Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Fiona Ann Johnstone

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services

Respondent

Decision

Member: Kerry-Lynne D. Findlay, Q.C.
Date: August 6, 2010
Citation: 2010 CHRT 20

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I. Complaint

[1] This complaint arose in April 23, 2004, and is brought pursuant to Sections 7 (*b*) and 10 (*a*) and (*b*) of the *Canadian Human Rights Act* ("the *Act*").

[2] The Complainant (Ms. Johnstone) alleges that the Respondent (CBSA) has engaged in a discriminatory practice on the ground of family status in a matter related to employment. The relevant prohibited ground of "family status" is enumerated in Section 3(1) of the *Act*.

[3] Section 7 (*b*) of the *Act* reads:

> "It is a discriminatory practice, directly or indirectly,
> (*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.]

[4] Sections 10 (*a*) and (*b*) of the *Act* read:

> "It is a discriminatory practice of an employer, employee organization or employer organization
>
> (*a*) to establish or pursue a policy or practice, or
> (*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination." [R.S., 1985, c. H-6, s. 10; 1998, c. 9, s. 13(E)]

[5] The practices complained of include failure to accommodate, and adverse differential treatment based on family status, which in this case means the raising of two young children. Pursuant to the findings in *Moore v. Canada Post Corporation*, 2007 CHRT 31, at para. 86 "failure to accommodate" is not a discriminatory practice under the *Act*, as "there is no free-standing right to accommodation under the *CHRA*."

[6] The alleged practice against the Complainant began in 2004. Although the Statements of Particulars of both parties deal primarily with the time period up to and including 2007, the complaint filed herein referred to the discrimination as being "ongoing". Ms. Johnstone took the same position at the hearing that the discrimination complained of constituted a "continuing event" and is ongoing. The Canadian Human Rights Commission (CHRC) supported this approach.

[7] The Respondent objected to the introduction of evidence being led pertaining to the time period after 2007 as constituting "post complaint" allegations, and that such evidence would be too remote in time in terms of relevancy. The complaint herein was filed April 23, 2004.

[8] The Tribunal accepted the Complainant's and the CHRC's characterization of the complaint as ongoing, and noted that the written complaint made this assertion. The allegations raised under Section 10 of the *Act* also speak to the conduct complained of being systemic in nature, and remedies sought reflect this position.

[9] Evidence was presented by all parties as to CBSA practices, CBSA written and unwritten policies, a relevant collective agreement as amended over the full time period, the governing Variable Shift Scheduling Agreement (VSSA) in place at the time of the complaint and as later amended, and implications both past and present of the implementation of those practices, policies and agreements.

[10] Ms. Johnstone alleges that the CBSA's policies forced her into part-time status upon her return to work after having each of two children, resulting in her being given fewer hours of work than she was willing and able to work, with an attendant loss of benefits that are available to full-time employees, including benefits under her collective agreement and pension entitlements under the *Public Service Superannuation Act*.

[11] Both the Complainant and the CBSA were represented by legal counsel at the hearing. CHRC was also represented by legal counsel, but addressed only the Section 10 arguments

raised by the complaint. It was very beneficial to this Tribunal to have experienced senior legal counsel acting on behalf of all parties.

[12] Previous to the hearing, the CBSA had sought to add the Union as a party. One of the main reasons given by CBSA to add the Union was that the VSSA prevented CBSA from considering Ms. Johnstone's request for static shifts, encompassing full-time hours over only 3 days per week. This argument was not advanced by CBSA at this hearing.

[13] Ms. Johnstone and CHRC opposed the application on the grounds that none of the remedies sought by Ms. Johnstone required amendments to the governing collective agreement or to the VSSA. The Union provided an affidavit to the Tribunal taking a position of support of the Complainant, but did not actively participate. This motion was dismissed by the Tribunal on the basis that the Union's participation in the hearing was not necessary for the presentation of relevant evidence or the Tribunal's ability to adjudicate on the matters so raised. It was also dismissed because the application was made late in the process, and the Union's participation would not be necessary to properly dispose of the liability portion of the complaint [See 2009 CHRT 14].

II. Factual Background

[14] Ms. Johnstone is a Canada Border Services Officer (BSO). She has been in the employ of CBSA since April 14, 1998. She is presently on leave without pay, the particulars of which are detailed later in this Decision. At the time of this complaint she worked in Passenger Operations at the Pearson Airport Terminal (PIA) in Toronto, Canada.

[15] By all accounts Ms. Johnstone is an exemplary employee, often exceeding her superiors' expectations and noted up for her diligence, excellent results, and acumen for her work duties.

[16] Ms. Johnstone has been married to Jason Noble (Jason) since December 2002. Jason is also a BSO. During the early relevant time of this complaint, Jason worked for CBSA as a Supervisor also at the PIA. He now works in Ottawa.

[17] Ms. Johnstone and her husband have two children. The eldest was born in January 2003, with Ms. Johnstone returning to work January 4, 2004. The second child was born in December 2004, with Ms. Johnstone returning to work December 26, 2005. Their two children will both be school age by 2010.

[18] PIA is a 24 hours, 7 days per week operation. To cover the operational requirements necessitated by the workplace, the Collective Agreement is built around a rotating shift plan referred to as 'the vassa' but spelled VSSA, an acronym for Variable Shift Schedule Agreement. From the time that Ms. Johnstone commenced working for CBSA, after a relatively short time as a part-time employee, she worked full-time on a schedule of 5 days on, 3 days off rotating shifts governed by the VSSA.

[19] In addition to the rotation, the shifts are irregular and unpredictable. At the time of the events giving rise to this complaint, full-time employees rotated through 6 different start times over the course of days, afternoons, and evenings with no predictable pattern. Also, employees worked different days of the week throughout the duration of the schedule. This schedule was based on a 56 day pattern. BSOs were given 15 days' notice of each new shift schedule. The employer can change the schedule on 5 days' notice.

[20] A full-time position within the context of this case, and as contemplated per Article 25.13 of the Collective Agreement in place at the time, was 37.5 regularly scheduled hours per week, based on an 8 hour day that included an unpaid ½ hour meal break. Any employee who worked less than 37.5 hours per week was considered part-time. Any employee who worked greater than 37.5 hours per week was paid overtime.

[21] Overtime hours are required as a BSO. The requirement for overtime is often unpredictable, as it may arise due to job duties at any given time in particular circumstances that cannot be foreseen, e.g. the detention of goods or persons. Sometimes employees know ahead of time, or are called in by management to work on an overtime basis due to workplace demands as they arise.

[22] Jason also worked regularly scheduled full-time hours on rotating shifts governed by the VSSA, and he worked an additional 10:00 am shift. Due to his supervisory duties, he was also required, from time to time, to attend meetings and training sessions on his days off and travel to other ports during job actions.

[23] In 2002 to 2004, both before Ms. Johnstone went on her first maternity leave, and as she was returning from it, she sought accommodation from CBSA due to her new child-rearing responsibilities. She sought the same accommodation upon her return to work from her second maternity leave. Both times she was faced with an unwritten policy of CBSA that will not provide full-time hours to those requesting accommodation on the basis of child-rearing responsibilities.

[24] Prior to returning from her first maternity leave, Ms. Johnstone asked CBSA for full-time static shifts. Ms. Johnstone wanted to work 3 days per week, 13 hour days, so that she could remain full-time. A 13 hour shift would include one ½ hour unpaid meal break. She did not specify a preferred start time. When she was advised by CBSA that this was not possible, she then made an alternate request of 3 days per week, 12 hour days. Although she recognized that this second position was part-time, she was trying to maximize the hours she would work in order to have as little negative effect on her pension and benefits as possible.

[25] Ms. Johnstone testified that the reason she asked to work over a 3 day period, is that these were the 3 days per week during which she could arrange alternate child care. She had three family members who were willing to care for her child, and later children, one of the three days each. She had no family assistance for a fourth day.

[26] Ms. Johnstone also testified that she tried to arrange third party childcare but was unable to do so due to the scheduling difficulties of a rotating shift schedule. She had no greater success on a static shift schedule that was outside normal third party care hours, and that could be unpredictably extended due to overtime requirements.

[27] Ms. Johnstone testified that the reason she wanted to continue to work full-time hours was so that her pension entitlements and her promotional opportunities and income would not be adversely affected.

[28] CBSA was willing to accommodate Ms. Johnstone, but to the extent only of a static shift of 3 days per week up to a maximum of 10 hours per day, plus a further 4 hours on a fourth day.

[29] Corollary to the above, Ms. Johnstone suggested methods to her employer that would allow her to continue to keep her pension at a full-time level while working part-time, but these suggestions were refused. This is discussed in more detail below.

[30] There is no dispute that CBSA has an unwritten policy that anyone seeking accommodation in order to care for children may be accommodated by being given static shifts, but must also go to part-time hours to a maximum of 34 hours per week. This unwritten policy does not allow employees to have static shifts with full-time hours if the reason for the request is childcare responsibilities.

[31] There is also no dispute that CBSA has and does accommodate employees for medical and religious reasons by giving them static shifts with full-time hours, from time to time, for varying lengths of time, and for some on a permanent basis. These requests are assessed on an individual needs basis, and in the case of medical accommodation CBSA requires medical substantiation of the request. There are also instances of employees having been accommodated because they have children with medical needs.

[32] Further, there was no dispute that this unwritten policy is applied unevenly. There are CBSA employees working part-time at 36 hours per week, employees working full-time static shifts, and others who have been allowed - although part-time - to maintain the equivalent of full-time pension and benefit entitlements. Although two of CBSA's management witnesses stated that CBSA wanted to discourage these anomalies, both conceded that these exceptions do continue to exist.

III. Respondent's Operations

[33] The mandate of the CBSA includes the screening and processing of travelers and goods entering into Canada at each of its airports and land borders on a 24 hours a day, 7 days a week basis.

[34] The busiest of these airports is PIA. The Passenger Operations District, a component of the CBSA's operations in the Greater Toronto Area (GTA) region, oversees these functions at PIA.

[35] Until 1994, customs functions were the responsibility of Customs and Excise within the Department of National Revenue. In or around 1994/1995, the federal government decided to combine customs and excise into a single department, called the Department of National Revenue. In November 1999, these functions of the former department were transferred to a newly created agency called the Canada Customs and Revenue Agency (CCRA).

[36] On December 12, 2003, by federal Order-In-Council, the CCRA's customs responsibilities were transferred to a new Crown agency called the Canada Border Services Agency. This agency also assumed the ports of entry component (Immigration Inland Enforcement) previously performed by the Department of Citizenship and Immigration. Additionally, the CBSA also took responsibility for the regulation of the entry of food, plants and animals, inspections previously performed by the Canadian Food Inspection Agency.

[37] This date of December 12, 2003, when CBSA was created (and took over the responsibilities relevant to this complaint) became significant as the evidence unfolded in terms of its relation to the exhibited comprehensive "Employment Equity Compliance Review of CCRA" delivered by the CHRC on December 10, 2003. This is dealt with in more detail below.

[38] Until the creation of the CCRA in 1999, the Complainant's employer was the Treasury Board Secretariat (TBS). Under its constituent legislation, the CCRA, and now the CRA, is a

separate employer. Upon the transfer of customs functions from the CCRA to CBSA on December 12, 2003, TBS once again became the Complainant's employer.

[39] Passenger Operations is currently one of the three main operational districts within the GTA region of the CBSA. The other two are Commercial Operations and GTEC. GTEC does not employ BSOs. In addition to these districts, the GTA region has a number of other divisions including the Investigations Division, the Intelligence Division, the Compliance and Verification Division, the Planning and Program Integration Division, and the Corporate Services Division (Human Resources, IT, Finance and Administration).

[40] Of these, only Passenger Operations and Commercial Operations employ individuals at the group and level at which the Customs Inspectors (CIs) (PM-02s), later called BSOs (PM-03s) were classified in 2004 and thereafter. The International Mail Processing Centre (Gateway) is now included within Commercial Operations.

[41] Commercial Operations was responsible for processing cargo from commercial aircraft and sufferance warehouses [facilities established for the landing, storage, safekeeping, transfer, examination, delivery and forwarding of imported goods before they are released by the CBSA], outports, a marine component and a railhead with locations in Concord and Brampton. The bulk of the work of this district is done at the PIA on the other side of the airfield from the terminals. BSOs in Commercial Operations performed counter duties for the public and examination of freight at warehouses with a view to determining whether to seize, hold or release goods.

[42] In 2004, Gateway was a separate district within the GTA region. In or around 2005/2006 these operations were merged into the Commercial Operations district. The work of the BSOs at Gateway is to sort and examine mail, documents and parcels coming to Canada through a primary processing area belt and then through secondary examination. Documentation is prepared on larger shipments that are held until duties are paid. Workers at Gateway work static shifts.

[43] The BSO work performed at Gateway, Passenger Operations, and Commercial Operations is set out in one universal job description and all are classified similarly.

[44] In 2004, Passenger Operations at PIA was responsible for processing passengers in three terminals (Terminals 1, 2 and 3). Passenger Operations also had responsibility at the East Hold, a building on the air field where small aircraft cross-border flights arrive. In 2004, passengers on these flights were met and taken by bus into Terminal 2 for processing. Fixed base operators (private jets) arriving with passengers were also processed through Passenger Operations, a function that moved to Commercial Operations in 2005.

[45] In January 2007, Terminal 2 was closed down, and the CBSA operations within that terminal were absorbed within Terminal 1. Currently, Air Canada's U.S. and international flights operate through Terminal 1, and most other airlines operate through Terminal 3.

[46] Mr. Norm Sheridan has been the District Director of Passenger Operations since 1999, and at all times relevant to this complaint. He first joined Revenue Canada–Customs & Excise in 1979 where he had a variety of roles and responsibilities including, for a time, Human Resources.

[47] In 2004, Mr. Sheridan had three Chiefs (one assigned to each Terminal) reporting to him. The three Chiefs included Rhonda Raby who testified at this inquiry, and held the position of Chief of Terminal 1.

[48] Each Chief had between nine to thirteen Superintendants reporting to them who were responsible for the day to day management in their Terminals and supervising the BSOs on their crews.

[49] BSOs each were assigned to crews within which they worked at the Primary Inspection Line (Primary), or Secondary counter (Secondary) processing passengers for entry into Canada.

In 2004, each crew had approximately 8 employees. Management tried to balance gender and experience on the crews, as well as ensure language capability.

[50] Also in 2004, each of the 3 Chiefs was assisted in their management and coordination functions by one or two Operations Coordinators. These Operations Coordinators worked afternoons, weekends and statutory holidays.

[51] Effective February 12, 2007 the management structure was changed. There are now 10 Chiefs within Passenger Operations: 3 per each of the two Terminals; one Chief of Enforcement; one Chief of Corporate Services; one Chief of the Redevelopment Program; and one Chief responsible for Immigration Policy.

[52] The Superintendents in the Terminals continue in the same general job description. In the corporate area, they prepare shift schedules, manage the performance appraisal system, and monitor the program. There are currently two Superintendents who specifically manage any accommodation requests by employees asking to be relieved, for whatever reason, from the VSSA schedule.

IV. Canadian Human Rights Tribunal (CHRT)/CHRC History

[53] There is a long history involving the CBSA (and its predecessors), and the CHRC, the CHRT and the Federal Court on the issue of the definition of family status discrimination as it relates to employment, and on the implementation of decisions previously taken. As this history arose repeatedly during the hearing, and many exhibits were tendered attesting to it, identifying some of this history at the outset is helpful as a framework to the present complaint.

1984 - 1993

[54] February 17, 1993: The decision of *Brown v. National Revenue (Customs & Excise)*, 1993 CanLII 683 (CHRT) (Brown) dealt with the issue of discrimination based on sex (pregnancy) and family status contrary to the *Act*. The Respondent was the CBSA's predecessor,

the National Revenue Agency – Customs and Excise. As in this case, the Respondent took the position that the Complainant had been accommodated to a sufficient degree to the point of undue hardship, and that she had not made adequate efforts to obtain day care, the onus for which was hers alone. Although the decision was rendered in 1993, it was based on allegations that arose in 1984 and 1985. The inquiry into the complaint, which was found to be substantiated, required consideration of the nature of 'family status' as a prohibited ground of discrimination within the *Act*.

