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Public Service
Labour Relations and Employment Board Act

BETWEEN

LAURA MARIE FLATT

Grievor

and

TREASURY BOARD
(Department of Industry)

Employer

Indexed as
Flatt v. Treasury Board (Department of Industry)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, a panel of the Board

For the Grievor: James L. Shields, counsel

For the Employer: Richard E. Fader, counsel

Heard at Hamilton, Ontario,
July 3 and 4, 2014.
(Written submissions filed June 27, July 31 and August 1 and 5, 2014.)

I. Introduction

[1] The grievor, Laura Marie Flatt, grieved that her employer, the Treasury Board, discriminated against her on the grounds of sex and family status when it refused her request to telework from home full time, Monday to Friday, for a year following the end of her year-long maternity leave in March 2013. She made the request because, as she put it in her grievance, she needed ". . . to change the way [she worked] because of breastfeeding."

[2] The grievance and the current state of the jurisprudence raised the following questions:

a. Is discrimination on the basis of breastfeeding discrimination on the basis of sex or family status or both?

b. What is necessary to establish a *prima facie* case of discrimination on the basis of breastfeeding, and did the grievor meet it in this case?

c. If the grievor did establish a *prima facie* case of discrimination, did the employer accommodate her to the point of undue hardship?

d. If it did not, then what is the remedy?

[3] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force, creating the Public Service Labour Relations and Employment Board (the Board) to replace the former Public Service Labour Relations Board (the former Board) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No.* 2 (S.C. 2013, c. 40) also came into force (PC2014-1107). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No.2,* a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before the day on which subsection 366(1) of the *Economic Action Plan Act 2013, No. 2* comes into force is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 366 to 470 of the *Economic Action Plan 2013 Act, No.* 2.

II. The hearing

[4] The hearing took place in Hamilton, Ontario, on July 3 and 4, 2014.

[5] I heard the evidence of the grievor. She was the only witness called to testify on her behalf.

[6] On behalf of the employer, I heard the evidence of the following people:

a. Peter Kohl, a shop steward for the International Brotherhood of Electrical Workers, Local 2228 ("the bargaining agent");

b. Lou Battiston, Director of the Central and Western District Office ("CWDO") of the Spectrum Management Operations Branch of Industry Canada working out of the CWDO's regional headquarters in Burlington, Ontario; and

c. Lyse Bossy, Sector Human Resources Manager for the Spectrum, Information Technologies and Telecommunications Sector of Industry Canada, who works out of Ottawa, Ontario.

[7] Since the grievance raised an issue involving the interpretation of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, a Form 24 ("Notice to the Canadian Human Rights Commission" ("the CHRC")) was sent on the grievor's behalf to the CHRC by her representative. The CHRC did not attend the hearing but it did file written submissions on June 27, 2014.

[8] All the witnesses testified in a straightforward fashion. They testified as to events that were relatively fresh in their minds and that were, to a large extent, preserved in emails and correspondence that they exchanged between themselves and with others at the relevant time. No relevant issue of credibility divided their testimonies. The issue they had to address — whether or how to accommodate the grievor's desire to continue breastfeeding her child during his second year — is complex, underdeveloped and occupies a grey area in the law. I was satisfied that all did the best they could under such circumstances. As I told them at the end of the hearing, if any of them ultimately made a wrong decision, it was not for any lack of good faith on their part. It would simply have been because the existing law and jurisprudence had provided little if any clear guidance on how to address the issues they had confronted. With these points in mind, I see no need to provide an exhaustive précis of each witness's testimony. I will simply set out the facts as I have found them, based on the totality of the evidence.

[9] One final note. Following the hearing and on reviewing the submissions and case law, I asked counsel to respond to the following question:

> *Can the issue of whether–and under what circumstances–work shifts/hours/assignments may be modified because an employee is breastfeeding her child be dealt with under the KVP rules under the management rights clause?*

[10] Counsel for the parties provided written answers dated July 31, 2014. In addition, on August 1st and August 5th, counsel for the employer and for the grievor each filed responses to the other's written answers.

III. Preliminary objections

[11] Counsel for the employer served notice that he intended to object to some of the evidence that he expected would be introduced on the grievor's behalf. He advised that he understood that the evidence would include events and negotiations that took place after the grievance was filed on March 28, 2013. His objection to such evidence was twofold.

[12] First, it was privileged as it was part of settlement negotiations or discussions between the parties or part of the grievance process or both.

[13] Second, such evidence would change the scope and nature of the grievance as it was filed. He emphasized that the remedy the grievor sought in this case — and the grievance that was before me — was based on the allegation that the employer's denial of her request to telework from home five days per week was discrimination on the basis of sex or family status. It was not a grievance that an offer of fewer days of teleworking — or some alternate way of accommodating her breastfeeding schedule — was discrimination as well.

