a crew at Pearson International Airport. Her work at the airport involved the clearing of passengers and this process was designated into primary and secondary phases. The primary was when a passenger came to the counter and was asked questions and then directed to go downstairs and collect their baggage. The secondary was where an officer did an actual physical investigation of a passengers' baggage. The Complainant was involved in this latter procedure.

In 1984, the Complainant had the designation of a Customs Officer at the PM-1 level. She became aware in March or early April of 1984 that she was pregnant. She became extremely ill as a result of this pregnancy and had a lost a child the year before due to pregnancy complications. She testified that her fellow employees were well aware of her complications.

She had been sick on a number of occasions and had collapsed at the crew counter, which incidents had been noted at the nurses' office since she was required to attend there. The notes and records of the nurses' station were not produced at this hearing.

The Complainant's physician, Dr. J.A. Harper, instructed her to seek a regular day shift because he felt the stress of shift work would possibly create further complications in her pregnancy. He provided a report for the Complainant which is found at Exhibit HR-2 under date of July 11, 1984. The report in essence recommends strongly a regulated work week with weekends off. In April of 1984 she spoke with her superintendent, John Lucas and advised him that she was pregnant. Mr. Lucas testified at this proceeding. In addition to speaking with Mr. Lucas, she approached Mr. Lucas' direct superior, one Roy Hedman, the Chief of Customs for Terminal 1. She spoke with Mr. Hedman and asked if she could be placed upon regulated day shift. The response of Hedman was negative and the Complainant testified that his response was to the effect that if he did it for her he would have to do it for everybody else.

The Complainant again spoke with her supervisor John Lucas and he told her to obtain a formal doctor's certificate and he would then endeavour to assist her with dealing with Mr. Hedman.

On July 11, 1984, a formal request was made by Mr. Lucas on the Complainant's behalf to Mr. Hedman for a temporary day position. Mr. Lucas met with Mr. Hedman and reviewed in detail what he felt were possible solutions to accommodating the Complainant, but Mr. Hedman was not prepared

to assist in any way. The Complainant submitted a formal request for transfer to Mr. Hedman which is found as Exhibit HR-3 under letter dated July 25, 1984.

In addition to discussions with Mr. Hedman, the Complainant approached the Superintendent of Terminal 1, Mr. Kirk Palmer and received a further negative response. He concurred with Hedman's conclusion that she should not be given any preferential treatment. The Complainant then asked about the terminal if there was anybody that was prepared to switch positions with her and she then ascertained that a fellow worker, one Cathy Musetescue would be willing to switch positions. Ms. Musetescue was at that time working what was known as Settlers' Effects, and offered to do a permanent transfer with her. Both parties had the same level of classification and both agreed to apply for a formal request for transfer.

It should be noted that the request for transfer by the Complainant is contained in both Exhibits HR-3 and the Revenue Canada form request for transfer at HR-4. The request for transfer was signed by Mr. Hedman but his response to the Complainant's letter of July 25th is contained at Exhibit HR-5 and the body of the response is as follows:

"This is in response to your letter of July 25th, 1984. Please be advised that there are currently no positions available at L.B. Pearson Int'l. Airport international traffic for which you have requested. Your transfer has been signed and processed."

The Complainant had been involved in endeavouring to arrange for a transfer or regulated shift for approximately three months and her health had substantially deteriorated. Her husband took it upon himself to contact directly Mr. Neville who was in fact the Head Regional Collector, the most senior authority in Customs and Excise over Pearson Airport. The Complainant's husband advised Mr. Neville of the problems encountered with Hedman and Palmer in effecting a transfer and ultimately as a result of his intervention Mr. Neville arranged for the transfer as requested in Exhibit HR-6.

The nature of this transfer required the Complainant to work at Manulife Centre on a regular day shift. As a result of this change, she lost the additional money for shift differential that she was receiving at the Airport. Unfortunately, a short time after she arrived at Manulife Centre, she was arbitrarily moved from Settlers' Effects to a commercial position she had no experience in. This placed the Complainant under additional stress to learn a new job at a time when she was having problems with her pregnancy. It should be noted that the Complainant was denied a

permanent posting to Manulife, however the person with whom she arranged a transfer, Cathy Musetescue, was allowed to take a permanent posting at Pearson Airport. It is unclear as to why this occurred and upon the Tribunal's review of the evidence, there appears to be no plausible answer for same. We are left to draw the inference that it was a continued extension of the Respondent's failure to appropriately accommodate this Complainant.

The Complainant testified as to problems with stress throughout this period of time and prior to being transferred to Manulife Centre, she had two separate occasions of bleeding which her physician advised her was simply the stress of being up all day and having to work shift work at night. On two occasions she was off work for two week intervals as a result of these problems. It appeared that she was able to regulate herself properly on her transfer to Manulife but the stress of learning a new position added additional concerns at a time when she was encountering illness.