[55] At page 15 of the *Brown* decision (supra), the Tribunal set forth the requirements to establish a prima facie case of discrimination based on the ground of family status as follows:

> (a) "…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."

[56] At page 20 of the *Brown* decision, the Tribunal found that parents are under an obligation to seek accommodation from their employer so that they can best serve their obligations to the employer and their duties and obligations within the family. The Tribunal went on to state:

> (a) "It is this Tribunal's conclusion that the purposive interpretation to be affixed to s.2 of the CHRA is a clear recognition within the context of "family status" of a parent's rights and duty to strike a balance coupled with a clear duty on the part of any 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.

[57] Ms. Brown was also a BSO (then called a Customs Inspector) who asked to work a day shift and if necessary to accomplish this a transfer, after her child was born to accommodate childcare needs as both she and her husband worked shifts. The Respondent employer did not accede to her request, as it did not recognize childcare needs for an employee working shifts as

an accommodation obligation under the *Act*. Having found the Respondent's failure to accommodate Ms. Brown's request for day shift work discriminatory, the Tribunal directed the Respondent to write a letter of apology to Ms. Brown and ordered the Respondent to prevent similar events from recurring through recognition and policies that would acknowledge family status to be interpreted as involving "a parent's rights and duty to strike a balance [between work obligations and child rearing] coupled with a clear duty on the part of any employer to facilitate and accommodate that balance" as noted in paragraph 54 above.

[58] Following this decision, a 1993 letter of apology to Ms. Brown was written by M. E. Hynna, Assistant Deputy Minister, Customs Operations Branch, two undated drafts of which were exhibited in this hearing with cover letters dated in July and August, 1993. The letter included the following:

a) "Based on the findings of the Tribunal that there was discrimination by regional management against you on both grounds outlined in your complaint dated July 17, 1985 and, in accordance with the Tribunal's ruling, I would like to apologize on behalf of the Department for failing to accommodate you during and after your pregnancy.

b) It is regrettable that the circumstances arising from your situation were not facilitated by management at the outset. However, in order to avoid any future misunderstanding, I would like to reassure you that a departmental policy is being developed in order to ensure that similar practices do not occur in the future.

c) A copy of this letter is being forwarded to management in The Toronto Regional Office as well as to your immediate supervisors for the purposes of remind them of their obligations under the Act."

[59] Presumably these last two paragraphs were a reference, at least in part, to the wording in *Brown* used at enumerated remedy 4 at page 15: "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 CHRC that there exists an appropriate policy of accommodation for employee transfer".

[60] Of note, Mr. Norm Sheridan, currently Director of Passenger Operations for CBSA at PIA, is mentioned in *Brown* at page 9 as having re-written an evaluation of Ms. Brown who had been described by her then superintendent in 1987 as "abnormal" without further explanation. Mr. Sheridan testified that in or about this time, he was Director of Programs for 3 years in the Greater Toronto Regional Office, and from 1989 forward he held the positions of Chief of Operations at PIA for Terminal 2 and then Chief of Operations at PIA for Terminal 2 for one year, followed by various positions in the Regional office again such as Manager of Operational Services, Chief of Operational Services, Director of Human Resources, and Chief in Drawbacks, Refunds and Remissions. It is apparent from these senior positions in operations and human resources that Mr. Sheridan was personally familiar with the *Brown* decision.

1993 - 1995

[61] 1993: A further exhibited letter dated July 19, 1993 and referencing the *Brown* decision was written by Dianne Dioguardi, Staff Relations Officer, Operations Section, Staff relations and Compensation Division, Human Resources Branch, Revenue Canada Customs & Excise "Revenue Canada". It was written to Mr. Robert J. Venier, Counsel for the Respondent, Civil Litigation, Toronto Regional Office, also with Revenue Canada It stated:

> (a) "…[with] the impending integration of the two divisions of Revenue Canada – Taxation and Customs and Excise, all policies will have to be amalgamated and tabled at separate Executive Committee meetings. Consequently, it could be quite some time before this particular policy is approved."

[62] Counsel for the CHRC, Rosemary G. Morgan, indicated that she intended to file the decision with the Federal Court and proceed with enforcement. A letter from John Viassi Nagy, Civil Litigation counsel, dated March 18, 1994 was also exhibited, addressed to

William F. Pentney of CHRC enclosing a draft policy to address the *Brown* decision. A judicial review of the *Brown* decision was initiated by the Respondent, and later mutually adjourned in 1995 in order to allow for a settlement of outstanding issues.

1998 – 1999

[63] The Federal Court initiated a Status Review of the implementation of the *Brown* decision in November 1998, which ultimately led to the dismissal of the judicial review application. An exhibited Treasury Board Secretariat letter dated October 5, 1999 to CHRC speaks to working in consultation with the CHRC to implement *Brown*, and giving the history of the matter. The letter noted that other implementation matters had been settled, but not the part of the Order calling for the Respondent to develop a policy of accommodation reflecting the decision.

2000

[64] The CCRA Labour Relations Division organized and hosted an Employment Equity Strategic Session on December 8, 2000. As part of the agenda, the participants considered an exhibited document drafted by this Division's personnel entitled "Draft – Introduction to the Strategic Direction of Employment Equity for the CCRA" that bore a date mark of 2000-11-02. Revealing that there was at that time an internal recognition of the disproportionate burden on women workers for childcare and related family responsibilities, at pages 5 and 6 of this document the following was stated:

a) "Women balancing work and family life is an issue that affects many women working in the federal public service and within the CCRA. **Generally women still continue to play a greater role in bearing the responsibility for childcare, eldercare and home maintenance. This issue can be compounded by a corporate culture that does not recognize this**, [Tribunal's emphasis], which in turn can have adverse affects on the distribution of women within the organization. In a study produced by the Conference Board of Canada, when asked what the impact of work-life conflicts was, 32% of respondents (54% female 46% male) indicated they have turned down or chosen not to apply for a promotion. Fourteen percent have left a job because of the work-life conflict while 24% have turned down or chose not to apply for a transfer because of it.

b) Women have been traditionally marginalized in the labour market…This trend is also seen in the CCRA where women dominate the Clerical Group with representation rates above 80% a full 10% above the Labour Market Availability. Under-representation for women in CCRA occurs in the Professional Group and the 'Program Administration and Senior Clerical Group'… Surprisingly, women are graduating from university programs at a rate of 58% in comparison to men. This ratio is consistent in the social science area and in the arts and science areas women are graduating at a rate of 67% in comparison to men.

c) The bulk of employees in the CCRA are with the 'Program Administration and Senior Clerical Group'. This group is where the majority of our custom inspectors and revenue officers in the program administration (PM) group are coded."

2001- 2003

[65] November 8, 2001: On this date the CCRA was formally notified of an upcoming audit by the CHRC, pursuant to the *Employment Equity Act*. The process commenced in January 2002. There was a workforce analysis done in 2002 and a goals feedback exercise in 2002. On-site visits were conducted over several months in 2003 in BC, Ontario and Quebec. At the time, 58.4% of CCRA's workers were women.

[66] A comprehensive Equity Compliance Review was completed and tendered by the CHRC to the CBSA's immediate predecessor on December 10, 2003.

[67] At pages 15 and 16 of the Equity Compliance Review there was a section titled **Women's Program** wherein the following was stated:

(a) "Nevertheless, the Agency has proposed some strategies and goals to improve the work situation for women as follows:

-increase representation of women in Administration & Senior Clerical using such initiatives as advertising on notices of job opportunities that employment equity may be used as a placement criterion;

-accommodate women in balancing their work and personal life through supportive policies and management."

[68] On December 12, 2003, as noted previously, the CBSA was created and took over the operations relevant to this complaint. In that the Compliance Review was tabled two days previous, the whole of the evidence is clear that its recommendations were not followed up on or implemented.

[69] Witnesses for both parties testified that to their knowledge, as senior managers and employees, there has never been full implementation of the orders in *Brown* that speak to creating policies of accommodation which demonstrate an acceptance of the family status obligations of an employer as defined by *Brown*.

2004- 2007

[70] 2004: After Ms. Johnstone filed her complaint on April 23, 2004, the CHRC Investigator appointed found that CBSA differentiated between classes of employees, permitting employees who sought relief from the rotating shift schedule for medical reasons to remain full-time, while requiring those who sought the same relief for reasons of childcare to work part-time. Part-time allocations of work, for childcare reasons are defined by the CBSA as meaning up to 34 hours per week. The Investigator also found that the Respondent's evidence of operational concerns was an "impressionistic assumption" and that the Respondent had failed to provide a justification for the policy in question. The CHRC Investigator recommended at that time that the complaint be referred to the CHRT.

[71] December 2005: An exhibited internet website page, published by CBSA Human Resources, contained excerpts from a "GTAR Newsletter". GTAR is an acronym that stands for Groupe de travail des associations de retraités des secteurs, public et parapublic. This newsletter excerpt touts a proposed CBSA mandatory Employment Equity Program, and the formation of local committees within CBSA to implement short and long-term plans based on an Employment Equity Plan filed in April 2005. The following statements appear in reference to both the Canadian Human Rights Act (referred to below as a "Human rights Code"), the Employment Equity Act, and employment equity generally:

a) "We will, through planning, implementing positive measures, monitoring and reporting, be able to chart our progress in this area, and demonstrate compliance with a key piece of Canadian legislation."…Many of us are balancing busy family lives with our work life; many of us have specific needs and wants from the organization. While organizational requirements always come first, we know that the Human Rights Code prohibits unreasonable discrimination on a number of grounds. For a complete list of prohibited grounds see the link below…."

b) "In addition to programming under the Employment Equity Act, CBSA adheres to principles related to diversity. In CBSA Human Resources Division website a workplace that embraces diversity, each individual is recognized for his or her uniqueness…."

[72] January 2007: Notwithstanding the Investigator's recommendation that the complaint be referred to the CHRT (see paragraph 70 above), the CHRC dismissed the complaint. Ms. Johnstone therefore initiated judicial review proceedings in the Federal Court seeking to set aside the CHRC decision. The application was allowed by Justice Barnes (See: *Johnstone v. Canada* (A.G.), 2007 FC 36). An appeal by the Respondent to the Federal Court of Appeal was dismissed (See: 2008 FCA 101), and the case remitted back to the CHRC for reconsideration. The CHRC thereafter referred the complaint to the CHRT for inquiry and deliberation.

[73] June 2007: The Respondent's position herein is that 'family status' discrimination has not been established on a *prima facie* basis, and that if it has been, the discrimination is justifiable as a Bona Fide Occupational Requirement (BFOR) due to undue hardship. In the context of this

position taken, it is worth noting that a draft "CBSA Policy on Duty to Accommodate" dated June 2007 was exhibited.

[74] The Respondent objected to the inclusion of the Draft Policy to Accommodate arguing the document was highly prejudicial, it had never been implemented, and therefore should not form part of the record. On its face, the Draft Policy to Accommodate was prepared by the Employment Equity & Diversity Division, Human Resources Branch of the CBSA. Whether its provisions had been implemented or not, and the evidence clearly established that they had not, it was a document that the Complainant's witness, Mr. Star, testified to. Mr. Star testified that he had been given the document by the Head of the employee's Union who was in turn given it at a meeting with Respondent representatives. Mr. Star had taken the document to a meeting with management for the Respondent when he was a Union steward, and had referred to it in that meeting. Although Rhonda Raby denied any prior knowledge of it in that meeting and at the hearing, another management employee of the Respondent present at the meeting admitted to Mr. Star that he was familiar with the document. Mr. Star's evidence was uncontroverted.

[75] The Draft Policy to Accommodate includes acknowledgement of the aims and objectives of federal Human Rights legislation and developed case law, as well as the responsibilities of the employee to inform the employer, request accommodation, and work with his/her manager to develop the most appropriate accommodation for the circumstances.

[76] The Draft Policy to Accommodate also outlines the responsibilities of the Union, the Human Resources Advisors, and the Manager's/Supervisors, as including but not limited to:

> "ensuring all employees know their rights in regard to accommodation",
>
> consulting on a confidential basis with the employees "to determine the nature of the accommodation required",
>
> "meeting the employee's needs" short of causing undue hardship,

> "taking an active role in exploring alternative approaches and solutions to accommodate the employee",
>
> "granting accommodation requests in a timely, reasonable manner",
>
> "following up proactively on requests for temporary or permanent accommodation…",
>
> "creating and maintaining an inclusive environment that is accessible and enables employees to be open and honest", and
>
> "ensuring that all employees who choose to participate in all work-related events are able to do so and that they can take advantage of the opportunities offered (ex: team meetings, training etc.)"

[77] The Draft Policy to Accommodate also speaks to the National Employment Equity/Diversity Section's Role, calls for the creation of a CBSA National Job Accommodation Fund to assist in accommodation costs, and details processes for seeking accommodation, responding to accommodation requests, and appealing accommodation decisions if necessary.

V. Complainant's Case

A. Evidence of Fiona Johnstone

[78] Until Ms. Johnstone had children, she worked regular full-time rotating shifts under the VSSA as outlined above. However, when she became a mother and the primary parent responsible for childcare, she could no longer work the VSSA schedule and meet her legal and moral obligations to her children due to a lack of available childcare.

[79] Ms. Johnstone testified that she was willing to engage third party childcare for her children. She quickly discovered, however, that the ordinary daycare hours of any registered facility were 7 am to 6 pm Monday through Friday.

[80] Ms. Johnstone also discovered that even unlicensed daycares or private daycare providers will not provide childcare on an unpredictable and fluctuating basis, usually not at all on weekends, and certainly not overnight.

[81] Ms. Johnstone then turned to her family members, and was able to get childcare coverage for unpredictable hours, including overnight, on three days per week. The Respondent disputed the Complainant's diligence in trying to arrange for third party childcare assistance, however, this Tribunal accepts Ms. Johnstone's evidence that this was the ultimate and best childcare arrangement she could make.

[82] The evidence showed that Jason's shift requirements also as a BSO at PIA, albeit as a Supervisor, were in many ways more onerous than those of Ms. Johnstone. Their schedules typically overlapped 60% of the time, but were not coordinated in any manner. Jason could not provide the childcare Ms. Johnstone needed on a reliable basis either.

[83] Ms. Johnstone testified that the alternative of a live-in nanny or childcare provider was not an option for her, due to the expense and the necessity that she and her family would have had to move into a home that could accommodate another adult person. As the expert evidence unfolded at the hearing, it is not a viable option for most Canadian families for the same reasons.

[84] Although it was obvious that this Human Rights complaint process has been an emotional ordeal for Ms. Johnstone, it was clear from her evidence which was given in a forthright manner that she enjoys her work as a BSO and is proud of her accomplishments in the workplace.

[85] Ms. Johnstone testified that she has made a long term commitment to her role as a BSO, and intended to make this her lifelong career. This is the reason that her initial most significant issue was her concern that she would lose pension and other benefits, with long term consequences detrimental to her future retirement and promotional opportunities.

[86] Ms. Johnstone emphasized that she wanted to return to work putting in full-time hours, but needed to serve those hours over 3 days. She did not specify the starting times for those 3 days, nor did she insist on returning to the duties she had performed before. What was uppermost in her mind was working at least 37.5 hours per week, and maintaining her pension and benefits and opportunities for training and advancement.

[87] Ms. Johnstone however ran up against an arbitrary unwritten policy of the CBSA applied to workers seeking accommodation on the basis of childcare responsibilities. Ms. Johnstone learned, from speaking with co-workers who had returned from maternity leaves, that if she requested static shifts outside the VSSA, the CBSA would only allow her to work part-time hours. She testified that she contacted a Terminal 2 Superintendent, Ms. Gerstl, in late 2003 asking to work full-time hours over 3 days. She stated that Ms. Gerstl e-mailed her back that this was against CBSA policy. Although CBSA questioned whether this exchange ever happened and Ms. Johnstone could not produce a copy of the e-mail, CBSA did not call Ms. Gerstl as a witness, advising she was on medical leave at the time of the hearing. This Tribunal accepts Ms. Johnstone's evidence that this e-mail exchange took place.

[88] The position of CBSA is that workers seeking accommodation for childcare obligations are doing so due to choices they have made in life, for which the employer bears no responsibility. Hence, while the Respondent is prepared to make some adjustments to such a worker's schedule, it refers to these adjustments as "arrangements" as opposed to "accommodations". This position was articulated on behalf of the Respondent by Mr. Norm Sheridan.

[89] Ms. Johnstone was aware, from her own observations during her time of employment with CBSA that historically the Respondent has treated only those seeking medical accommodations as obligations to be met pursuant to human rights legislation. Such workers are assessed on an individual basis. Accommodations are made in their work schedules, in accordance with supporting medical information/recommendations, and if it is compatible with their specific medical requirements they are given static shifts with full-time hours.

[90] Ms. Johnstone learned later from speaking with Murray Star, then a Union executive member, that he had been accommodated for religious reasons but only after he had pursued a complaint so that he could observe the Sabbath and other sacred days of his Jewish faith. Mr. Star testified to this experience in his evidence at the hearing.

[91] When her attempts to find childcare that would allow her to work the VSSA full-time failed, Ms. Johnstone pursued full-time hours despite her knowledge that in most cases it is denied. She did this in part because she also knew that there had been exceptions made to this unwritten policy, and that some workers who had returned from maternity leave had been given static shift daytime hour duties, and shifts of greater length than the regular 8 hours per day.

[92] Ms Johnstone testified that she knew of at least two other co-workers, whom she named, that worked 9 hour shifts over 4 days per week for a total of 36 hours per week. She stated that both of them had told her this, and in any event their schedules are posted publicly. This was not challenged by CBSA. In other words, these workers were not limited by policy to 34 hours per week, nor to the regular 8 hour per day shift.

[93] Ms. Johnstone also named another co-worker whom she knew to be working 11 hour shifts due to her childcare responsibilities at home. This was not challenged by CBSA.

[94] Ms. Johnstone further named two other co-workers who had initially been assigned to full-time program support in day shifts due to their family responsibilities, and then had stayed on in those positions after the need for their accommodation had passed. This was not challenged by CBSA. These co-workers, therefore, were not limited by policy to only work part-time up to 34 hours per week.

[95] Ms. Johnstone was encouraged to ask and pursue her desire to work full-time upon return by her then Union representative, Murray Star. However, once Superintendent Gerstl had told her it was not possible, through her husband she approached Rhonda Raby, then Chief of Terminal 1, to work 12 hour shifts over 3 days. This approach was made shortly before

Ms. Johnstone was to return to work after her first maternity leave. Raby denied this request citing health and safety concerns.

[96] Ms. Raby also made it clear that the maximum number of hours Ms. Johnstone could work per week in order to get static shifts would be 34.

[97] As a result, Ms. Raby offered that Ms. Johnstone could work a maximum of 10 hour per day over 3 days per week, and a further 4 hour shift on a fourth day. Starting times might vary, but these shifts could be on the same days of the week, each week. Ms. Raby made no inquiries of Ms. Johnstone as to her efforts to find childcare, or the reasons behind her childcare provision difficulties, but simply applied the CBSA unwritten policy.

[98] With respect to working the fourth day offered, this was not viable for Ms. Johnstone. As she could not work full-time in any event, she did not want to incur the cost of childcare for a shortened 4th day. She did not know if she could arrange a fourth day's coverage, but even if she could, the cost of getting to and from a daycare and to and from work added to the daycare costs themselves, negated the real benefit to her earning an extra 4 hours of wages.

[99] After her first child was born, Ms. Johnstone was able to arrange childcare coverage on Fridays, Sundays and Mondays. As stated, she was prepared to work 13 hour shifts and overtime on those days. Because the Respondent would not consider this suggestion as relayed by Ms. Gerstl, and would not allow her to work 36 hours per week, she ultimately accepted the 10 hours only on each of the three days she had childcare through family members.

[100] Ms. Johnstone testified that shortly after her return to work after her first maternity leave, she asked her employer if she could remain on full-time status and characterize those hours not worked as leave without pay. She was aware at the time that leave without pay was pensionable. The Respondent would not allow her to do this. She also inquired about "topping- up" the difference to enable her to keep the equivalent of full-time pension benefits, but the Respondent did not allow this either. The CBSA did not dispute this application of its unwritten policies.

[101] Ms Johnstone further testified, and this Tribunal accepts, that if she had been allowed to work full-time hours over the three days she requested, that she would have found a way to handle her childcare responsibilities to be able to work those days, both after the birth of her first child and her second child. She did ask her employer, before her return from her second maternity leave, to allow her to work full-time hours over 3 days, but was again refused.

[102] Ms. Johnstone testified that she therefore worked even less than 30 hours per week after the birth of her second child, because she had been forced to give up on the possibility of full-time static shifts, and had greater family responsibilities. Again, management for the Respondent made no inquiries of Ms. Johnstone as to her particular circumstances.

[103] In addition to having her pension and benefits pro-rated, Ms. Johnstone testified that as a part-time employee she missed out on training opportunities, was not permitted to become an acting Superintendent, nor work on Special Teams. Overtime is also paid on a lesser basis to part-time employees when compared with those working full-time.

[104] Ms. Johnstone knew and named workers who had returned from maternity leave and been given full-time static shifts at PIA. She also knew and named BSOs in other operations that work 13 hours shifts such as in Niagara Falls, ON and Estevan, SK. She did not know at the time that the Respondent could have transferred her to another part of their operations, such as Gateway, where static shifts were the norm. This information became known to her through the complaint process.

[105] Ms. Johnstone was asked as to her knowledge of other BSO couples, i.e. where each partner works as a BSO at PIA. She testified that she knew of 20 such couples out of an approximate workforce of 275 workers. Of those 20 couples, most but not all have children. Of those who have children a small percentage have children under school age, and approximately 8 of the 20 have partners with rotating shift schedules as well. Her testimony in this regard was not challenged by CBSA.

[106] At the time of the hearing, Ms. Johnstone was on unpaid Care & Nurturing Leave covered by the VSSA. Previously, she had been on a one year Relocation of Spouse Leave without pay because her husband was transferred to Ottawa as a trainer. There are relatively new provisions in place that all BSOs carry firearms, and Jason had the qualifications to provide this expanded training. She testified that she would have preferred to be working during both these periods, but as she could not work full-time hours in any event, she took these Leaves.

[107] As both her children will be of school age in September 2010, Ms. Johnstone testified that she intends to return to full-time work at that time. There are provisions in the VSSA that cover situations where a spouse has to leave one city (Toronto) to live in another city (Ottawa) to be with her husband. This situation mandates that she be accommodated with a position in her new place of residence, being Ottawa.

[108] With respect to the workplace generally, in response to questions put by CHRC counsel, Ms. Johnstone testified that neither the Respondent nor the Union had given her any information, written or orally, about the Respondent's accommodation policies or her human rights. She identified co-workers also working part-time who had been refused full-time status requested for reason of childcare responsibilities. She also identified co-workers who were working part-time by choice.

[109] Under cross-examination, Ms. Johnstone was questioned extensively on the nature of her duties as a BSO in terms of the need for focus, sustained attention, maintaining vigilance, assessing risk, handling public aggression, etc. Presumably this was an attempt by Respondent's counsel to adduce evidence through this witness of health and safety concerns with longer shifts. Ms. Johnstone never indicated that she felt she could not handle the longer shifts she had requested.

B. Evidence of Murray Star

[110] Mr. Star has been employed with CBSA since 1990 as a BSO. From 1996 to 2000 he held the position of acting Supervisor for various interim periods, and he has been engaged in training of other BSOs over time.

[111] In or about 1999 Mr. Star was a Union Steward, and from 2003 to 2008 was an Executive Steward representing Union members. At the time of the hearing he was no longer a Union Executive member.

[112] Mr. Star testified that he had his own issues involving the *Act* (in approximately 2001) when his employment terms did not reflect his religious observances regarding the Sabbath and religious holidays. Being of the Jewish faith, he did not want to work from sundown on Fridays through Saturdays, or on the Jewish High Holidays for religious observance.

[113] Initially, his Terminal Chief agreed that he should be accommodated and was willing to allow him to exchange shifts for one year. However, Mr. Norm Sheridan took the position that the entitlement to the observance of a "Holy Day" only related to one event per year, not a weekly ongoing observance. Mr. Star filed a complaint under the *Act*. Mr. Sheridan gave authority to each Terminal Chief to decide the issue based on "operational requirements". The CHRC Investigator found in Mr. Star's favour and an agreement giving Mr. Star the accommodation he sought was reached between the parties with mediation.

[114] Mr. Star has worked alongside Ms. Johnstone and described her work performance as "excellent". He also assisted her with putting forward first her request for accommodation, and later her CHRA complaint when she was not given what she was asking for.

[115] Mr. Star knew upon Ms. Johnstone's return from her first maternity leave that she wanted to work static full-time shifts. Shortly after her return in early January 2004, Ms. Johnstone confided to Mr. Star that she wanted to work full-time static shifts. He was aware that she approached management with her request but she was "rebuffed". He recalled discussing

Ms. Johnstone's request with Norm Sheridan on more than one occasion during the relevant 2004 to 2006 period. He testified that Mr. Sheridan stated to him that Ms. Johnstone would not be given the accommodation she was seeking because if CBSA gave this to her 'everybody would want it'.

[116] Mr. Star testified that he also specifically asked Mr. Sheridan for the operational reasons for his position verbally and in writing, but he never received a response.

[117] Given his long term familiarity with Passenger Operations and the VSSA, and his experience on the Union executive and as an employee representative, Mr. Star stated that granting Ms. Johnstone's request would not have had any adverse effect on the CBSA financially or otherwise. He was also unaware of any negative operational effects resulting from the existing medical accommodations.

[118] Mr. Star confirmed that the Union was open to, and supportive of, special requests for human rights reasons. Mr. Star stated that the Union executive was very supportive of any individual requests as they would never 'infringe on anyone's human rights".

[119] Mr. Star confirmed that, unlike the VSSA in place in 2004, there are 12 hour shifts contemplated in the latest VSSA that came into effect in Fall 2008. It is a 5 days on, 4 days off schedule with multiple shifts starting at different times during the day over a 63 day period. There are approximately 12 shifts scheduled in the Customs and Immigration divisions of the workplace that operate from 5 am through to a midnight shift. He further testified that he could identify at least 5 or 6 workers that work 5 day static shifts.

[120] Mr. Star also testified to personal knowledge of approximately 12 workers who have shift schedules that are specific to that individual for a variety of reasons. He named one co-worker who requested static midnight shifts (10 pm to 8 am) that management agreed to. He confirmed based on exhibits put to him, that there are a number of BSOs who are working static midnight shifts or the same 3, 4, or 5 days each week. For instance, Dedicated Coverage Teams (primarily

"new-hires") might work different hours but are primarily afternoons, and they are fixed for the days they work, typically the busiest periods of Thursday through Sunday. The most popular shift is the evening shift from Noon to 11 pm, or from 3 pm to 3 am, as the younger workers do not seem to prefer an early start.

[121] Mr. Star was unaware throughout his time with CBSA of any co-worker complaints of preferential treatment when accommodation requests were met by management. Mr. Star had not observed any prejudicial impact on CBSA's PIA operations from medical accommodations, nor religious accommodations.

[122] Mr. Star had personal knowledge that management had not stopped BSOs from transferring "body for body", i.e. in equal numbers to maintain the same personnel complement, (for various reasons other than childcare responsibilities) from one part of the CBSA operations to another, e.g. from Passenger Operations to Gateway or vice versa. Mr. Star testified that the nature of the work at Gateway is less demanding and less varied than at Passenger Operations and there is no necessity for any re-training if a BSO goes from Passenger or Commercial Operations to Gateway. Mr. Star was aware of several BSOs who have transferred from Passenger Operations to Gateway.

[123] Knowing that all pension and contractual benefits are pro-rated for those that "self-reduce" to part-time status, Mr. Star was aware of a BSO in Passenger Operations, whom he named, who reduced her hours after she returned from maternity leave but was allowed to put in her unworked hours as leave without pay, and thereby maintain her benefits by paying the full amount into her pension. This was denied to Ms. Johnstone.

[124] Mr. Star was unaware of any official accommodation given by CBSA for family status reasons, and confirmed that there are no written policies requiring a worker who wants static shifts because of childcare obligations to move to part-time hours. It is local management's decisions that carry with respect to scheduling requests. In this case, "local management" means PIA management.

[125] Mr. Star testified as to the exhibited Draft Policy to Accommodate dated June 2007. This 13 page document was given to him in 2007 by John King, a former Union Representative and later the Union President. Mr. King had advised him at the time that he picked it up at an "Occupational Hearing", which is a meeting of senior Union officials and management held from time to time to discuss operational issues.

[126] Mr. Star testified that he used the Draft Policy to Accommodate as part of his negotiations with management on behalf of an employee who was seeking medical accommodation. In the 2007 meeting when he produced it, Mr. Star testified that Ms. Raby claimed to have no knowledge of it whatsoever and that she questioned its authenticity.

[127] After some time, Supervisor Darren Millet who was also present at the meeting, acknowledged that he had seen the Draft Policy to Accommodate before and that it had been circulated to management for management's opinion. Mr. Star was given the distinct impression by Mr. Millet that management was not keen on the Draft Policy to Accommodate. Mr. Star asked Mr. Millet if they (the employees) could be looking forward to its introduction, to which Mr. Millet did not respond. Mr. Star confirmed that there has been no implementation of the provisions of the Draft Policy to Accommodate.

[128] Mr. Star testified that he felt the Draft Policy to Accommodate answers all the employees requests and that something like that document would be "perfect". He offered through CBSA management in the past to work with management to develop a policy on family status accommodation but was ignored.

[129] Mr. Star confirmed that at Gateway, located adjacent to the Airport, there are multiple shifts there. There are 3 day, 12.5 hour shifts, many Monday to Friday day shifts, and Monday to Friday static afternoon shifts, etc. It is Mr. Star's observation that management at Gateway is more willing to accommodate worker requests for specific shifts and times. Gateway only operates from Sunday night through to Friday.

[130] Mr. Star also confirmed that there was a management proposal for "shift bidding" on a rotational non-seniority based system that doesn't impact the needs of the CBSA operation. It has not been implemented however, because management and Union have not been able to ascertain a workable process that does not conflict with the VSSA. It was unclear whether this proposed shift bidding would have alleviated the Complainant's situation, and it was not relied on by either side as an answer to the issues before this hearing.

[131] The Tribunal dealt with the Union's position in 2009 CHRT 14 as the Respondent applied to have the Union added as a party to this hearing on the basis that the Union may share responsibility for any discriminatory conduct that might be found because the VSSA prohibits the Respondent from acceding to the Complainant's hours accommodation requests. The Union took a position in support of the remedies sought by the Ms. Johnstone arguing that those remedies do not require changes to the collective agreement or the VSSA, but only for the Respondent to establish a policy of accommodation based on family status. The Tribunal dismissed the Respondent's application, finding that Ms. Johnstone had not made allegations against the Union nor was there any indication on the record that the collective agreement or the VSSA played a role in management's policies concerning the issues raised by her complaint.

[132] Asked about BSOs working part-time Mr. Star said there were workers who work part-time for family reasons, due to medical restrictions, or by personal choice such as being close to retirement. Generally, when a request based on these reasons is put forward, the BSO sits down with management and a shift that accommodates the particular request is worked out. Generally, part-time workers work afternoon shifts (10 am to 8 pm; 12 pm to 10 pm). Afternoons are the busiest time at PIA so this fits neatly with management's operational goals.