The Complainant commenced her maternity leave November 19, 1984 which was to be for a period of seventeen weeks requiring her to return to employment at the end of March, 1985. She gave birth to her child in the first part of December, 1984. She gave evidence that in addition to the maternity leave benefit there was a five year maternity care and nurturing leave which could be taken all at once or broken up for each child. With this form of leave, you must make a formal request to your employer.

On March 21st, 1985, the Complainant filed with Mr. Kirk Palmer a written request to extend her maternity leave to September, 1985. This written application confirmed a telephone conversation requesting same that she had with Mr. Palmer and this request is found at Exhibit HR-8. In addition to her application to extend maternity leave, the Complainant also made inquiries of Mr. Duncan Marshall-Smith regarding the work assignment cycle (W.A.C.) which would have allowed her to be put on straight days. It should also be noted that in March or April of 1985 she also contacted Mr. Roy Hedman and requested that she go on the W.A.C. programme or alternatively if she could go into a training unit. At the same time she asked Hedman why Cathy Musetescue had been given a permanent transfer to the Airport and why she was not given one to Manulife. His own explanation for this as he testified was that he had done away with Ms. Musetescue's person years at Manulife and therefore had done away with her position.

The Tribunal is not prepared to accept Mr. Hedman's explanation as a reasonable explanation for failing to accommodate the Complainant in this regard and we found his evidence in this regard unreliable.

The Complainant described her difficulty in arranging for a shift work babysitter and enumerated the problems she had. Despite her best efforts, she interviewed people and could not obtain a satisfactory person to care for her child overnight. With her husband being a police officer, he was also required to work shift work and could not consistently arrange for his shift to accommodate the Complainant when she was on a night shift. The Complainant requested of the Respondent a day shift in April of 1985

and was denied and then requested that she go on care and nurturing leave which is unpaid leave. She had to pay back the superannuation benefits once she returned in October 1985 and then the only salary she received between April and October 1985 was a training period in August 1985. Her request for extended maternity leave which took effect on October 21st, 1985 is outlined in Exhibit HR-10 which is a letter directed to Mr. Hedman.

The Complainant described her efforts to get on a work assignment cycle (W.A.C.) in 1984. She approached Mr. Hedman who advised her that it would not be fair to put her on W.A.C. and then allow her to go off eventually on maternity leave as it would not be fair to the person who would be receiving her as an employee. She got a similar response from Mr. Palmer.

In contrast to the Complainant's inability to be accommodated as requested, we have the incident involving one Kathy Brawley. Ms. Brawley requested a transfer described in Exhibit HR-11 under date of April 9, 1985. This request was directed to Mr. Hedman and requested a transfer to a temporary or full-time position. There is no evidence before this Tribunal to indicate that this application was for medical reasons and it was a request made at or about the same time the Complainant made her request to Mr. Hedman. It is the evidence in this proceeding that Ms. Brawley was allowed a transfer to a different position. When we examined Exhibit HR-12, it contains the response of Mr. Hedman to the Complainant under date of September 4, 1985 that there were no positions available for PM-1 Customs Inspectors at Pearson Airport. The Complainant testified that as a result of her treatment generally, and specifically the Kathy Brawley incident, her complaint was filed. The Complainant ascertained that Ms. Brawley went into a training unit whereas she had not even been considered.

In addition to the evidence given by the Complainant regarding her failure to obtain accommodation from the Respondent, she also outlined in detail a course of conduct of certain of her supervisors both before and after the laying of her Human Rights complaint which caused the Tribunal some considerable concern.

It is clear from the evidence both from the Complainant and John Lucas that Mr. Hedman displayed a course of conduct towards the Complainant that was both inappropriate and discriminatory. We accept the evidence of the Complainant and John Lucas as to the description of Hedman's conduct. Where the evidence of the Complainant and Mr. Lucas is in conflict with that of Mr. Hedman, we choose to believe the evidence of the Complainant and Mr. Lucas.

The Complainant testified that her first involvement with Mr. Hedman started in 1981 shortly after her initial employment. This incident took place at the cash cage at Terminal 2 when she describes Hedman as brushing his arm up against her breast. She advised him that she did not like this conduct and his response was that it was an accident. She chose to give him the benefit of the doubt at that time.

When the Complainant was added to the crew of Mr. Lucas, Lucas testified that Hedman told him the Complainant had "a previous history".

When Lucas asked for specifics, Hedman simply advised him that she was a troublemaker and had to be watched and that she was being transferred to his crew for special attention. Mr. Lucas felt that Hedman's comments were out of place. Indeed, Lucas made a statement to the Human Rights investigator when he asked Mr. Hedman about the transfer in July 1984 and he responded as follows:

"I do not give a shit about her or her transfer."

Mr. Hedman denied that he had made this statement to Lucas.

The Complainant further testified that following the laying of her complaint and specifically at a Christmas party for management and staff in 1988 Hedman in reference to the presence of the Complainant at the party was alleged to have made the following comment:

"What's that bitch doing in here?"

Mr. Smith does not recall that Hedman spoke these words however he did testify to the fact that there was an obvious dislike by Hedman for the Complainant. Hedman denied that he made this statement referring to the Complainant.