[133] As to his own accommodation for religious reasons, Mr. Star testified that every new shift period (now every 63 days) he sits down with his supervisor and they work out his unique shift. The process typically takes about 5 minutes: 3 to discuss and 2 to make the changes by computer on the shift schedule. He does not work late on Fridays or on Saturdays at all. Sundays

are usually his longest day, i.e. 5:00 am to 3:15 pm. He works at different start times over static days.

[134] Mr. Star stated that the granting of his accommodation request has not opened the "floodgate" on similar requests for religious accommodation. A couple of other BSOs came forward and were quickly dealt with, but that is the extent of it. As to family status requests, under cross-examination Mr. Star described himself as the "maven' of the issue when he was on the Union executive, and that the majority of employees seeking accommodation for family responsibilities would come to him. He stated that not all seeking family status accommodation were seeking static shifts, but a number of them were. When challenged as to whether he and the Union believe that all such requests should be accommodated, he responded that he felt management should accommodate for this reason until it can show undue hardship such as morale being destroyed, the cost being prohibitive, or the occurrence of unacceptable layoffs that would occur.

[135] Mr. Star testified that for BSOs, every hour worked is a pensionable hour, therefore if you work fewer hours you earn less pension benefits. Employee pension contributions are matched by the employer. Other benefits are also based on full-time hours worked of 37.5 hours in a week set as 100%, and therefore fewer hours worked normally lead to a pro-rating of those benefits.

[136] Mr. Star confirmed that part-time staff are paid less for overtime hours put in. He also spoke to an exhibited Part-Time Agreement that management asked workers working part-time to sign, the content of which basically indicates that the signing worker agrees with being assigned part-time hours. This was in place at the time of the complaint, and continues to be used. When Mr. Star was part of the Union Executive, he recommended that staff not sign the Agreement as its language suggests that it operates to take away the worker's ability to return to full-time hours as of right. There was a concern that in the case of an employee who is forced to "self-reduce" such as Ms. Johnstone, the signing of such an Agreement could leave her unable to return to full-time shifts as of right when her circumstances changed. There was no evidence led

that anyone who had not signed it suffered any repercussions, but that the proffering of it by management left the worker feeling that he or she should sign it as a condition of employment.

[137] Mr. Star also confirmed that there is nothing in the VSSA that specifies the maximum number of hours that may be worked by a part-time employee, or limits part-time to 34 hours per week.

C. Evidence of Expert, Dr. Linda Duxbury

[138] Dr. Linda Duxbury was qualified as an expert in strategic Human Resources management including labour force demographics, managing change, and the impact of work-life balance issues on workers. The Respondent consented to Dr. Duxbury being qualified as an expert in these areas.

[139] Dr. Duxbury filed a written report to address the accommodation needs of workers with child care responsibilities, and the nature and impact of any employer's response to accommodating those needs. In the preparation of her Report, she read the Statements of Particulars of both parties.

[140] Dr. Duxbury is a fully tenured professor at Carleton University's Sprott School of Business where she teaches and supervises Masters and PhD courses on topics including organizational behavior, work-life balance issues, and managing change for employees. She also writes on attribution theory (the basic need to understand and explain the causes of other people's behavior) and managing organizational structure to maximize worker performance.

[141] In addition, Dr. Duxbury engages in research, consulting and writing in her field. Her principle areas of research involve the managing of the "people part" of change, i.e. the impact and effects of workplace change on workers, and work-life balance demographics from a strategic point of view. This has been a 20 year field of study and consideration for Dr. Duxbury, and she has consulted with both the private and public sector.

[142] Dr. Duxbury's work and database findings are globally recognized and cited. She spoke of Google Scholar which is a website where only academic referenced, peer-reviewed publications are posted. Her and her colleague's research is cited under "key citations" on that website. The authoritativeness of Google Scholar was not challenged by the Respondent.

[143] A focus of Dr. Duxbury's report and testimony was on "Role Overload" where work interferes with family obligations and/or family obligations interfere with one's work, to the point where the individual feels the stress of never having enough time, and tasks at hand are never complete.

[144] "Work interferes with Family" is the descriptor for when a worker psychologically prefers his or her time spent at work to time spent attending to family obligations.

[145] "Family interferes with Work" is the descriptor for when a worker will sacrifice work for family obligations, such as turning down a promotion, or taking part-time hours, etc.

[146] Dr. Duxbury testified that workplace culture dominates as the predictor of whether a worker feels he/she is in control of the family and workplace interface or not. Childcare availability that can be matched to your work duties makes a difference because there is less stress if the two can be matched.

[147] Workplace culture, i.e. the reality of the workplace, is determined not by one's manager in terms of organizational charts, but the temperament and attitude of one's immediate manager, the person the worker reports to. According to Dr. Duxbury, workplace culture and demands are the "big two" factors impacting "Work interferes with Family" in Role Overload.

[148] A good manager breeds loyalty in his or her team, but a bad manager who is overly demanding and unsympathetic breeds stress and resentment because a worker feels he/she is not heard and not appreciated.

[149] There has been a phenomenal increase in Canada in women in the workforce, and presently 2/3 of Canadian families are headed by dual income earners. This is now the "modal" or norm in Canada. There are also more single working parents in the workforce than males working with a stay-at-home wife. Normally, the latter males earn more than the modal family.

[150] 15% of the workforce, mostly dual income families, have young children. Younger children, defined as age 5 and under, mean increased demand on the parent(s) and reduced parental control over being able to choose variable shifts for work.

[151] Dr. Duxbury emphasized that there is a disconnect often between policy and practice in the workplace. Practice is workplace culture, the worker's actual experience. Speaking generally, she stated that many organizations feel that they have done "their bit" by implementing stellar policies, but do not follow-up on implementation.

[152] An example given by Dr. Duxbury was "telework". She testified that there is an excellent federal government policy on telework, but in reality few engage in it other than on their own time because it is not encouraged by federal government employers.

[153] As to 24/7 operations, work schedules and accommodations have to be individualized to suit that workplace, but Dr. Duxbury felt there were very few operations where flexibility cannot be found if management looks to implement it.

[154] Dr. Duxbury also commented that shift work is a major predictor of a dramatic increase for workers in "work interferes with family" and has the potential to be very problematic.

[155] A lot of these competing tensions have been felt and borne more by women, but with a younger generation of male workers who want to participate more in family life, men are being increasingly impacted as well. The more society denies this reality, the harder it becomes to address it in a healthy way.

[156] According to Dr. Duxbury the data is clear that the predictability of a fixed schedule allows a worker to set up her/his support network effectively. As Canada moves into a seller's market (more jobs available than workers to fill those jobs), Dr. Duxbury poses the question as to how employers can afford not to accommodate workers with young children given the demographic changes in our nation.

[157] Canada's fertility rate is critically low at 1.5. The fertility rate needs to be 2.1 to sustain itself and grow. During the 'baby boom' after World War II, Canada's fertility rate was 4. This decrease will result in a significant shortage in personnel over the next 25 years.

[158] The average Canadian enters the permanent workforce at 25. The average Canadian professional woman has her first child at age 31. This older age is a factor in the numbers of children being born because of fertility issues and time available.

[159] Dr. Duxbury generally observed in her further testimony that recruitment, retention and succession planning have become crucial concerns in Canadian government and business enterprises. In a seller's market for labour, lack of accommodation creates a real challenge to recruit, retain and plan. In Dr. Duxbury's view, doing nothing in this regard has a real and increasing cost attached to it.

[160] According to Dr. Duxbury, the costs associated with ignoring these demographic truths, changing attitudes toward work-life balance, and the impact on workers who are in the midst of trying to manage competing demands result in a workforce were:

- people are overloaded, burned out, stressed, depressed, and have more mental health issues;

- absenteeism increases due to health concerns and exhaustion;

- workers are less committed, less loyal, and less satisfied;

- prescription drug use increases;

- workers are less engaged with lower job satisfaction;

- there are higher turnover rates;

- the public experiences poorer customer services as employees "retire on the job";

- more workers are planning to leave their employment because of family demands and a sense of not being valued.

[161] The real benefit to an employer who is accommodating is the reversing of the above-listed trends. If an employee is in good mental and physical health with sufficient sleep and a feeling of being appreciated at work, Dr. Duxbury testified that it is a pretty safe assumption that such an employee will be more productive and perform better.

[162] Dr. Duxbury testified that being valued is very important in the workplace. We easily have a concept of managing dollar capital but not human capital. A worker who wants to contribute needs to feel valued, i.e. recognized and appreciated. Otherwise, that worker will not give the employer the benefit of his/her skills.

[163] Where an employer is responsive to the concerns of its workforce, it is important to educate the rest of the workers so that they gain an awareness that any added benefit or perceived accommodation that another worker has now may be given to them when they are in need. In order to educate, the employer has to have policies that are unambiguous, transparent and which contain built-in accountability for mis-use. Such educative steps lead to attitudinal change.

[164] Dr. Duxbury underscored her testimony by stating that the data is unequivocal that people will use health care facilities and health professionals less if these work-life balance issues are dealt with favourably. She stated that the "number one coping method" in Canada is cutting down on sleep. This is followed by drinking, smoking, eating poorly, and not exercising enough – all of which have negative health consequences.

[165] Dr. Duxbury was asked by CHRC counsel whether an organization's impressionistic fear over great numbers seeking the same accommodation is well-founded. She responded in the negative because there are a range of people in or at a range of life cycle places with differing needs at any given time. Dr. Duxbury stated that her experience shows that people will generally use the accommodations they need and not misuse them. Her comment was that generally we "don't give people enough credit".

[166] As women make up 47% of Canada's workforce presently, Dr. Duxbury stated that unless accommodations are made for working women when their children are young, there will be fewer women available in the workforce or society will suffer from their choice to have fewer or no children.

[167] Under cross-examination, Dr. Duxbury was challenged on the applicability of her database statistics to the present case. This Tribunal found that it was clear that Dr. Duxbury's data came from a broad range of workers from all sectors in many different job and career positions, who were asked a broad range of questions that addressed the workplace itself and attitudes toward the workplace.

[168] Further, Dr. Duxbury made it clear that she was not suggesting that poor employees be rewarded, rather, that good management and employers who do not silo employee groups off from one another, benefit. She stated that treating each employee the same does not necessarily equate with fairness, as people and their needs are not the same. Some flexibility and individual assessment is appropriate and manageable.

[169] In summary, Dr. Duxbury is stating that as a general framework for the workplace, good management and a supportive workplace culture is a win/win combination for both employers and employees.

[170] In the context of a workplace with rotational shifts, Dr. Duxbury acknowledges that shift work of this type is more problematic for employees, however some of the unpredictability can

be alleviated by sufficient notice and the ability to trade shifts with colleagues. This adds to a worker's sense of control and her/his ability to create support networks. She also noted that the shift a worker prefers today may not be the shift that worker prefers in two years, as a person's needs and demands change over time. The whole of Dr. Duxbury's evidence was presented as generally applicable to the CBSA workplace, but she had not personally observed nor drawn conclusions about the CBSA workplace specifically.

[171] Dr. Duxbury opined that it is naïve to suggest (as the Respondent does) that childcare issues are solely as a result of the employee's choice, when that employee is faced with housing and feeding a family. Dr. Duxbury posed the rhetorical question that although theoretically a person has choice, how real is that choice if there is only one legally and morally acceptable option? Dr. Duxbury's premise is that a person should not have to choose between raising a family and meaningful work that she/he is trained for and has demonstrated his/her ability to perform. She stated that in her opinion the worst employers are those that say they value work-life balance, but don't in fact.

[172] Dr. Duxbury suggests that if an employer puts workable and understandable, fair policies in place, it is then up to the employee to make use of them. Workplace culture is based on observations of the actual environment, and that culture, one's immediate manager, and the ability to inject some flexibility and predictability into one's work life are the best indicators of success.

[173] The best environment is to have policies in place, and then allow managers the authority to deal with people individually so that support is tangible and fits the need. Dr. Duxbury added to this by stating that once a request is satisfied, it is important for the manager to communicate to others the reasons why it was a good management decision. "In the absence of transparency, people assume favouritism."

D. Evidence of Expert, Martha Friendly

[174] The Complainant tendered Martha Friendly for qualification as an expert on childcare policy in Canada, including childcare availability for people who work rotating and fluctuating shifts on an irregular basis. The Respondent objected to this characterization on the basis that Ms. Friendly had not personally engaged in empirical studies, but had only studied available data of which there is not an abundance and of which there is not recent data. The Respondent suggested that Ms. Friendly be accepted only as an expert on childcare policy in Canada. In accepting Ms. Friendly's qualifications as an expert on the basis put forward by the Complainant, this Tribunal found in the description of Ms. Friendly's long writing and teaching career, that she has an overall awareness of the general availability of childcare, both traditional and non-traditional, in Canada for all Canadian workers, and knowledge of factors that affect women in the workforce including the impact of childcare availability on Canadian working women. This Tribunal felt that any concerns that Respondent's counsel had with respect to the reliance on data that was insufficient or dated could be addressed in cross-examination.

[175] Ms. Friendly is the Executive Director of the Childcare Resource and Research Unit "CRRU" in Toronto, Ontario. CRRU is a policy research facility concerned with early childhood education and childcare and family policy. She filed a written report to address the extent to which child care is accessible to employed parents who are working non-standard, rotating, unpredictable hours. The Respondent took the position that Ms. Johnstone had more childcare options that she presented herself as having, and Ms. Friendly's report was tendered by the Complainant to address that position. In the preparation of her Report, Ms. Friendly also reviewed the Statements of Particulars of both parties.

[176] For over 30 years CRRU was part of the University of Toronto, but in 2007 became a separate non-profit organization in receipt of provincial and federal funding. Ms. Friendly is a specialist in policy concerning early childhood education and childcare. She is also part of an international childcare policy community that researches, analyzes data and writes on topics that arise by virtue of her specialization. She is a published author in her field and teaches in the Masters Program at Ryerson University.

[177] Although her evidence revealed that Ms. Friendly is an advocate for increased public funding for childcare options, her evidence of interest to this hearing was her knowledge of availability of childcare in Canada, and there was no suggestion by the Respondent that her evidence on this relevant point was influenced by her policy positions.

[178] Complainant's counsel characterized Ms. Friendly's evidence as meant to inform the Tribunal as to the *bona fide* difficulties a parent such as the Complainant faces in finding third party childcare, a difficulty shared by anyone in the position of the Complainant having young children and a workplace that requires rotational, fluctuating, and unpredictable shifts. This Tribunal found that Ms. Friendly's evidence on these points was reliable.

[179] In her testimony, Ms. Friendly emphasized that the single most difficult factor in accommodating child care is unpredictability. Many factors go into child care decisions but unpredictability of a worker's schedule makes finding paid third-party provider daycare, regulated or unregulated, in a centre or in a private home, almost impossible.

[180] Next most difficult is the need for extended hours, i.e. outside the standard operating hours of approximately 7 am to 6 pm on weekdays. Need on weekends and especially overnights makes availability virtually impossible as well.

[181] Further, Ms. Friendly noted that available childcare spaces fluctuate. A provider who is caring for children in her own home, for example, may not operate such a service once her own children are of school age. However, others may open up that were not previously available.

[182] As Ms. Friendly says there is largely no data on unregulated childcare in Canada, her evidence focused more on available regulated childcare which includes childcare centres and care provided in the care provider's home under provincial regulation. She testified that regulated child care facilities in Canada are very limited, and as a result unregulated care is commonly used. In other words, the need far outweighs the supply.

[183] Reliable data on the availability of extended hours childcare in unregulated settings is likewise not readily available, but this Tribunal can accept anecdotal evidence on this issue supported by Ms. Johnstone's direct evidence.

[184] Ms. Friendly provided some evidence on two major studies done in the 1990s on the availability of extended hour daycare. The results of these studies, not surprisingly, was that there are (or have been) a few programs that offer extended hours or weekend childcare, but there was little use made of weekend or overnight childcare and therefore it was not cost-effective enough to continue to be offered.

[185] This supports Ms. Johnstone's position that the type of childcare she needed was not easily available if at all, and that there are relatively few workers who require third party assistance on this basis, i.e. there are few in number who work rotating fluctuating shifts with frequent overtime, who are also married to someone who works similar shifts.

[186] Taking that reality a step further, coupled with Ms. Johnstone's direct evidence on point there are few BSOs who would need accommodation to work outside the VSSA on static shifts for any period of time. Most workers look first to their spouse, family and friends for childcare assistance, and only if this is not workable or sufficient do they then turn to third party caregivers. Ms. Friendly found it understandable, as does this Tribunal, that most parents would not be comfortable with third party overnight care of their young children.

[187] It is doubtful that Ms. Johnstone or anyone in her similar situation as outlined would find any third party other than family willing to provide reliable childcare for young children based on an unpredictable schedule, even if that schedule is confined to 3 days per week. The provider has set hours and a separate life to live, and even family has to be locally accessible to the worker, therefore unpredictability is devastating for this purpose.

[188] By using family members over a 3 day period, albeit that she and her husband had to transport her children to 3 different locations on these days, she was able to propose to her

employer the most flexible schedule availability possible for her at the time: the same 3 days per week, but not restricted as to start times, location, or length of shifts, and able to accommodate overtime and full BSO responsibilities.

[189] Ms Friendly testified to funding and cost barriers that exist for typical Canadian families. Government-backed maternity leave periods have lengthened over the past 30+ years, moving to a full year in 2003. Over the same time period, government tax credits and child benefit programs have also increased for families. This has helped, and is not offered in every country such as the United States. As a result, U.S. data on this topic is largely unreliable when discussing Canada.

[190] Also, there are subsidies available to lower income families (but only if regulated childcare is used), but not to middle income families. The majority of Canadian families including Ms. Johnstone's, fall into the middle income category by definition and these are the ones who have difficulty affording third party care, but have too much income to qualify for subsidies.

[191] Ms. Friendly quoted one of the main American experts in her field, Harriet Presser (a demographer at Harvard University), who wrote a 2003 book on the subject. Ms. Presser stated that it is "rare that you have two people working unpredictable shifts who are a couple", and that the main arrangement for most couples is spouses and family. Ms. Presser has written extensively in this area and coined the term "split shift families" referring to dual income couples who work different shift schedules in order to accommodate childcare.

[192] CBSA's counsel asked Ms. Friendly numerous questions under cross-examination about the many factors that go into a parent's decision to access third party childcare. Ms. Friendly acknowledged that many factors go into such choices including cost, type of care, location, availability, quality, and comfort with the provider. The type of shift and hours worked is not the only determining factor.

[193] Although it seems evident that any number of factors may go into individual choices, this complaint deals with a situation where there was no available third party childcare in any event to cover Ms. Johnstone's work schedule, and neither her spouse nor other family members could fill the void entirely.

[194] In such a situation as this, the parent either must seek accommodation through her/his employer or no longer work for that employer (an alternative covered in Dr. Duxbury's testimony). Ms. Johnstone wanted to make a career with CBSA. She had invested time, taken training specifically for the position, and enjoyed the work. By her performance reviews and her own assessment she was good at her job. It does not seem unreasonable to this Tribunal that Ms. Johnstone would want to remain employed with CBSA, and would ask for accommodation on her shift schedule until the children were of school age, i.e. up to age 5/6.

[195] Ultimately, Ms. Friendly confirmed that the ability of a parent to find suitable third party childcare falls on a continuum of difficulty depending on that particular parent's needs. She stated that she felt that Ms. Johnstone's situation was "one of the most difficult childcare situations that she could imagine" based on: different shifts at different times and different days including weekends; overtime; shifts at all hours of the day or night; and her spouse worked a similar type of job schedule.

E. *Prima Facie* Case

[196] The test to establish a *prima facie* case is set out in *Martin v. Saulteaux Band Government* (2002) CanLII 23560 (C.H.R.T.) at paragraph 24 *(Martin),* and *Ontario Human Rights Commission v. Simpson Sears Limited, (O'Malley),* [1985] 2 S.C.R. 536, at paragraph 28 *(O'Malley)*.

[197] Essentially, a *prima facie* case is established if the allegations by the Complainant are covered, and if believed, the evidence is complete and sufficient to justify a verdict in Ms. Johnstone's favour, in the absence of an answer from the Respondent. If the Tribunal answers in the affirmative to this, then the onus shifts to the Respondent to show that despite the

discrimination found it had a Bona Fide Occupational Requirement (BFOR) to engage in it, and that accommodation of those affected would amount to undue hardship for the employer.

[198] At this stage, the two questions before this Tribunal are:

- Did CBSA engage in a discriminatory practice, directly or indirectly,

(b) in the course of employment, to differentiate adversely in relation to Ms. Johnstone, on the prohibited ground of family status?

- Did CBSA engage in a discriminatory practice by establishing or pursuing a policy or practice, or did the CBSA enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment, that deprived or tended to deprive Ms. Johnstone of any employment opportunities on the prohibited ground of family status?

[199] In the ordinary course, to establish a *prima facie* case the Complainant need only demonstrate that a policy has had some differential impact on her due to a personal characteristic which is recognized as a prohibited ground of discrimination. *Morris v. Canada (Canadian Armed Forces),* [2005] F.C.J. No. 731, at paras. 27-28 (*Morris)*

[200] In this inquiry, the ground of discrimination alleged is family status. There is a difference in position between the parties as to the definition of family status within the meaning of Sections 3, 7 and 10 of the *Act*, and therefore this Tribunal must address the meaning of family status before it can determine whether a *prima facie* case has been made out.

[201] Additionally, it is the position of CBSA, that the ground of family status carries with it a higher burden of proof to establish a *prima facie* case, than other grounds enumerated under the *Act*. In this proposition, CBSA, relies on the case of *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, [2004] C.H.R.D. No. 33 *(Campbell River),* and subsequent decisions of provincial human rights tribunals and federal arbitrators that have followed *Campbell River's* approach on this issue.

Family Status

[202] Turning first to what it is meant by "family status" in the *Act*, Ms. Johnstone cites the previous CHRT rulings in Brown initially discussed in Section IV above, and *Wolden v. Lynn*, [2002] C.H.R.D. No. 18 *(Wolden)*.

[203] The facts in Brown are very similar to this complaint and the Respondent in Brown is the predecessor of the CBSA. The CHRT found that the complaint was substantiated in Brown, and in doing so considered the nature of 'family status'.

[204] At page 15 of *Brown*, the Tribunal defined the ground of family status as follows:

> (a) "…the evidence must demonstrate that at an 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."

[205] At page 20 of the *Brown* decision, the Tribunal stated that the ground of family status contemplated:

> (a) "… duties and obligations within the family", and "that the purposive interpretation to be affixed to s.2 of the CHRA is a clear recognition within the context of "family status' of a parent's rights and duty to strike a balance coupled with a clear duty on the part of any 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."

[206] Ms. Johnstone argues that it is well established that the purpose of human rights legislation is to protect and enshrine the rights and dignity of Canadian. As a result, human rights codes must be interpreted in a broad and liberal manner.

[207] Ms. Johnstone also relies on *B. v. Ontario (Human Rights Commission),* [2002] S.C.J. No. 67 *"B. v. Ontario"* at paras. 44 – 45, wherein the art confirmed that to establish discrimination, family status claimants need only demonstrate that they were "arbitrarily disadvantaged on the basis of 'family status'. In other words, the Supreme Court adopted a broad and liberal interpretation to the *Act*.

[208] Ms. Johnstone agrees that the family obligation at issue must be substantial, however once that determination is made, then the Complainant states that interference with that obligation is sufficient to make out a *prima facie* case.

[209] Ms. Johnstone also raised the cases of *Hoyt v. Canadian National Railway,* [2006] C.H.R.D. No.33 *(Hoyt).* In Hoyt, the Complainant was a railway worker who sought accommodation from her employer to work a certain shift that would allow her to make childcare arrangements for her child. Again, the CHRT accepted that the scope of family status as encompassing childcare obligations of the nature faced by Ms. Johnstone.

[210] The interpretation that 'family status' within the meaning of the *Act* includes family and parental obligations that include childcare has been adopted in numerous decisions:

> Wight v. Ontario (Office of the Legislative Assembly), [1998] O.H.R.B.I.D. No. 13 (Wight)
>
> Canada Post Corp. v. Canadian Union of Post Workers (Somerville Grievance, CUPW 790-03-00008, Arb. Lanyon), [2006] C.L.A.D. No. 371 at para. 66
>
> Rennie v. Peaches and Cream Skin Care Ltd., (December 4, 2006) Human Rights Panel of Alberta (unreported) at paras. 51, 53-54
>
> Canadian Staff Union v. Canadian Union of Public Employees (Reynolds Grievance), [2006] N.S.L.A.A. No. 15
>
> Ontario Public Service Employees Union v. Ontario Public Service Staff Union (DeFreitas Grievance), [2005] O.L.A.A. No. 396 at paras. 19 -21

[211] This Tribunal notes that even the *Campbell River* decision and decisions that have followed that ruling and adopted the same approach, still accepted that childcare obligations are within the scope of the definition of 'family status' within the *Act*. The debate between this line of cases and those cited by Ms. Johnstone is with the threshold required in such cases to establish a *prima facie* case, not with the meaning of 'family status'.

[212] The B.C. Court of Appeal in *Campbell River* reversed the arbitrator's decision on this point and acknowledged that childcare responsibilities (in this case by a mother to provide for a son with behavioural problems) are within the scope of 'family status'.

[213] The same can be said of the Federal Court's judicial review of the initial CHRC dismissal of Ms. Johnstone's claim, referred to in paragraph 68 above. Mr. Justice Barnes, in overturning the CHRC dismissal of Ms. Johnstone's complaint, took no exception to her complaint falling within the definition of 'family status' within the *Act*. This decision focused on a criticism of the approach taken in the *Campbell River* line of cases as to whether interference is sufficient, or one has to find a "serious interference" with the Complainant's protected interests. *Johnstone v. Canada (Attorney General)*, [2007] F.C.J. No.43 *(Johnstone)*

[214] CBSA argues for a more restrictive interpretation claiming that the law on this point is unsettled.

[215] CBSA proposes that protection is not provided with respect to family obligations at all, as only distinctions based on one's actual or 'absolute status of being in a family relationship is meant with the inclusion of 'family status' in the *Act*. CBSA denies that protection extends to the activities or responsibilities relating to one's status as a parent.

[216] In *B. v. Ontario* the Supreme Court of Canada spoke to the term "status" as implying membership in a class or group encompassing both the absolute definition and the relative definition requiring the existence or absence of a relationship with another person. The decision, as stated, also spoke to an arbitrary disadvantage suffered, but did not set out a comprehensive

definition of "family status" within the meaning of the Ontario Human Rights Code, which is provincial legislation akin to the federal *Act*. At paragraph 57 of the decision, the Court did speak of a person experiencing differential treatment on the basis of "an irrelevant personal characteristic" that is enumerated.

[217] CBSA urges this Tribunal not to follow earlier CHRT decisions in *Brown, Wolden* and *Hoyt*. CBSA suggests that this Tribunal adopt a purposive interpretation that does not "overshoot the actual purpose of the right or freedom" as stated in *R. v. Big M Drug Mart,* [1985] 1 S.C.R. 295, para. 117.

[218] CBSA warns against the perils of an approach that presumes any conflict between work and family obligations amounts to discrimination on the ground of 'family status'. In this regard, CBSA cites the case of *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de Hopital General de Montreal,* [2007] S.C.J. No. 4, at para. 49, per Abella J. *(McGill)*, to assert that 'family status' should not be interpreted as favouring and promoting particular familial arrangements as not every situation cannot be afforded the protection, but only those that are truly discriminatory.

[219] This Tribunal does not find Madam Justice Abella's statement in conflict with the complaint put before us by Ms. Johnstone.

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

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

[222] CBSA set out in its written submissions information on the history of the ground 'family status' being included in the *Act* and provincial human rights codes, including a reference from Hansard quoting the then federal Minister of Justice's address on December 20, 1982. The Minister of Justice, 27 years ago, stated that the inclusion of family status "means you cannot have guilt by association or failure to employ somebody by association because someone else in his family has a weakness of some kind…You cannot use this as reason to deny this person employment. Each person is to be judged on his or her own merits and abilities, not on his family status."

[223] In *Canada (House of Commons) v. Vaid*, 2005 SCC 30, the Supreme Court of Canada applied Elmer Driedger's modern approach to statutory interpretation to the *Act*, referencing his 2nd edition book *Construction of Statutes*. This approach specifies that: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". In other words, the supposed "intention of Parliament", to the extent that this can be divined from the words of a Minister, is not the only determinative factor. This is especially so when the context and the scheme of the *Act* suggest otherwise.

[224] When the Minister made the statement in 1982 relied upon by the Respondent, the duty to accommodate in employment did not appear in the *CHRA*. More particularly, the phrase "have their needs accommodated" was not in the "purpose clause" of the *Act* (s. 2). The inclusion of this concept in the purpose clause, as separate and distinct from its inclusion in s. 15, has led to a broadening of interpretation of the *Act*, in that equal opportunity has come to mean more than just not being hindered by stereotypes or prejudice ("guilt by association"). It involves taking into account people's needs. Accordingly, family status in this Tribunal's view should not be limited to identifying one as a parent or a familial relation of another person. It should include the needs and obligations that naturally flow from that relationship.

[225] While the historical context put forward by the Respondent is a factor, this Tribunal does not find it persuasive as an exhaustive understanding of the present meaning of 'family status'

within the *Act*, given the legislative changes and jurisprudence that has evolved and developed over the more recent past.

[226] CBSA also cites the *Whyte* grievance and the *Simcoe Country District School Board and Ontario Public Service Employees Union, Local 330,* (2002), 103 L.A.C. (4th) 309 *(Griffith)* grievance.

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

[228] In G*riffith*, a parent who sought to use sick leave credits to leave work early twice a week to meet her child's needs was denied. The arbitrator found the employer's refusal did not amount to discrimination on the basis of family status.

[229] This Tribunal does not find the Whyte or Griffith grievance decisions persuasive.

[230] Both parties rely on their own interpretation of Section 2 of the *Act* as it relates to their arguments, but this Tribunal finds nothing in Section 2 that creates a restrictive and narrow interpretation of 'family status'.

[231] To the contrary, the underlying purpose of the *Act* as stated is to provide all individuals a mechanism "to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society…" It is reasonable that protections so afforded include those naturally arising from one of the most fundamental societal relationships that exists, that of parent to child. The fact that the language of Section 2 mentions "lives that they are able and wish to have" carries with it the

acknowledgement that individuals do make separate choices, including to have children, and that the *Act* affords protection against discrimination with respect to those choices.

[232] CBSA relies on *Schaap v. Canada (Canadian Armed Forces)*, [1988] F.C.J. (*Schaap)*, a case dealing with marital status discrimination in the assigning of military housing, and quoted Justice Marceau from page 3 of that decision in its final submissions. Taking some of the same quotations used by CBSA, this Tribunal interprets them for purposes of this complaint differently. His Lordship stated that "decisions are to be made on the basis of individual worth or qualities and not of group stereotypes. He went on to posit as follows: "…is not this in perfect keeping with the purpose of all human rights enactments….to prevent the victimization of individuals on the grounds of irrelevant characteristics over which they have no control, or with respect to which their freedom of choice is so vital that it should in no way be constrained by the fear of eventual discriminatory consequences…"

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

[234] Having found that the enumerated ground of 'family status' does include childcare responsibilities of the type and duration experienced by Ms. Johnstone, one has to then turn to the two questions set out in paragraph 199 above, to determine whether Ms. Johnstone has made out a *prima facie* case on this ground absent CBSA's response in keeping with *Martin* and *O'Malley*.

[235] Again, the parties differ on what is required for Ms. Johnstone to make out a *prima facie* case. Ms. Johnstone adopts the low threshold set out in *Morris*. Following *B. v. Ontario* would also allow that Ms. Johnstone need only show that she was arbitrarily disadvantaged based on

her family status. This Tribunal finds that CBSA adopted an unwritten policy and practice of arbitrarily forcing any person who sought accommodation for reasons of family obligations such as childcare for young children, to work 34 hours per week or less in exchange for a schedule outside the regular VSSA schedule. Although CBSA made individual assessments and changes for those seeking accommodation on medical and religious grounds, and broke their own arbitrary policy fairly often, CBSA was unyielding in Ms. Johnstone's case.