In addition to the conduct of Hedman, the Tribunal heard of other incidents of treatment from the Complainant which when pieced together establish a pattern of conduct both inappropriate and a clear breach of s. 59 of the C.H.R.C.

The Complainant testified when she was speaking to the superintendent Tom Whiffen, he told her that "we all know about you and you're an instigator...". He advised the Complainant that he had received a call about her from Hedman. The Complainant further testified that while she was working at Buttonville Airport in 1989 she was approached by the Chief of the Kennedy Road Terminal 1, Rick Simone, and he asked her if she had laid a complaint under the Human Rights Code and when she responded in the affirmative, he wanted to know what had happened to the complaint. The Complainant advised Simone that it was none of his business and refused to discuss it with him. She described Simone as creating a lot of problems for her and if any work issue arose between them, he would then inquire as to whether or not she was going to lay a complaint.

In 1987, while working at Commercial Operations, her superintendent, one Ian Malcolm gave her an evaluation wherein he described her as "abnormal". When asked for clarification of this evaluation, which was rewritten by Mr. Norm Sheridan, the response to the Complainant was that Mr. Malcolm was not capable of writing her evaluation. There was no explanation as to why Malcolm had found the Complainant "abnormal".

Mr. John Lucas was called as a witness for the Complainant. The Tribunal was impressed with Mr. Lucas' evidence. He had specific notes for much of the period of time covered in the substance of the complaint. He gave his evidence in a clear, candid manner. It is to be noted that he is not presently under the supervision of Mr. Hedman nor was he in any

competition with him regarding employment advancement. Mr. Lucas described briefly his career and the supervisory hierarchy of Pearson Airport. In May of 1991 he became a supervisor of a crew of ten customs inspectors as well as part of the management for shift operations at both Terminals 1 and 2 at Pearson Airport. In addition to his duties, he was required to provide off hours management functions and indirect supervision of approximately 150 customs inspectors and support staff. He maintained that

position until 1985 when he was transferred from Terminal 1 to a court liaison office. He presently is with the Respondent in the area of economic fraud and crimes respecting duties and tax evasion.

He outlined the management of the airport as consisting of customs superintendents which was the first level of management over top of which were terminal chiefs and above these chiefs was the airport manager. At the time of this complaint, that was Mr. Elliott. Mr. Elliott's direct supervisor was the regional collector Mr. Neville as hereinbefore referred to. His immediate chief was Roy Hedman and the other chief of the airport was Kirk Palmer.

He confirmed in his testimony when the Complainant was assigned to his crew, Hedman told him that she had a "previous history". Further, Hedman advised him that she was a troublemaker and had to be watched. Lucas described the Complainant as being an aggressive individual dedicated to her work. After he got to know her, he felt that she was well motivated and was keen about doing her job.

He testified that the Complainant spoke to him in April of 1984 regarding the fact that she lost a child and she was again pregnant. He described this as a very emotional discussion and he became aware that the Complainant had spoken to Hedman on an informal basis and was denied any accommodation. He further testified that the Complainant advised him of the medical opinion she had which required her to go on a regulated work day as a result of problems with her pregnancy. The Complainant requested that he speak to Mr. Hedman and Lucas suggested she obtain a medical report which was done.

Mr. Lucas testified that in the presence of another superintendent, one Elaine Forchuk and the Complainant, he called Hedman by telephone requesting the Complainant be put on a straight day shift. The flat response from Hedman was "no". Mr. Lucas then arranged to have a meeting with Hedman at Mr. Hedman's office and, in detail, he testified as to particulars of their meeting. He related that he showed to Mr. Hedman the medical certificate and outlined particularly several areas that could provide for the Complainant, either on a temporary or permanent basis special duties including different shifts at ramp and skyport operations.

It is the Tribunal's finding as a fact that Mr. Lucas discussed with Mr. Hedman in full and complete detail a wide range of possibilities that existed to accommodate the Complainant in her request for straight day shift because of her medical condition.

The results of the discussion with Mr. Hedman was that of a

negative response. Mr. Lucas testified that the medical request was a serious request and that there had been a philosophy as it relates to employees, namely the more serious requests would be given higher priority. He classified the Complainant's medical concerns as having a higher merit and priority and describes his reaction to the doctor's report at Volume 2, p. 346 as follows:

"I applied a very high degree of seriousness to the letter and to her claim and I believe it would have taken a higher priority....should have taken a higher priority on the transfer."

Mr. Lucas further testified as to the various procedures available to change employees in different areas with different schedules and different work assignments and they totalled three different forms of transfer utilizing the work assignment facility. In view of Dr. Harper's letter, it was his opinion that any additional medical authorization would not have been necessary, indeed quite unnecessary in order to effect a transfer.

He felt that his discussion with Hedman regarding the transfer was pre-destined for a negative response. He testified that Mr. Hedman simply would not consider any form of relief for the Complainant. It was Mr. Lucas' opinion that there was some form of personality conflict between Mr. Hedman and the Complainant and that he would not look realistically at any of the options. Mr. Lucas categorized Mr. Hedman's approach as either liking or disliking people and obviously the Complainant had fallen into the "disliked" category. Mr. Lucas was aware that on many occasions people have been given concessions to facilitate transfers.