[236] CBSA adopts the reasoning in *Campbell River* that there is a different and higher threshold for family status discrimination cases. In *Campbell River*, the Court found that the CHRT's rulings in both *Brown* and *Wolden* were "overly broad". The B.C. Court of Appeal did not follow the Supreme Court of Canada's direction in *O'Malley* and *British Columbia (Public Service Employee Relations Commission) v. The Government of the Province of British Columbia as represented by the Public Service Employee Relations Commission,* [1999] 3 S.C.R. 3 *(Meiorin).*

[237] Instead, *Campbell River* adopts a new and greater test where a determination of bad faith on the part of the employer is undertaken, and the analysis calls for a change in a term or condition of employment which results in a serious interference with a substantial parental duty or obligation of the employee. *Hoyt* rejected this restrictive analysis as does this Tribunal.

[238] This Tribunal agrees with Ms. Johnstone's position that an individual should not have to tolerate some amount of discrimination to a certain unknown level before being afforded the protection of the *Act*. Justice Barnes agreed with this position in *Johnstone*. Either there is or is not discrimination found in any given complaint process. If so, there cannot be a hierarchy of grounds. The *Act* does not suggest this.

[239] In the recent decision of *Rajotte v. The President of the Canadian Border Services Agency et al,* 2009, PSST 0025 dated August 7, 2009 *(Rajotte),* the Public Service Staffing Tribunal considered a complaint by a female employee against the same Respondent as in this

complaint. The Complainant was a mother who alleged that she had not been considered for a certain position or positions due to an abuse of authority by the CBSA and her family status.

[240] The Tribunal in *Rajotte* followed the reasoning and decisions in *Brown, Wolden, Hoyt*, and *Johnstone* with respect to the definition of family status, as well as the test for a prima facie case set out in *O'Malley* and *Meiorin*. *Rajotee* expressly rejects the approach in *Campbell River*.

[241] CBSA sought leave to address the *Rajotte* case before this Tribunal as *Rajotte* was released just two weeks after submissions were completed in this hearing. However, this Tribunal decided that further submissions were unnecessary. *Rajotte* is self-explanatory and this Tribunal finds it relevant to this complaint, although not binding.

[242] This Tribunal finds that Ms. Johnstone has made out a *prima facie* case of discrimination contrary to Sections 7 and 10 of the *Act*, in that CBSA engaged in a discriminatory and arbitrary practice in the course of employment that adversely differentiated Ms. Johnstone on the prohibited ground of family status. CBSA engaged in a discriminatory practice by establishing and pursuing an unwritten policy communicated to and followed by management that affected Ms. Johnstone's employment opportunities including, but not limited to promotion, training, transfer, and benefits on the prohibited ground of family status.

[243] The policy and practice that CBSA established and pursued is based in a view that family status within the meaning of the *Act* does not include family obligations of the nature of Ms. Johnstone's. CBSA forced Ms. Johnstone to self-reduce to part-time status thereby adversely affecting her with respect to employment.

[244] CBSA accommodates those seeking accommodation for medical and religious reasons by creating schedules for them outside the VSSA, some on a permanent basis. Additionally, CBSA has not uniformly followed this arbitrary discriminatory unwritten policy resulting in some employees in the same category as Ms. Johnstone being accommodated with full-time hours and static shifts, or full-time benefits although on part-time hours and static shifts

[245] It is pertinent to note that the CBSA and its predecessors have been under CHRT and CHRC direction since 1993 to develop accommodation policies for those seeking accommodation on the ground of 'family status' and has been aware that those bodies have interpreted 'family status' as equating to family responsibilities of the type and nature that Ms. Johnstone faced. Ms. Johnstone's testimony was unequivocal that she was not asked about her personal situation or the difficulties she was facing, but dealt with according to the above-described arbitrary unwritten policy of either working under the VSSA or self-reducing to up to 34 hours if seeking static shifts. There was no attempt to individualize Ms. Johnstone's situation by CBSA, because they have not treated such requests as falling within the ambit of federal human rights legislation.

[246] This Tribunal asked Mr. Star if there is anyone at CBSA working now or in the past two years with the title Employment Equity Advisor or Disability and Accommodation Case Coordinator, as recommended in the Draft policy, and there is none.

[247] Mr. Star testified that there are two named Supervisors that specifically coordinate (and monitor) the medical accommodation issues. They do not have decision-making authority. There is a committee made up of Mr. Norm Sheridan, Ms. Rhonda Raby, Mr. Darren Millet and perhaps others that look at case by case medical accommodation requests.

[248] When this Tribunal asked who dealt with accommodation requests for reasons other than medical, Mr. Star testified that the same two Supervisors amass the information, and put the requests forward to the same committee to make the decision.

[249] Further this Tribunal asked Mr. Star if a CBSA National Job Accommodation Fund exists as recommended in the Draft policy, and there is none.

VI. Respondent's Case

A. Evidence of Norm Sheridan

[250] Mr. Sheridan is the District Director of Passenger Operations for CBSA at PIA, one district within the CBSA's Greater Toronto region operation. He has held that senior position since April 1, 1999 under CBSA's predecessors as well.

[251] The position of CBSA, as articulated by Mr. Sheridan and Respondent's counsel, is that workers seeking accommodation for childcare obligations are doing so due to choices they have made in life, for which the employer bears no responsibility. Hence, while the Respondent is prepared to make some adjustments to such a worker's schedule, it refers to these adjustments as "arrangements" as opposed to "accommodations".

[252] Prior, as stated above in paragraph 58, Mr. Sheridan held senior management, operations and human resources portfolios within PIA and the Greater Toronto Regional Office. Overall, Mr. Sheridan has worked for CBSA or its predecessors since 1979 starting as a Customs Inspector.

[253] Because of his extensive background with the Respondent employer and his senior responsibilities, Mr. Sheridan was very knowledgeable about CBSA structure as it relates to the functions at PIA, and as it relates to this hearing. He had an excellent recall of dates of transition from one predecessor of CBSA to another. He confirmed that CBSA was created as of December 12, 2003.

[254] Upon the creation of CBSA, the customs parts were taken out of the Canada Customs and Revenue Agency (CCRA), the immigration inland enforcement piece out of Citizenship and Immigration, and the food, plant and animal inspection piece out of the Canadian Food Inspection Agency. As of October 8, 2004, the port of entry component of Citizenship and Immigration joined CBSA to create the full agency as it is known today.

[255] Mr. Sheridan described the mandate of CBSA as at January 2004 at PIA as the facilitation of movement of low risk persons and goods into Canada, while at the same time detecting and interdicting high risk persons and goods including agricultural products such as plants, and animals. This was all done as part of providing for the safety and security of Canadians.

[256] At that time, the immigration component of the port of entry piece had not yet come over to PIA, however, the long-standing customs mandate gave CBSA at PIA authority to perform "primary immigrations functions" or "front end screening".

[257] In 2004, there were 3 operating Terminals including the East Hold mentioned previously. BSO responsibilities at Passenger Operations included and still include:

- The primary inspection line "PIL": where the public sees inspectors in booths;

- Immigration: where travelers are referred by the PIL such as first-time immigrants, refugee claimants, those holding visas, and persons who should not be allowed entry due to criminality; and

- Customs secondary "Secondary": where travelers pay duties, and taxes and baggage is inspected.

[258] PIL determines whether to refer a traveler to Secondary where BSOs look at travelers' documents, the reason for the referral, and determine what other steps have to be taken including detention or seizure. The referral is primarily done through a coding system written on a traveler's customs declaration.

[259] There are still a few BSOs who have not been trained in the full range of current duties in Food, Immigration and Customs. Since July 2005, the regular training of BSOs at Rigault, Quebec now includes training in all duties including familiarization with all relevant legislation.

This includes Control and Defensive Tactics Training (CDP Training), and all the processes a BSO would have to do in the ordinary course of one's work. BSO training takes approximately 14 weeks. There is further training available as well, and some training given later is location specific.

[260] BSOs are responsible for the control of firearms, controlled substances, agricultural goods including plants, animals, seeds and dairy products. The inspection of goods can also include explosives, telecommunication products, precious metals, drugs, weapons, child pornography, and controlled goods such as cultural properties, historic artifacts, precious gems like diamonds, etc.

[261] At Gateway, Mr. Sheridan described the BSO work as the examination of mail coming into Canada including parcels and documents handled at both a primary and secondary inspection line. The BSO work at Commercial Operations involved limited interaction with people where the focus is primarily on good imported into Canada for commercial purposes.

[262] Mr. Sheridan confirmed that BSO work performed in 2004 and currently at Passenger Operations, Commercial Operations and Gateway is set forth in one universal job description and classification.

[263] Mr. Sheridan described the Director's Role, i.e. Mr. Sheridan's role as ensuring the efficient and effective operation at PIA for the processing of travelers and their goods. This is done through 10 subordinate Chiefs of Operations. Each of those Operational Chiefs, with the exception of one working on a particular project have Superintendents who report to them. The Superintendents are each assigned a crew of BSOs for whom they are responsible, and it is the BSOs on the front lines "who get the job done".

[264] Mr. Sheridan stated that he is given a budget allocation every year by his boss, the Regional Director General for the Greater Toronto Region. There is an expectation that he constantly look at his program and identify ways to improve on the program within the

parameters and guidelines set out by the Region, and within the applicable legislative framework.

[265] Mr. Sheridan was taken through extensive detail on the PIA operations and structure, produced organizational charts, and various example work schedules to show the intricacies of the VSSA as a BSO works through any given period on rotating, fluctuating shifts.

[266] Although extensive testimony was given on PIA operations, the most pertinent testimony from Mr. Sheridan with regard to the complaint before this Tribunal, centered around CBSA rationale regarding accommodation requests, CBSA's view of such requests based on family responsibilities, the methodology used to deal with medical and religious accommodations, and the manner in which CBSA and its predecessors have dealt with the various pronouncements set out in Part IV above regarding the treatment of family status requests within CBSA and at PIA specifically.

[267] There is no doubt that PIA is a busy international operation with an important mandate that by necessity operates round the clock to fulfill that mandate. Ultimately, however, this Tribunal found that the level of detail on operations did not really assist in the fundamental questions before it.

[268] CBSA does not view employees who require accommodation for childcare responsibilities as a group that falls within the protection of the *Act*. CBSA's position is that such employees who cannot work the VSSA shift schedule, have the options of working part-time, taking Care and Nurturing Leave from 3 weeks to 5 years (leave without pay), or quitting. Mr. Sheridan's summed up the position as "People make their own choices."

[269] Under cross-examination Mr. Sheridan testified that all non-medical accommodation requests are referred to separately as "arrangements" including requests based on family reasons, lifestyle choices, educational requirements, and religious observance. He stated that previously all of these requests had been referred to by management as "accommodations" but there was an

active decision taken to "get control over the real situation" by separating the language out to better describe the difference.

[270] When asked under cross-examination if there were many requests from employees returning from maternity leave or those with children to be accommodated outside of the VSSA, Mr. Sheridan replied in the negative.

[271] Mr. Sheridan pointed out that under the Collective Agreement there are a number of differently titled Leave Without Pay provisions for parents, as well as other assistance such as the Employee Assistance Program that provides free services for a range of issues like referrals for medical concerns, referrals for elder and childcare, and counseling for addictions and mental illness.

[272] Mr. Sheridan stated that he was personally unaware of CCRA's or CBSA's strategies and goals to support work-life balance, and that he had seen nothing on the issue from Headquarters. Even though he had been Director of Human Resources in the Greater Toronto Area region of CBSA in 1993 when *Brown* was decided, he has no knowledge of any policies arising from that decision being adopted by the CBSA or its predecessors.

[273] With reference to the operational reason for the VSSA, Mr. Sheridan testified that rotating all BSOs through a 24 hour shift schedule allows employees to equally share in both popular and unpopular shift times. It also exposes BSOs to different types of travelers and different degrees of traffic.

[274] Midnight shifts are the least popular, however some employees prefer to work only the midnight shift. As a result, in the latest VSSA at PIA static midnight shifts have been incorporated.

[275] Mr. Sheridan also testified that the new VSSA allows some employees to work static days of the week, i.e. Thursday through Sundays or Fridays through Monday. This is offered

primarily to new employees known as Port of Entry Recruits. These BSOs are assigned to the Dedicated Coverage Team. This, of course, is what Ms. Johnstone had asked for – static days with no particular shift within those days sought.

[276] Mr. Sheridan confirmed that he had no hand in the decision to create and maintain an Accommodations Log at PIA which he had seen being used since about 2000-2001. He recalled that management needed to manage accommodation requests. At one time anyone who was part-time was placed on the Accommodations Log regardless of the reason that the employees had moved to part-time. There was about 32 – 35 people listed on the Log.

[277] Mr. Sheridan testified that his boss, the Regional Director, wanted to separate out medical accommodations from other umbrella reasons for better tracking. Some employees had a dual reason for wanting to work outside the VSSA, so they stayed listed on the Accommodations Log. Otherwise, if an employee was being accommodated for medical reasons, their names were no longer entered on the Log. Medical accommodations were seen and treated as Human Resources issues, but other requests as purely operational.

[278] Mr. Sheridan testified that over the past several years it had become necessary from a management perspective to better manage employees working part-time to improve consistency. It was felt, for example, that there were certain employees working a 36 hour week in order to get the flexibility and perhaps static shifts that can be afforded with part-time status outside the VSSA. For this reason, an unwritten policy was adopted that anyone working part-time should be allowed to work only to a weekly maximum of 34 hours. It was felt that this would discourage employees from seeking part-time status so close to full-time hours, just to get around the VSSA.

[279] Because of the decision to treat employees seeking accommodation for childcare obligations as reflecting just personal choice (the same as someone who went back to school or chose part-time for lifestyle reasons) this brought such employees within the ambit of the 34 hour maximum policy for part-time.

[280] Another unwritten CBSA policy is that part-time employees should not work greater than 10 hours per day. Mr. Sheridan expressed concern that an employees work performance might suffer in terms of energy and focus, if permitted to work a longer day. This is why Ms. Johnstone was told that she could not work a 13 hour shift 3 days per week, but only 10 hours 3 days per week, with another 4 on a separate fourth day.

[281] However, Mr. Sheridan acknowledged that there are part-time employees working more than 10 hours per day, and that this has been permitted if it also meets "operational needs". In addition, Mr. Sheridan conceded that both today and in 2004 many part-time BSOs were working shifts longer than 10 hours and some more than 34 hours per week.

[282] Gateway and land border sites, for example, have many employees working greater than 10 hour shifts as well. Certainly, at the land border sites Mr. Sheridan agreed that BSOs must be ever-vigilant and prepared to meet and deal with the unexpected.

[283] CBSA offered no evidence to substantiate this impressionistic view that a BSO shift of more than 10 hours would have a negative operational and performance impact.

[284] Mr. Sheridan agreed with the other witnesses that the time of greatest operational demand at PIA is the afternoon period from approximately 14:00 to 22:00 hours. As it turns out, the majority of part-time employees who have the option of working a preferred static shift, choose this time period. Mr. Sheridan acknowledged that this alignment would make accommodation on a full-time basis fairly easy, and Ms. Johnstone was willing to work over this time period on the 3 days she requested. However, its arbitrary policy was in place and there was no individual assessment of Ms. Johnstone's request as outlined.

[285] With medical accommodation requests separated out from other "arrangements", and the recognized requirement by CBSA that such accommodations are required under human rights legislation, a system has evolved to deal with medical request on an individualized basis. Two

managers are tasked with coordinating and monitoring such requests, i.e. gathering in medical documentation and other factual background information to 'package' the request.

[286] The request is then sent on to a regional committee is called the Accommodations Subcommittee. This committee, upon which Mr. Sheridan sits, is composed of CBSA management representatives. It meets regularly, and is given a schedule of requests to consider with the relevant background information. Decisions are taken at this level to grant the request, ask for further information or clarification, or deny it with reasons given. To assist in these decisions, the committee members follow a CBSA policy called Interim Guidelines for Medical Accommodations.

[287] Minutes of these meetings were not produced until mid-way through the hearing after Mr Sheridan had testified to the existence and practices of the committee. Those minutes revealed that the committee does have before it accommodation requests other than for medical which Mr. Sheridan testified should not have been brought before the committee. The minutes also revealed that at times accommodations requests had been granted for employees who had children with medical needs.

[288] In other words, CBSA at PIA has found an efficient and individualized way to deal with medical accommodation requests. It also has accommodated an employee with a child with medical needs, but it will not recognize nor individually assess an employee who seeks accommodation to care for a healthy child or children.

[289] Mr. Sheridan was asked under cross-examination if his operating budget constrained CBSA's ability to respond to accommodation requests, and whether CBSA was under any budget constraints that prevented it from accommodating Ms. Johnstone's request specifically. Mr. Sheridan's response was, "no".

[290] In a follow-up question, Mr. Sheridan was asked if CBSA/he had taken any steps to assess the costs of not addressing work-life balance issues. His response was, "no".

[291] Mr. Sheridan confirmed that the Treasury Board is the legal employer of BSOs and that he would have to be given directives on work-life balance issues from Treasury Board.

[292] An exhibit was put to Mr. Sheridan aimed at 24/7 operations and authored by Human Resources and Skills Development Canada with the heading, "Work/Life Balance and New Workplace Challenges – Frequently Asked Questions for Organizations" "Work/Life Balance FAQs". He was asked what he has done to respond to these directives.

[293] Mr. Sheridan responded that "we negotiated a VSSA to allow greater flexibility to allow employees to get that predictability." This new VSSA allows regular employees more time off on weekends. Mr. Sheridan also felt that the imposed 34 hour or less part-time schedule for those seeking family status accommodation was, in itself, consistent with supporting work-life balance.

[294] Among the information in the Work/Life Balance FAQs was the following:

(a) **"How can our organization do this when we are expected to operate in a 24-7 environment?**

> There isn't any work environment, any job, any position, that can't be in some way designed to allow the individual to achieve a sense of work-life balance. The real question is, how can we, in a 24-7 environment, a shift work environment….create a workplace that recognizes work-life and well being as critically important for individual and organizational resiliency, for short-term and long-term success. Organizations need to take a look at … workload, to work structure, to work systems, to work-life, to wellness, to safety, to health."

(b) **If our organization begins to support work-life balance, how can we be sure that no everyone will want a flexible arrangement?**

> What we know is that most people prefer their work life to be fairly predictable, fairly routine, and fairly consistent from one week to the next. It doesn't matter if you're a night shift worker or a day shift worker or a Monday to Friday 9 to 5-er. Most employees are looking for predictability and consistency. The myth about flex is people come and go whenever they want. They take time off and they get paid for it and other people get stuck doing the work. In fact, a flexible working arrangement requires clear communication, negotiation and documentation of the way of working in a consistent way.

(c) **What can organizations do with employees that say, "It's not fair. I don't have kids. This just benefits some people"?**

> You can also prevent backlash by making sure that processes are in place that allow all people to apply easily for flexible work arrangements or have access to the benefits. It is crucial that the process is consistently an fairly applied, clearly and well documented…

(d) **How are demographic changes in Canada going to affect how organizations need to handle work-life?**

> The aging workforce is going to force organizations to be more creative in phasing towards retirement. The nexus generation is coming into the workforce with very clear expectations of what they want from employers and clear expectations that they will be able to have meaningful work for meaningful wage without sacrificing work-life balance….there is a serious labour shortage in this country….employers are going to have to accommodate employees' demands in order to attract and retain valuable employees."

[295] This Tribunal found the content of this Work/Life Balance FAQs dated 2005-02-03, particularly consistent with the earlier testimony and report of Dr. Linda Duxbury.

[296] Although Mr. Sheridan held the same post in 2003 under the CBSA's predecessor as he does now, he stated that he was completely unaware of the December 10, 2003 Equity Compliance Review directives and completely unaware of the Draft Accommodation Policy dated June 2007.

[297] Mr. Sheridan was asked how it could be that he would be unaware of these documents. Mr. Sheridan noted that the Compliance Review is dated two days prior to the creation of CBSA, and stated that although some policies came over from CCRA to CBSA, he is unaware if any policies relating to the Equity Compliance Review that came over. There was no one called as part of the CBSA's case to explain who was in charge of receiving this Equity Compliance Review or how it was dealt with in the transition from CCRA to CBSA.

[298] As to the Draft Accommodation Policy, he testified that he was not consulted about it and normally the drafters would consult with managers. As there are 190 Directors in CBSA, such a

Draft would only go to some. This Tribunal notes that Mr. Darren Millet, by Mr. Star's testimony, was aware of it, but not Mr. Sheridan who is his superior. Also, Mr. John King, then President of the Union took a copy of it from a meeting he attended, and yet Mr. Sheridan was neither consulted nor had he seen it previously.

[299] There was no one called as part of the CBSA's case to explain what happened to this Draft Policy after it was circulated, why it was written in the first place, why the Director of Operation for PIA would not have been made privy to it, or why is was not adopted after its creation. There was no evidence of any decisions taken not to adopt the Draft Policy for reasons of undue hardship, for example.

[300] When asked about Dr. Moore-Ede's expert report tendered on behalf of CBSA, Mr. Sheridan stated that he wholly adopted its conclusion.

[301] Mr. Sheridan testified that if Ms. Johnstone was accommodated for childcare responsibilities that he believes management would be inundated with such requests, the costs would be prohibitive, and it would be destructive to PIA operations that require that most employees work the VSSA schedule.

[302] Although Mr. Sheridan testified that there were not that many accommodation requests made on the basis of childcare responsibilities, he has formed this opinion of the negative impact accommodation would have based on impressionistic reasons only. CBSA produced no studies or inquiries of any kind on the issue of undue hardship in terms of cost, morale, or operational failure. Impressionistic reasons are not sufficient to prove a BFOR.

[303] The only evidence produced at this hearing to bolster CBSA's position that undue hardship would result is the expert report and testimony of Dr. Moore-Ede that was only produced for purposes of this hearing within the few months previous. In fact, when asked why Dr. Moore-Ede had not surveyed actual employees of PIA he replied that there had not been enough time. This is 5 years post-complaint.

[304] Mr. Sheridan testified that the turnover rate of PIA employees is significant and a matter of concern for management, however, there seemed to be no acknowledgement that greater accommodation and shift flexibility might alleviate some of this problem.

B. Evidence of Rhonda Raby

[305] Having been told that she would not be granted full-time hours, in December 2003 Ms Johnstone wrote an e-mail trying to establish her new schedule to Rhonda Raby who then held the position of acting Chief of Terminal 1 at PIA Passenger Operations.

[306] This Tribunal accepts Ms. Johnstone's evidence that her husband had approached Ms. Raby on Ms. Johnstone's behalf in the Fall of that year. Ms. Raby told him that she would not approve shifts for Ms. Johnstone of greater than 10 hours.

[307] Accordingly, Ms. Johnstone asked to work Fridays, Sundays and Mondays from 11:00 am to 9:30 pm each day. Ms. Raby accepted this proposal.

[308] Ms. Raby testified that there was no communication with her from Ms. Gerstl as to Ms. Johnstone's initial request, and Ms. Raby confirmed that she and Ms. Johnstone never discussed it directly either. Hence, Ms. Raby was unaware of Ms. Johnstone's initial request to Ms. Gerstl, but this Tribunal does not find that anything turns on this. Ms. Raby followed the unwritten policy of CBSA in dealing with Ms. Johnstone, and her approach would not have been any different if she had known of Ms. Johnstone's earlier request.

[309] During her testimony, Ms. Raby seemed to have little knowledge of human rights legislative requirements despite her management position.

[310] This Tribunal also found it notable that Ms. Raby stated that even though she was a Chief of Terminal 1 operations from 2002 to 2008, and saw her staff levels double and traffic double after the closure Terminal 2 in 2006, she could not recall anyone else asking for full-time work

on return from maternity leave. She testified that often people want to work part-time on return from maternity leave.

[311] Also, during those years, average accommodations per terminal (encompassing all requests for medical, educational, religious and family responsibilities) over three terminals was 15 people at any given time, or 45 for the whole operation (average to low estimate). This Tribunal finds this to be a very manageable level.

[312] During Ms. Raby's evidence, she kept alluding to "SOP" or "Standard Operating Procedures", unwritten, which speak to the part-time mandatory hours being developed because otherwise management would have been "inundated with requests". To avoid this, she testified that management deliberately capped the hours at 34 hours to make part-time less desirable, i.e. workers wanting to be accommodated are discouraged from those requests.

[313] Ms. Raby did not seem to see the irony in her remarks. Management has capped part-time at 34 hours to make it less desirable, and yet management forces the 34 hour cap on employees like Ms. Johnstone who want to work full-time but need accommodation to do it.

[314] Ms. Raby testified that at the time of at least Fiona Johnstone's initial request there was a Chief of Operations for Terminals 1,2, and 3. There was also Director overseeing Gateway (Mr. Sheridan). The Chiefs consulted on accommodation requests (all of them, for whatever reason) among themselves, but they did not consult at the time with the Gateway Director.

[315] There were a lot of questions asked during the hearing as to why Ms. Johnstone couldn't have been accommodated by giving her 12.5 hours shifts at Gateway where such shifts exist, and one of CBSA's excuses of the high-stress work environment does not exist. Ms. Raby testified that because they weren't talking to each other, this was an option that was never considered nor suggested to Ms. Johnstone. Ms. Raby stated that none of the separate districts within PIA communicated on accommodation requests.

[316] Ms. Raby confirmed that CBSA management treats medical accommodations differently because CBSA acts in accordance with the medical evidence, i.e. doctor validation, that accommodation is necessary for reasons of health, safety concerns and liability.

[317] Ms. Raby confirmed that not accommodated employees are part-time, but often in the CBSA witnesses' testimonies there was confusion between those being accommodated and the term "part-time".

[318] Mr. Star was an example of an accommodated employee who was not part-time. He has been accommodated on an on-going permanent basis for religious observance.

[319] Most people seeking religious accommodation do not need it on a continuing basis for each shift period, e.g. Christians who do not want to work on Christmas Eve or Easter Sunday, or Muslims who may want to take a several day pilgrimage to Mecca, or need short periods off for prayer. Therefore, these people are accommodated for a short time, from time to time, but are still full-time employees.

[320] Medical accommodation, of course, depends on the medical issue and can require very short-term to longer term accommodation, depending on what the doctor feels the worker can do. This can affect how many days or what hours or what duties a person needs to be relieved from. Not all of these accommodations are part-time either.

[321] Ms. Raby confirmed Mr. Sheridan's testimony that the term "accommodation" was used at CBSA to mean all adjustments off VSSA. It can be confusing, so Management started differentiating by using the terms "accommodation" for medical reasons, and "arrangement" for other requests. Such arrangements include educational requests where people want changes to return to school, etc.

[322] It was apparent that Ms. Raby had never received anything other than the most cursory human rights training in terms of understanding there was a duty to accommodate those with medical reasons. She was aware that there were other enumerated grounds in the *Act*.

[323] Ms. Raby's testimony revealed that CBSA efforts, if any, have been totally inadequate in terms of training even management on human rights issues, obligations, duties, or processes.

[324] CBSA's approach upon receipt of accommodation requests has been to only do sufficient inquiry or background questioning to establish the bona fides of the request, its legitimacy. No effort is put into actually trying to meet the accommodation request, or to determine what the actual impact or cost be would be. This is all driven by a pervasive belief at the management level that too many people would want to be accommodated "off VSSA' which would be operationally far too difficult. According to Ms. Raby, this is the issue and not cost.

[325] Asked if she had any complaints from other employees about people getting shift changes due to medical accommodation, Ms. Raby said, "yes". Asked further, she remembers receiving one e-mail, and bases her belief that there is a "morale issue" around medical accommodation on "what she hears around the workplace".

[326] Although she was a Chief of Operations and had the mandate during the relevant years to deal with and decide upon accommodation requests, Ms. Raby testified that she kept no ongoing log to identify people being accommodated, and kept requests for full-time static shift work only in an e-mail file.

[327] Ms. Raby further testified that if an opening came along in an area that an employee had expressed a desire to work in, she would not cross-reference particularly or ever. In other words, although she had denied Ms. Johnstone's request, if an opportunity had come up to meet her request in an area in which she had expressed an interest, Ms. Raby would make no attempt to put that opportunity together and communicate it to Ms. Johnstone.

[328] When new job opportunities arise, a Call Letter goes out, which you do not receive if you are off the job site on maternity leave. Depending on who responds, then management looks back at preferential listings on a worker's annual performance review assessments. They do not catalogue or look through the preferences listed, and do not keep that data anywhere. There are also internet and intranet postings, but employees on maternity leave would not receive intranet postings, and would be unaware of those.

[329] Given Ms. Raby's testimony on these various issues, it seemed evident to this Tribunal that CBSA management does not see its role as working cooperatively with its BSO employees, and yet when it comes to human rights accommodation requests that is exactly what the jurisprudence calls upon an employer and employee to do.

C. Evidence of Expert, Dr. Moore-Ede

[330] Dr. Moore-Ede was qualified as an expert in the study of shift work and extended working hours including staffing level analyses, shift scheduling optimization, shift work lifestyle training, and cost-benefit analyses with respect to employer policies pertaining to the management of shift workers, including all relevant factors that relate to the development of shift schedules.

[331] Dr. Moore-Ede founded Circadian in 1983, an international research and consulting firm specializing in how to manage the challenge of employing workers in a 24/7 environment.

[332] His database indicated that approximately 52% of all shift workers have childcare needs and 60% of these, or 31% of all shift workers use childcare other than their spouse or partner. However, he also referred to studies which have found that shift workers are more likely to arrange or rely on care by spouses, relatives and friends, as opposed to third party caregivers.

[333] This Tribunal finds that there were several serious flaws in this report. The whole basis of the data that leads Dr. Moore-Ede to the conclusion that between 31% to 52% of CBSA workers will seek the same accommodation as Ms. Johnstone, comes from answers by 32,000

shift workers to question #13 of his Circadian questionnaire found at Addendum C of his exhibited written report.

[334] The sampling respondents are made up of workers from the US and Canada, but the Canadian percentage is very small. There was no questionnaire or surveying done of CBSA workers as Dr. Moore-Ede said that CBSA had not given him enough lead time nor paid him sufficiently to undertake that sort of exercise.

[335] The one question relied upon, question # 13, reads:

(a) "What primary childcare arrangements do you currently have?

A. Child care provider

B. Relatives

C. Spouse or partner

D. Other

E. does not apply (no children at home)"

[336] This question does not address subsets such as children of pre-school age as opposed to children and teenagers still at home.

[337] Also, when Dr. Moore-Ede used the numbers to extrapolate, he didn't just extrapolate from those who said they used third party childcare providers, but from all respondents who had children at home regardless of whether they had indicated care was provided by spouse, family, third parties or "other". There is no indication that all parents would seek accommodation regardless of the age of their children and regardless of the childcare arrangements they have arranged.

[338] Additionally, Dr. Moore-Ede had no overlay of data related to workers who work rotating shifts, with their partners/spouses also working rotating shifts. Other provided evidence indicates this situation would only apply to 1.2% of the shift worker population.

[339] Dr. Moore-Ede's conclusions were premised on the belief that there would be a ripple effect from accommodating Ms. Johnstone's request driven by the dissatisfaction of non-accommodated workers being necessarily shoved into less desirable shifts and times.

[340] Dr. Moore-Ede testified that the above scenario would lead to dishonesty and people "playing games" where they would create childcare accommodation scenarios to meet the requirements in order to get preferable shift days and times.