Again, at Volume 2, p. 371, Mr. Lucas testified as follows:
"I knew in my heart that something could be done for Donna Brown but that it just would not be done. It would not be done by Mr. Hedman and I also believed that it would not be done by Mr. Elliott, his superior and that the only course of action would be to take it higher to Mr. Neville and if that was not satisfactory, to take it even higher than that."

In summary, Mr. Lucas was of the opinion that there was absolutely no reason why the Complainant could not have been transferred and accommodated as a result of her medical condition. He dismissed as being absurd Mr. Hedman's advice that he did not wish to set a precedent and that he was simply trying to justify or excuse his decision. Mr. Lucas

testified on many occasions without fail that a doctor's certificate would require an automatic transfer.

The Tribunal accepts the opinions of Mr. Lucas as it relates to the fact that the Complainant could have been accommodated if Mr. Hedman wanted to but his failure to do so was motivated fully as a result of his intense dislike of the Complainant and not from any established work place policy. The Tribunal does not accept as factually true the various excuses as to failure to accommodate or his inability to effect a transfer either

through an exchange of position or through the W.A.C. programme.

Where the evidence of Mr. Hedman differs from that of Mr. Lucas, the Tribunal prefers the evidence of Mr. Lucas.

The Respondent called Mr. James Campbell, a staff relations officer for Canada Customs. At the time the Complainant's issue arose, he was a PM-1 customs inspector. He confirmed that a Ms. Essiambre could have exchanged with the Complainant, had Mr. Hedman given his consent. He explained the procedure for a lateral transfer which required that a request for transfer would be put in which needed both the approval of the receiving and sending manager. Upon the request of transfer form being filed, it was then put into an inventory and sent to all managers in their region to be made aware of the request. If the transfer was not responded to, then the regional collector (in this case Mr. Ralph Neville) could intervene. Unfortunately, Mr. Neville had passed away at the time of this hearing.

Mr. Campbell testified that he had reviewed the Complainant's file and it appeared that Mr. Neville had been contacted about the Complainant's transfer on August 2nd by the Complainant's husband. Mr. Neville then effected the transfer in August of 1984 which was a loan position to Manulife enabling the Complainant to have a day position.

Mr. Campbell testified that there was a health policy in force and referred to Exhibit R-9 of the Respondent's documents. This was a policy that could be interpreted by each individual terminal chief and the essence of the policy is recited as follows:

"It is government policy that departments must make a reasonable effort to transfer or assign pregnant employees who are concerned about the performance of certain duties during their pregnancy."

Mr. Kirk Palmer, chief of customs for Terminal 2 testified for the Respondent and indicated that he was the acting chief in the years 1984 to 1985. He described a working shift for customs inspectors at the Airport which is basically a 56 day schedule with eight crews in each of the two terminals. He indicated that at the end of each 56 days, the two crews would rotate between the terminals and would then take approximately eight months before you would return back to the other terminal.

It was the Tribunal's impression that Mr. Palmer had a very vague recollection of the evidence surrounding this complaint. He could not recall that the Complainant made a request for day work regarding her pregnancy. He did testify however, and it is noted that he did not recall any occasion when a female being pregnant requesting a day shift would not have been accommodated. He indicated they would normally go through the supervisor.He denied the substance and content of a remark the Complainant testified to at the time she requested help from Mr. Palmer. The substance of this remark was that Palmer advised the Complainant of the following:

"When women got pregnant, they just left and went home." Mr. Palmer was quite sure that he did not make such a remark to the Complainant. He describes his working relationship with the Complainant as good and does not recall having any trouble with her.

Mr. Palmer was shown Exhibit R-1 which is a request for medical disclosure. Although he identified his signature, he could not recall whether he had ever requested such request for medical disclosure nor why he would have done so. He felt it must have been the Complainant who requested it. This evidence of course makes absolutely no sense at all since Exhibit R-1 is a medical authorization requested by the employer. Mr. Lucas testified that such a request when a valid medical certificate had been filed would have been totally and completely unnecessary and out of order.

As indicated, the Tribunal was concerned that Mr. Palmer did not have a clear recollection of what occurred, both with respect to the original request to accommodate in 1984 as well as the complaint arising out of family status when the Complainant wished to return to work. In addition, Mr. Palmer could not recall any of the circumstances regarding the shift change notification found in Exhibit HR-6 despite the fact that he signed same. He did indicate however that it was department policy to change employees off of midnight shifts when requested. This was not a written policy. Under questioning by the Tribunal at p. 661 and 662,

Volume 4, he advised that if a worker was pregnant and had a medical certificate, it was almost automatic that she would be transferred. He clearly testified that he was unaware of any problems Mr. Hedman was having with the Complainant or any comment made by him regarding the fact that she was a "troublemaker". As indicated, he felt that the Complainant was a good employee and was doing her job appropriately.

Mr. Roy Hedman testified for the Respondent that in the years 1984-85 he was the Chief of Customs at Terminal 1. He had been in that position for approximately eight to ten years and had been an employee of the Respondent for approximately thirty-five years. His evidence was given in sharp contrast to that of the Complainant and John Lucas. He testified that he had not been contacted until July 12th regarding the Complainant's problems with pregnancy and her request for day work. He described his telephone conversation as lasting approximately five minutes and denies that he had made up his mind regarding the Complainant's request. Contrary to the very detailed content of Mr. Lucas' evidence, Hedman gave the explanation of the various alternatives as simply not being available and further that there was only one position in the seizure section of Terminal 1 which is filled on a temporary basis. On July 12th he said there were no vacancies in this section and it was not possible to make any room for the Complainant. He said that he recommended to Lucas that he have the Complainant fill out a transfer document as was referred to in Exhibit HR-4.

Mr. Hedman confirmed that he was acceptable to the Complainant going to duties at the primary function, but only on a shift basis.

Further, he advised that he discussed with Lucas the possibility of the Complainant exchanging some of her shifts and that if the Complainant could find another employee to change, he would agree. This evidence is in direct contradiction to the evidence given by the Complainant and Mr. Lucas.

Mr. Hedman conceded that he did not have a great relationship with the Complainant however he denied any flirtatious behaviour with her. He further denied that he referred to her as a "bitch". He confirmed and testified that he did not treat her any differently than any other pregnant female. He did confirm that his statement dated October 27th, 1987 was true and accurate.

When questioned with respect to the fourth paragraph of that statement, he confirmed under oath that he did not feel the Complainant was

suited for a position in seizures and it had nothing to do with the fact that she was pregnant. It was his opinion that the Complainant lacked the sensitivity to fulfil the job. When referred to the Complainant's performance appraisals, at Exhibit HR-22, he reviewed them while in the witness box and was referred to the comments in the various statements which indicated the Complainant's communications, both oral and written, were satisfactory and that her overall performance as a PM-1 was satisfactory. Further performance appraisals indicated that she was always cooperative to other fellow inspectors.

When Mr. Hedman was asked if he agreed with the statements contained in the performance appraisals, his response was that he did not disagree with them. He was also referred to the 1983 assessment and the comments regarding the Complainant contained therein. He was also referred to the letter of Dr. Stackhouse which was a letter of commendation regarding the actions of the Complainant as a customs officer. Mr. Hedman did recall seeing such a letter in her file but did not disagree with Dr. Stackhouse's assessment.

Mr. Hedman was again referred to Exhibit HR-21 which was his witness statement and he really was unable to give any reasonable explanation as to why the Complainant was not suitable. As previously indicated in these reasons herein, it is the Tribunal's assessment that Mr. Hedman's evidence as to his explanation for not accommodating the Complainant was not credible and totally unsubstantiated by the testimony of the Complainant, John Lucas and Kirk Palmer as well as the documentary evidence and statements filed as exhibits herein.

Mr. Hedman suggested that Mr. Lucas' evidence regarding his statements about the Complainant and his unwillingness to accommodate her were simply a fabrication. He felt that Mr. Lucas was endeavouring to put him in a bad light because of a previous employee situation and he disagreed with Mr. Lucas' handling of an employee in the crew.

It is important to note that after further examination by the Tribunal, Hedman suggested an additional reason that she could not be

considered for a position which would have resulted in accommodation and that was because of her attendance. This was completely inconsistent with the position put forward by the Respondent's counsel and he advised the Tribunal that there was no issue as to attendance and indeed no evidence was offered to even suggest that the Complainant had a poor attendance record. Again, it is the assessment of Mr. Hedman's evidence by this

Tribunal that such suggestions were merely a weak attempt at covering up his obvious dislike of the Complainant.

The last witness for the Respondent was Duncan Marshall-Smith. Mr. Smith was the public relations and media officer for the region which included Pearson Airport. In 1984-85 he was a technical training administrator.

He was asked if there was a risk that customs officer being trained for three weeks and then off for illness or some other reason for four months would lose everything they had learned in the three weeks training. Mr. Smith did not think this would be the case since a lot of the training occurred on the job. This evidence was in contrast to that given by Mr. Hedman wherein he stated this as one of his many reasons for not considering the Complainant for the W.A.C. programme.

Mr. Smith was examined at length regarding the question of pregnancy being a disqualification for going into the W.A.C. programme but at best his evidence is unclear but the Tribunal's assessment is basically that the fact the Complainant was pregnant ought not to have been any type of disqualification or reason for not considering her going into the programme. At Volume 4, p. 770, the following exchange occurred between the Chairman and Mr. Smith:
"Let me put it to you this way. Did the fact preclude her from consideration, at least during the time of her pregnancy as you were shuffling people around as you say?

The witness: Not from the way that the W.A.C. was intended to work, the policy for how many people are going to move."

Mr. Smith's comments both with respect to the matter of preliminary training and his statement of policy on applicants who are pregnant is in complete contrast to the Respondent's investigation report dated September 14th, 1989 submitted to the C.H.R.C. found at p. 4, par. 11.