[341] Obviously, a 24/7 rotating shift scheduled operation could not afford to have one-half of its workforce working off the VSSA. However, this speculation by Dr. Moore-Ed is not borne out by the actual experiences to date of even the CBSA's own witnesses in management. The numbers that Dr. Moore-Ede put forward are not realistic, and founded in either inadequate details in the question relied upon for the numbers to be valid, or unproven assumptions that are a discredit to the ethics and motivations of the subject workforce.

[342] Dr. Moore-Ede did not address the effect of employee education as a key component. There is no substantive evidence before this Tribunal that this particular workforce cannot be educated as to the human rights law basis for certain accommodation requests being acceded to.

[343] It is notable that this was a temporary accommodation being sought during Ms. Johnstone's children's pre-school years. She intends to return to full-time work in 2010. This is not a permanent accommodation request as one would see in a religious accommodation, nor a long-term disability situation.

[344] Dr. Moore-Ede took no exception to Ms. Johnstone's experts' reports regarding lack of availability of third-party child care, and generally agreed with those conclusions.

[345] Dr. Moore-Ede conceded that he had not taken into account the offset saving of costs that occur with accommodation in terms of reduced absenteeism, sick days, leave requests, etc. when accommodated workers are more satisfied with a workplace that meets, or endeavors to meet, their temporary needs.

[346] Dr. Moore-Ede also conceded that he had not taken into account the difference between Canada and the U.S. in terms of the Canadian government offering a wider safety net to young parents with the availability of one year maternity and parental leave – something not offered in the U.S. So, whereas in the U.S. parents may be faced with finding daycare when a child is just 2 months old, in Canada this usually does not arise until the child is 1 year old. This reduces the overall need for alternative care to ages 1 -5, as opposed to newborn to 5.

[347] Further, Dr. Moore-Ede assumes that employees with childcare responsibilities would request day shifts, i.e. childcare friendly hours. He assumes from there that this would have a negative impact in terms of health and safety on non-accommodated employees. This is contrary to other evidence before this Tribunal. Ms. Johnstone in her own request did not request day shifts. She suggested afternoon shifts.

VII. Conclusion/Analysis

[348] In *Meiorin* the Supreme Court of Canada affirmed that the duty of employers to accommodate is a fundamental legal obligation. An employer must demonstrate that the discrimination is necessary to achieve legitimate work-related objectives and tender affirmative evidence that the point of undue hardship has been reach in its efforts to accommodate the employee.

[349] Also in *Meiorin*, the Supreme Court of Canada stated that "[u]nless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands".

[350] In *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] S.C.J. No. 15 *(Via Rail)* the Supreme Court of Canada stated that "undue hardship is reached when reasonable measures of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain".

[351] These cases very apparently set out a duty on the part of CBSA to make a real effort to accommodate, an effort that is tangible and measurable, and tests out the employer's ability to meet the accommodation request. CBSA must not base its assessment of whether an employee needs accommodation, or of whether it can implement accommodation measures, based on "impressionistic assumptions."

[352] It is a clear directive to employers to make all reasonable efforts and afford employees all reasonable opportunities, not to fall back on impressionistic views standing behind unwritten policies brought into practice for unrelated reasons.

[353] In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (*Grismer)* the Supreme Court of Canada stated that, "…impressionistic evidence of increased expense will not generally suffice."

[354] Generally, undue hardship means "disproportionate, improper, inordinate, excessive or oppressive…" (*Via Rail*)

[355] In that her performance appraisals were universally sound, and she had testified to often working long shifts extended due to overtime requirements, this Tribunal accepts that there are no viable health and safety concerns about Ms. Johnstone performing 13 hour shifts.

[356] It is telling that despite Dr. Moore-Ede's numerical extrapolation that would see half of the CBSA employees at PIA seeking family status accommodation, Ms. Raby could not recall another request between 2002 and the hearing, and Mr. Sheridan could think of only one

instance. This testimony as to management's actual experience with this specific workforce weighs heavily against Dr. Moore-Ede's theory.

[357] Other than Dr. Moore-Ede's report of 2009, no analysis has been done, no scientific study undertaken, no consultants brought in to look at accommodation issues, no policies put in place since either the *Brown* decision of 1993, or the CHRC direction 10 years later that policies should be developed.

[358] This Tribunal finds that CBSA has not established a BFOR defence, nor developed a sufficient undue hardship argument to discharge the onus upon it. CBSA did not assess whether it could accommodate Ms. Johnstone's family responsibilities. The Tribunal therefore finds that CBSA failed to establish that it could not accommodate Ms. Johnstone to the point of undue hardship.

[359] This Tribunal confirmed with witnesses called by both the Complainant and the Respondent, as well as Respondent's counsel, that none of the Draft Policy to Accommodate's proposals, including the creation of a National Job Accommodation Fund, were ever put into action. The Respondent's position throughout the hearing was that childcare responsibilities under any circumstances do not trigger a duty to accommodate under the family status discrimination grounds of the *Act*. The Respondent therefore has no written policies on accommodation under this provision of the *Act*, and its unwritten policies are as set out above: CBSA allows an employee requesting static shifts for childcare responsibility reasons, to have static shifts off the VSSA, but mandates that such employee only work up to 34 hours per week on part-time status.

[360] The importance of setting out the history in Part III of this decision is to allow an understanding that over an approximate 25 year period, the CHRT, the CHRC, and mechanisms within the federal government public service (some internal to the Respondent itself), have recognized a need to address work-life balance issues that naturally arise for some employees who are parents and have childcare obligations that are not compatible with the regularly

scheduled shifts set up by the VSSA or like regimes. Such childcare obligations have been recognized elsewhere, as set out, under the family status ground enumerated in the *Act*.

[361] On the whole of the evidence, and by the admission of the Respondent's witnesses in senior management, there have been no attempts to raise awareness of human rights legislation pertaining to family status among either management or employees, nor manage any perceived or actual resistance among those in the workforce who may not directly benefit from accommodation measures at any given time. The evidence of the Respondent's management witnesses showed a very cursory, nominal understanding of human rights legislation and no training or awareness of the details of the decision in *Brown*, or the CHRC audit referred to earlier, in their identification of childcare and child rearing as an identifier that warrants accommodation under the *Act*.

[362] The Respondent has not undertaken any detailed look at bona fide operational requirements and options short of undue hardship. The evidence as a whole strongly indicates that the Respondent has not taken these steps because it has not recognized the necessity of doing so. In other words, if the Respondent's position is correct that child-rearing obligations for young children does not fall within the meaning of "family status' in the *Act*, there is no reason to do anything. The expert evidence of Dr. Moore-Ede presented through this hearing was the first study of any kind undertaken on behalf of the Respondent to justify or explain its position.

[363] During the time period spanned by the evidence presented in this hearing, the Respondent could have easily created written, transparent and fair policies that are uniformly applied and demonstrate a real commitment to and understanding of human rights legislation under the enumerated ground of "family status". At the same time, the Respondent could have dealt openly with unique cases as they arise which the Respondent admits it has not done, within already existing mechanisms. It is admitted by the Respondent's management witnesses, that these mechanisms instead are reserved for those seeking medical and religious accommodations only, with random exceptions.

[364] Having found that Ms. Johnstone's complaint is substantiated and that she has been discriminated against on the grounds of "family status", it is important that she benefit from an individualized assessment of her accommodation needs.

VIII. Decision

[365] For the reasons that follow, this Tribunal finds that Ms. Johnstone's complaint is substantiated:

a) Ms. Johnstone has made out a *prima facie* case of adverse differentiation against CBSA within the meaning of section 7 of the *Act*, on the basis of family status;

b) Ms. Johnstone has demonstrated, on a *prima facie* basis, that the CBSA established and pursued policies and practices that deprived or tended to deprive the Complainant and any similar class of individuals of employment opportunities, on the ground of family status, within the meaning of Section 10 of the *Act*;

c) CBSA has failed to establish a *bona fide* occupational requirement, present a reasonable explanation for, or otherwise justify the case of *prima facie* discrimination against it.

IX. Remedy

A. Systemic Remedy

[366] This Tribunal orders the Respondent to cease its discriminatory practices against employees who seek accommodation based on family status for purposes of childcare responsibilities, and to consult with the Canadian Human Rights Commission, in accordance with the provisions of Section 53 (2) (*a*) of the *Act*, to develop a plan to prevent further incidents of discrimination based on family status in the future.

[367] In order that Ms. Johnstone and other employees in her like situation not be deprived of future employment opportunities, wages and benefits, this Tribunal further orders that CBSA establish written policies satisfactory to Ms. Johnstone and the CHRC to address family status accommodation requests within 6 months, and that these policies include a process for individualized assessments of those making such requests.

[368] Ms. Johnstone seeks reimbursement for all lost wages and benefits, including overtime that she would have received and pension contributions that would have been made on a full-time basis but for the fact that she was a part-time employee. She also seeks an Order directing that she be entitled to effect pension contributions as a full-time employee subsequent to August 2007.

[369] Ms. Johnstone commenced part-time employment on January 4, 2004. Thereafter, other than her time on her second maternity leave from December 24, 2004 through to December 26, 2005, she worked part-time hours. During the time she worked part-time hours, the evidence is that her wages and benefits were all pro-rated. Her wages and benefits were also pro-rated at the part-time rate while she was on maternity leave.

[370] Between August 14, 2007 through to August 2008, Ms. Johnstone was on Leave Without Pay for Spousal Relocation due to her husband being transferred to Ottawa. This ended in August 2008. During this Leave, Ms. Johnstone has been entitled to make pension contributions at a pro-rated rate of 20 hours per week.

[371] Since August 2008, Ms. Johnstone she has been on Care and Nurturing Leave (unpaid) as allowed under the Collective Agreement.

[372] Ms. Johnstone was clear in her evidence that she made choices regarding the number of hours she would work because of CBSA's refusal to allow her to work full-time hours with consequent loss of full-time wages, benefits and opportunities. Her statement that she "would

have made it work" had she been granted full-time shifts after the birth of her second child, was uncontroverted.

[373] Ms. Johnstone further testified (see para. 106 above) that she would have continued to work full-time despite her husband's relocation.

[374] At the hearing counsel for the parties seemed confident that they could reach agreement on the quantum to which Ms. Johnstone would be entitled should this Tribunal order that she receive compensation under this heading.

[375] Accordingly, this Tribunal orders that Ms. Johnstone be compensated for her lost wages and benefits, including overtime that she would have received and pension contributions that would have been made had she been able to work on a full-time basis from January 4, 2004 to the present. This Order includes a direction that Ms. Johnstone be entitled to effect pension contributions as a full-time employee during this relevant period. Ms. Johnstone is not entitled to lost wages due to attendance at this hearing.

B. General Damages for Pain and Suffering

[376] It was evident in Ms. Johnstone's testimony that she suffered injury to her person, her personal and professional confidence, and her professional reputation resulting from the discrimination that gave rise to this complaint.

[377] Ms. Johnstone testified that she was embarrassed by reference to her as the "human rights" case, and that she was upset by the arbitrary way in which she was dealt with despite her best efforts to try to find a way to create a workable balance between a job that she stated she truly enjoyed and her young children.

[378] I award Ms Johnstone $15,000.00 under this heading pursuant to Section 53 (2) (*e*) of the *Act*.

C. Special Compensation

[379] Section 53 (3) of the *Act* provides for awards of "Special Compensation" for willful and reckless conduct, to a maximum of $20,000.00. Although heard before the 1998 *Act* amendments when the quantum allowed for damages under the headings of pain and suffering and special compensation were lower, this Tribunal is still guided by the reasonableness of *Martin* that followed the reasoning in *Premakumar v. Air Canada*, T.D. 03/02 and *Canada (Attorney General) v. Morgan*, [1991] 2 F.C. 401 (F.C.A.), that the maximum award should be reserved for the very worst cases.

[380] This Tribunal finds that CBSA, by ignoring so many efforts both externally and internally to bring about change with respect to its family status policies of accommodation has deliberately denied protection to those in need of it.

[381] CBSA, and its organizational predecessor's lack of effort and lack of concern takes many forms over many years including: disregard for the *Brown* decision after writing a letter of apology; developing a model policy and then burying it (some management knew of it, some did not); pursuing arbitrary policies that are unwritten and not universally followed; lack of human rights awareness training even at the senior management level; the proffering of a floodgates argument 5 years after the complaint with the Respondent giving insufficient time and data to its own expert to enable him to provide a helpful expert opinion; and no attempt to inquire of Ms. Johnstone as to her particular circumstances or inform her of options to meet her needs.

[382] Given all the circumstances of this case, this Tribunal awards Ms. Johnstone $20,000.00 under this heading. CBSA's conduct has been willful and reckless, showing a disregard for Ms. Johnstone's situation and denying that a duty to accommodate exists on grounds of family status arising for childcare responsibilities such as hers.

D. Interest

[383] Pursuant to Section 53(4) of the *Act*, this Tribunal orders that compound interest at the Canada Savings Bond rate be paid on any and all amounts awarded pursuant to this decision under the headings of General Damages for Pain and Suffering pursuant to Section 53(2)(*e*) of the *Act*, and Special Compensation pursuant to Section 53(3) of the *Act*.

E. Solicitor Client Costs

[384] Ms. Johnstone was represented by senior legal counsel, experienced in matters of human rights law and the organizational structures of the federal public service. Ms. Johnstone's counsel's expertise allowed her to present a thorough Complainant's case before the Tribunal and was an integral part of her ultimate success. Due to the conflicting nature of past court decisions and adjudications on the enumerated ground of family status in the *Act*, and the unique and complex nature of CBSA operations, it would have been difficult for an unrepresented person to present this case.

[385] However, by a decision rendered October 26, 2009, the Federal Court of Appeal has found that the CHRT cannot compensate victims of discrimination for legal costs under Section 53 (2)(*c*) of the *Act*. [*Canada (A.G.) v. Mowat* 2009 FCA 309]. The Federal Court of Appeal found that Section 53 does not convey express statutory jurisdiction to award compensation under this heading.

[386] At paragraphs 101 and 102 of the decision, Justice Layden-Stevenson, with the concurrence of Justices Letourneau and Sexton found as follows:

a) "[101] These are issues that require the consideration of Parliament, for example, the desirability of empowering the Tribunal to award costs and, if desirable, the manner and the limits in which it should be accomplished. The role of Commission counsel may be a factor for contemplation as its role in the adjudicative process has changed significantly over the years. For many years,

> Commission counsel appeared at most Tribunal hearings, but that practice appears to have changed. The former procedure may have impacted Parliament's decision regarding the propriety of costs awards in human rights proceedings. Counsel advised that in 2003 the Commission revisited its interpretation of its role under section 51 of the *Act*. Finally, if authority to award costs is to be granted to the Tribunal, the nature of the costs regime must be determined. There are a number of potential permutations.

b) [102] The ultimate decision and the policy choices inherent in making it are for Parliament, not the Tribunal or the court."

[387] Accordingly, there is no award to the Complainant under this heading.

F. Retention of Jurisdiction

[388] This Tribunal will retain jurisdiction for six months after the filing of this Decision, in the event that the parties are unable to reach agreement on quantum under this heading or cannot agree with respect to the implementation of any of the remedies awarded. Should an extension of this time be required, submissions may be made as to the necessity for an extension.

Signed by

Kerry-Lynne D. Findlay, Q.C.
Tribunal Member

Ottawa, Ontario
August 6, 2010

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1233/4507

Style of Cause: Fiona Ann Johnstone v. Canada Border Services

Decision of the Tribunal Dated: August 6, 2010

Date and Place of Hearing: May 25 to 28, 2009
June 22 to 26, 2009
June 29 and 30, 2009
July 2 and 3, 2009

Ottawa, Ontario

July 22 and 23, 2009

(Videoconference)

Ottawa-Vancouver

Appearances:

Andrew Raven, Lisa Addario and Andrew Astritis, for the Complainant

Ikram Warsame and Sulini Sarugaser, for the Canadian Human Rights Commission

Christine Mohr, Joseph K. Cheng and Susan Keenan, for the Respondent