FINDINGS OF FACT

The Tribunal after a review of the evidence concludes from the testimony the following findings of fact.

1. That the Complainant Donna Marie Brown at the material time of this complaint was pregnant and the early stages of this pregnancy were complicated. Further that these medical complications were serious and

were well-known to the Respondent and those persons acting on its behalf in positions of authority over the Complainant.

2. That the Complainant made a request formally as early as May 1984 for accommodation to day shift as a result of the recommendations of her medical physician. This request was denied by Mr. Hedman.

3. That a formal request for accommodation was arranged through Mr. Lucas on July 12th, 1984 and a doctor's certificate was filed. We find as a fact that there were a number of possible solutions to the Complainant's request and Mr. Hedman refused to consider same.

4. That there was no defined policy which prevented the Complainant from entering into a work assignment cycle (W.A.C.) programme at a time when she was pregnant.

5. That the Complainant did in fact request a day shift duty following care and nurturing leave as early as April 1985 and the Respondent had the ability to effect accommodation and failed to do so.

6. That the Complainant has both prior and subsequent to the complaint being filed been the subject of inappropriate behaviour and harassment by persons in authority and employed by the Respondent.

THE LAW

It is conceded by the Complainant's counsel that s. 7 of the C.H.R.C. requires the Complainant to establish a prima facie case on the grounds of:

(a) sex, in the case of pregnancy, and;

(b) family status.

With respect to ground (a), the Complainant must establish that she was pregnant and as a consequence of combined factors of pregnancy and employer rule, she was unable to participate equally in employment. Once this is established, then the burden shifts to the employer to demonstrate that they did accommodate the employee and give her full and equal opportunity to participate in employment and that they did everything they could to afford her this right short of undue hardship.

With respect to ground (b), 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.

Once the Complainant establishes a prima facie case, it is then the employer's burden to demonstrate that they did accommodate the employee in order to afford her full and equal opportunity to participate in the employment or at the very least that it did everything it could to afford her this right short of undue hardship.

Finally, it must be fully demonstrated that the Complainant acted reasonably to accommodate the employer.

In this case, the employer rule requires all PM-1 customs inspectors working at Pearson International Airport to work shift work of three or more shifts over a 56 day schedule. This employer rule is neutral in that it applies to all PM-1 customs officers regardless of any of the prohibitive grounds of discrimination contained in s. 3 of the C.H.R.A.

Its application, however, to the Complainant results in differential and adverse treatment in breach of s. 7 on the grounds of sex and pregnancy and by virtue of s. 3, ss. 2 of family status wherein direct discrimination can be where a neutral employer rule applies to all employees but because an employee is pregnant or responsible for child welfare they are excluded from participating equally in employment opportunity.

The leading case to define indirect discrimination is the Alberta Dairy Pool case. At p. 506, Madame Justice Wilson provides the following definition of adverse affect discrimination:

"It arises when an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group obligations, penalties or restrictive conditions not imposed on other members of the workforce....employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply may yet be discriminatory if it affects a

person or group of persons differently from others to whom it may apply."

The counsel for the Complainant contended that the meaning of s. 2 of the C.H.R.A. elicits four distinct principles applicable to this proceeding. They are as follows:

A. Every individual should have an equal opportunity with other individuals to make for herself a life she is able and wishes to make (this is also articulated in the Canadian Charter of Rights and Freedoms s. 15);

B. Without being hindered in or prevented from so doing by discriminatory practices;

C. Consistent with duties and obligations as a member of society;

D. Without discrimination by reason of sex and family status.

It is not seriously in dispute that the C.H.R.A. should have a purposive approach. The case of Human Rights Commission and Simpsons Sears recites:

"Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary....and it is for the courts to seek out its purpose and give it effect."

Further the Interpretation Act recites as follows:

"S. 11. Every enactment is deemed to be remedial and shall be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects."

Madame Justice Wilson in the Alberta Dairy Pool decision at p. 517 puts forward the court's interpretation of how adverse discriminatory effect should be interpreted at p. 517

".....where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule and its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship."

With respect to this proceeding, the position the Complainant takes is that the duty to accommodate must be applicable to all grounds of discrimination since there is no exclusion in s. 7(b) of the C.H.R.C. with regard to its applying only to religion or disability and therefore it must also include discrimination of sex and family status. We agree with this interpretation of s. 7. Further the Complainant takes the position that the duty to accommodate is not a duty within reason but a duty short of undue hardship as recited by Madame Justice Wilson in the Alberta Dairy Pool case at p. 520 as follows:

"....the onus is upon the Respondent employer to show that it made efforts to accommodate the religious beliefs of the complainant up to the point of undue hardship."

It is submitted by the Complainant that there are certain guidelines for assessing whether employers' actions would reach undue hardship and we were referred to the decision of Gilbert Janson v Ontario Milk Marketing Board [1991], 13 C.H.R.R. D/397 at p. D/401 wherein reference to a complaint on the ground of religion the following appears:

"Balancing undue hardship against importance of freedom of religion is a difficult equation and neither courts nor tribunals have had a great deal of experience in interpreting the specific meaning of the phrase. The concise Oxford dictionary defines "hardship" as "severe suffering or privation" and "undue" as "excessive, disproportionate"."

On the case law, counsel for the Complainant suggests that there are three factors which we must review in evaluating undue hardship claims.

1. The validity of the substantive reasons advanced by the Respondent for failing to accommodate.

2. The sufficiency of the Respondent's deliberative and investigative process for responding to a request to be accommodated.

3. The employer's sincerity or bona fide in responding to a request to accommodate.

Within the context of these three factors, counsel has suggested that the evidence of the employer's reasons for failing to accommodate must be reliable, objective and persuasive evidence and not impressionistic evidence. We must also examine the actual costs involved and the alternatives relating to such costs. In other words, what was the sufficiency of the process for responding which naturally carries with it a duty to undertake a thorough and adequate process of inquiry and deliberations into the request for accommodation. This necessarily

includes an identification of options for accommodation. Obviously, the Respondent in this proceeding is in a potentially superior position to know the work environment and what possibilities exist.

We were referred to the decision of Irene Ghom v Dometar Inc. et al [1990] 12 C.H.R.R. p. D/177 at par. 198 wherein Chairman Pentney makes the following finding:

"...I find that this concern about the interests and views of other employees is a relevant consideration to the determination of whether the accommodation would constitute an undue hardship and can be properly taken into account on the basis of the "O'Malley" decision, supra. It is one relevant factor in the determination of whether the accommodation would cause "undue interference in the operation of the employer's business"."

Counsel for the Complainant therefore concludes that the factors identified by the Supreme Court of Canada in the Alberta Dairy Pool case were as follows:

A. Costs of accommodation;

B. Employee morale;

C. The ease with which the workforce facilities can be adapted;

D. The constraints imposed by collective agreement.

With respect to the bona fide occupational requirements under s. 15 of the C.H.R.A., counsel for the Complainant referred us to the Alberta Dairy Pool case. On the authority of this case, it is clear that where there is a neutral employer rule which on its face does not exclude or expel one employee on a prohibited ground but in practice results in adverse treatment, then the rule cannot be justified as a bona fide occupational requirement because the only purpose of justifying it would be to prevent the court from ruling that the employer's rule is discriminatory without justification. This principle is enunciated at p. 513 of the Alberta Dairy Pool case. In view of our findings of facts herein contained, the Tribunal concurs with the position on the facts urged upon us by the Complainant's counsel which can be summarized as follows:

A. There is no contest that the Complainant was pregnant and that her condition mandated that she control her work by regular day shifts Monday to Friday.

B. Her condition of pregnancy was creating serious problems for her medically.

C. That there existed a neutral employer rule that all employees work shift work scheduled.

D. That the Complainant made a verbal request for accommodation from Mr. Hedman in May or June and it was clear that he was not going to assist her.

E. At the initial meeting with Mr. Hedman, the Complainant raised the question of going on a W.A.C. cycle for which Hedman advised he could not provide accommodation since she was pregnant and it would not be fair to put her on a programme and then a few months later take her off on maternity leave. The Complainant received the same response from Mr. Palmer.

F. We were referred to Exhibit HR-18 which is contained in the submissions of the Respondent to the C.H.R.C. previously recited in these reasons.

G. The evidence of Mr. Smith determined that there was no policy to prevent employees from going on W.A.C. training but he agreed that it had been a practice not to send them if the employee was going on maternity leave. He conceded, however, that the three weeks of training was not going to be interfered with by being off for seventeen weeks maternity leave since much of the focus was on the job training.

H. The Complainant's counsel urged that conflict of evidence between Lucas and Hedman should be resolved by accepting Lucas as having the more reliable evidence. This necessarily leads the Tribunal to the conclusion that Mr. Hedman really did nothing to accommodate the Complainant and that he simply signed the transfer document.

It would appear that there was no transfer policy in effect because of the position set out in Exhibit HR-18 which gave as a reason because of legal problems involving the application of the "Public Service Employment Act" there was no policy in effect. We did not hear any

evidence as to the legal problems with regard to the transfer problem. The Complainant's position is that the delay in accommodating the Complainant was unreasonable and the Tribunal's review of its finding of facts agrees with this position. There is no doubt that the Complainant was ultimately accommodated, but this was through her own actions and those of her husband and had nothing to do with the Respondent. It took over four months to effect an accommodation for the Complainant which this Tribunal finds could and ought to have been accomplished quickly and without compromising any of the relevant factors referred to in the Alberta Dairy Pool case.

The second aspect of this complaint deals with the matters arising out of family status. This presented both a novel and difficult issue on this point but we are persuaded to find in favour of the Complainant.

It is interesting to note that there is no definition of "family status" within the C.H.R.A. There is such a definition in the Ontario Human Rights Code, s. 9(1)(d):

"Family Status: means in a parent and child relationship."

There is a judicial interpretation contained in the decision of Ina Lang and C.H.R.C. [1990] 12 C.H.R.R. D/265. At D/267, paragraph 5, the following is recited:

"The Tribunal is of the view the words "family status" include the relationship of parent and child...."

We were referred by counsel for the Complainant to the obligations of a parent to child arising out of the Children and Family Services Act, R.S.O., 1980, c. 11 and specifically the following excerpts:

"1. The purposes of this Act are,

A. As a paramount objective to promote the best interests, protection and well-being of children;

At 37(3), the following factors are acknowledged amongst others as being important for determining the best interests of a child:

"(5) The importance for the child's development of a position relationship with a parent and a secure place as a member of a family....

(7) The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity."

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 s. 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.

It is this Tribunal's conclusion that the purposive interpretation to be affixed to s. 2 of the C.H.R.A. is a clear recognition within the context of "family status" of a parent's right and duty to strike that balance coupled with a clear duty on the part of an employer to facilitate and accommodate that balance within the criteria set out in the Alberta Dairy Pool case. 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.

Counsel for the Respondent in argument readily conceded that there was a duty to accommodate as enunciated in the Alberta Dairy Pool case and took the position that the Respondent had in effect fulfilled its obligation to accommodate. The Respondent's counsel reviewed in detail the meetings and discussions which occurred between the Complainant, Mr. Lucas and Mr. Hedman as well as Kirk Palmer. Throughout, the Respondent took the position that the early informal meeting with Mr. Hedman and the Complainant did not occur. Further, the Respondent took the position that

any requirement to accommodate must arise out of a clear notice requesting same and there was not sufficient proof that this had been done.

As an alternative, it was argued by the Respondent that it in fact had provided accommodation and relied upon the actions of Mr. Lucas and subsequently Mr. Neville. It is this Tribunal's conclusion that the reasoning in this regard is flawed. Clearly, on the balance of evidence, Mr. Hedman was cloaked with substantial management authority to provide if he chose to do so an expeditious accommodation for the Complainant. It is our finding that he elected to allow his own personal dislike for the Complainant to cloud his judgment and refused to provide accommodation. The Respondent must acknowledge responsibility for the actions of Mr. Hedman.

There is no doubt that the actions of Mr. Lucas provided some assistance to the Complainant, however, the eventual accommodation for Donna Marie Brown came about as a result of the personal efforts of her husband escalating the situation to Mr. Neville. It is our finding that such efforts by Mr. Brown ought not to have been necessary and really only fortifies our conclusion that there was a clear failure to accommodate the Complainant by the Respondent.

The Respondent's counsel urged upon us that with respect to the second part of the complaint namely "family status" in fact the Complainant had not made any formal request for accommodation despite her testimony of approaching both Hedman and Palmer in April of 1985. As previously indicated, we chose to accept the evidence of the Complainant as it differs from the observations of Mr. Hedman and Mr. Palmer on this point and conclude again that there was failure to accommodate the Complainant on the second part of the complaint, namely "family status".

It is our finding therefore that upon a review of the facts and the law as referred to herein that there has been discrimination by the Respondent as against the Complainant Donna Marie Brown on both grounds outlined in the complaint dated July 17, 1985 pursuant to the provisions of s. 3 and s. 7 of the C.H.R.A.

REMEDIES

In view of our findings, we are of the view that the following remedies are appropriate in this proceeding.

1. General damages: We find the Complainant is entitled to compensation in the amount of $1,500 for suffering in respect of hurt feelings caused by the discriminatory practice.

2. Wage loss and benefits: We received evidence that the Complainant lost approximately two weeks following her request for

transfer in 1984 and further that she needed a further three weeks of unpaid sick leave following her request for a day position. Between April and October 1985 she lost her annual pay increment. Accordingly, we order that the Respondent compensate the Complainant for all wage loss and benefit loss for the periods outlined herein and those losses are calculated in Exhibit HR-24. If there is a problem

in calculation and the parties are unable to agree as to the amounts awarded hereunder, this Tribunal is prepared to reconvene at the request of either party to resolve same.

3. Interest: We find the Complainant is entitled to interest on the monies awarded under paragraphs 1 and 2 above at the Bank of Canada prime rate as of the date of July 17, 1985 to run to the present time. Interest is to be calculated on a simple interest basis.

4. In order to ensure similar discriminatory practices do not occur in the future, we direct pursuant to s. 53 (2) (a) that the Respondent submit proof sufficient for the

Canadian Human Rights Commission that there exists an appropriate policy of accommodation for employee transfer.

5. The Respondent shall provide a written apology to the Complainant for its failure to accommodate her health problems and that such apology be filed with her personnel file.

It is expected that such form of apology provide sufficient notice to the Respondent for those persons working in authority over the Complainant to desist from continuing breaches of s. 59 of the C.H.R.C. That section recites the following:

"No person shall threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so."

We wish to thank counsel for their thoughtful and careful presentation of the issues in this case.

Dated this 17th day of February, 1993.

_____

CARL E. FLECK, Q.C., Chairman

_____

PATRICIA HAYES - Member

_____

AASE HUEGLIN - Member