[14] I thanked counsel for the employer for the advance notice and indicated that I would hear his submissions, and those of counsel for the grievor, when we got to that point in the evidence.

IV. Background

[15] The grievor is a spectrum management officer ("SMO") working for the Spectrum Management Operations Branch of Industry Canada. She is a member of the bargaining unit represented by the bargaining agent. The bargaining agent and the

employer are parties to a collective agreement that contains, among other things, a non-discrimination clause.

[16] Industry Canada's Spectrum Management Operations Branch supervises and manages the radio frequency spectrum in Canada. Radio frequencies are regulated in Canada as a natural resource. Users of the radio spectrum — such as radio stations, police and fire services, marine and airplane operators, and so on — are issued licences for the frequencies they use. The use of such frequencies is administered, monitored and supervised by various Spectrum Management Operation Branches across Canada. SMOs work within each branch. Their responsibilities include reviewing applications for using particular frequencies, issuing licences for that use, and managing and resolving radio interference that sometimes develops between those using various frequencies. The administrative portion of an SMO's duties is generally office work conducted out of a regional office. However, resolving frequency conflicts often involves field or road work in which an SMO visits the licensees, uses specialized equipment to identify the source of the interference and works to remedy the problem (for example, see Exhibit U1, Tab 7).

[17] The CWDO of the Spectrum Management Operations Branch was responsible for an area running from Mississauga, Ontario, west beyond Collingwood to Tobermory, Ontario, and then southwest through the Niagara peninsula through Burlington to London and Windsor, Ontario. Its headquarters were located in Burlington. A number of satellite offices reported to it, which at one time included offices in Kitchener, Windsor and London.

[18] The grievor is an SMO classified in the EL (Electronics) Group at level 5. For many years, she has worked out of the Burlington office. She started working with the employer at the EL-01 level in January 2003 in the CWDO. She first worked under the supervision of an EL-05, among other things handling communication and site inspection duties. She moved up to the EL-02 level by April 2003 with the same duties. She then moved to the EL-03 level, at which point she was carrying out less-complex site inspections on her own. At that point, her duties also included evaluating proposals from clients and service providers for mobile radio licences. By 2005, she had reached the EL-05 level, working, in her words, "pretty much on [her] own, doing radio site inspections and investigating radio interference cases."

[19] In April 2007, the grievor became pregnant. As of then, a number of SMOs, including the grievor, could and did carry out site visits from time to time. She stopped carrying out field inspections, I assume because of her pregnancy, and limited her work to office duties. She went on maternity leave in September 2007. She returned from maternity leave in September 2008. She testified that she did not perform any site visits from that point on (and that in fact she carried out her last site visits before September 2007; see Exhibit U1, Tab 7). When her counsel questioned her on that point in direct examination, she explained that there was not much road work after 2007. That being the case, generally, road work was assigned to more junior SMOs in the office to provide them with experience. As well, road work would usually be assigned to the office that was closest to the site to be visited. Since at that time the grievor had the most seniority, and since road work was generally done by an SMO out of the closest office, it turned out in practice that the newest person in the office nearest the problem would be sent, which was not the grievor.

[20] I pause here to say something about the employer's telework and compressed work week systems. It appears that in the late 1990s and early 2000s, the growing move to paperless offices, along with improvements in technology, Internet access, virtual private networks and a move to client appointments rather than "walk-ins" meant that the employer had begun to recognize the possibility of providing telework arrangements for some of its employees. In such cases, employees could perform some of their work in other government offices closer to their homes, or indeed work out of their homes, for part of their regular workweek. It appears that the employer created a telework policy by December 1999, if not earlier. Industry Canada put a telework policy into effect in 2003, and an example of its "Telework Guidelines" as of November 2013 was put into evidence as Exhibit E3, Tab 2; see also Exhibit U1, Tab 8, which is an email dated January 13, 2009 from Peter Dougall. SMOs who were permitted to telework could work for part of the workweek out of their homes, or other government offices closer to their homes. Those on compressed workweeks could work their regular hours, but spread them over four rather than five days.

[21] The preamble to the six-page 2013 Telework Guidelines states as follows:

> *Industry Canada is committed to providing policies and guidelines designed to help employees balance their work, personal and family responsibilities. In keeping with our goal of being a workplace of committed people making a difference, these telework guidelines will assist Sectors,*

> *Branches and Regions in meeting both business and sustainable development objectives while satisfying the growing needs of employees to improve their overall quality of life.*

[22] The Guidelines include a number of guiding principles, the first seven of which are as follows:

> *a. In a telework agreement, employees are authorized to perform the duties of their position which are ordinarily performed at the employees' designated workplace at an alternative location, usually the employees' home* ***on a regular basis for a set period of time****.*
>
> *b. Telework does not necessarily imply that an employee will work away from the office five days a week. In most cases a balance between hours worked at the telework location and at the office is to the mutual benefit of the manager and the employee.*
>
> *c. Telework must be operationally feasible.*
>
> *d. There must be no loss of productivity.*
>
> *e. Telework must not generate extra costs (except for one-time start-up costs, which can be recouped over a reasonable period of time).*
>
> *f. Telework is not an employee right or entitlement. The decision to approve a telework request is at the discretion of management and shall be made in a fair, equitable and transparent manner. Each request should be dealt with on a case by case basis as not all jobs are appropriate for teleworking. Considerations include: the cost-effectiveness of the arrangement, the employee's personal suitability and performance and the impact on operations, colleagues, clients and other stakeholders.*
>
> *g. Telework is a voluntary activity. An employee cannot be directed to telework.*
>
> *h. Telework must not be used as a long-term substitute for family care responsibilities; however, it can assist employees to balance work and family responsibilities in the short term. Employees must manage their family responsibilities in a way that allows them to successfully meet their work requirements.*
>
> [Emphasis in the original]

[23] Returning to the facts of the grievance before me, in January 2009, the grievor filed a request to telework out of her home on Thursdays between 06:00 and 15:30 (Exhibit U1, Tab 8). At that time, she explained that since starting to work in the Burlington office, she had been commuting from her home (140 km round trip) for more than 6 years. The commute to and from the office took her over two hours each day, which had been increasing as the volume of traffic on the Queen Elizabeth Way highway had increased. She justified her request by referring to various improvements in productivity, morale and environmental effects that she expected would result, as well as "[l]ess stress and worry with the needs of balancing work, personal and family [needs]" (Exhibit U1, Tab 8). After some discussions over the conditions that would apply to telework (such as returning calls promptly, the fact that her work would be restricted to "authorization" (i.e., administrative) work, since she was no longer working in the field, and security with respect to her home office), her proposal was accepted (Exhibit U1, Tab 8).

[24] The arrangement of working in the Burlington office four days per week and teleworking one day per week remained in place until the grievor went on maternity leave again in September 2009.

[25] The grievor returned to work at the end of her maternity leave in September 2010. The evidence was not clear as to whether the telework arrangement she had made in January 2009 remained in effect. For the purposes of this decision, I will assume that it did. However, the grievor did testify that the employer's telework policy had changed by 2011 to require that such arrangements be renewed annually. In 2011, she proposed a telework arrangement of working Tuesdays and Thursdays from her home from 06:00 to 14:00 (Exhibit U1, Tab 8). The proposal was apparently approved for April 2011 to March 2012.

[26] The grievor commenced her maternity leave for her next child in March 2012.

[27] I pause to note that in 2009, the CWDO had 17 staff located across its four offices in Burlington, Kitchener, London and Windsor. By 2013 the staff complement had shrunk from 17 to 11 because of downsizing. Mr. Battiston testified that the downsizing had an impact on the CWDO's operations, inasmuch as it then had fewer staff (and fewer SMOs) to cover the same area and the same work. He also testified that in early 2012, the directors of the Atlantic and Ontario regions had reviewed the impact that the various alternative work arrangements, such as telework and

compressed workweeks, had had on operations and on staff who worked more regular arrangements. The review had been sparked in part by past and projected staff reductions (due in part to retirements). It revealed that the CWDO had a large number of staff using telework and compressed workweek arrangements.

[28] Mr. Battiston recorded the review's result in an internal file memo about telework and compressed workweeks dated April 12, 2012, which provided in part as follows (Exhibit 3, Tab 3):

. . .

> *CWDO's staff complement decreased in 2012 by four positions through three retirements (positions eliminated through attrition) and one resignation. This was a decrease in office size by 23.5%. It was noted that with fewer staff in the office, which is responsible for a relatively large territory, telework and CWW's [*compressed work weeks*] were putting higher demands on the remaining staff across the various locations to the point where it becomes more challenging to respond to contingency situations that arise such as a short notice ministerial enquiry, and ELT, or public safety interference investigations during our core office hours. Even simple tasks like receiving a courier or helping a colleague or manager with a question, scheduling staff, client meetings or training sessions becomes more difficult when staff work from their homes or a regularly scheduled basis. Additional staff applying to telework would only make the situation worse.*
>
> *Given the changes above and in order to obtain uniformity across the various AOR [*Atlantic and Ontario Region*] offices, telework for CWDO staff will be restricted to extenuating circumstances such as medical accommodation, severe weather conditions, or a family emergency and that only the CWW option would be provided to staff.*

. . .

[29] The grievor was on maternity leave for a year between March 2012 and March 2013. She breastfed her new child. As the year wore on, she decided that she would like to continue breastfeeding for another year following her return-to-work date in March 2013.

[30] On November 27, 2012, she emailed the employer to ask that her desire to continue breastfeeding be accommodated by way of permitting her to telework five days per week for a year, as of March 2013. She noted as follows: "In order to facilitate

this, I would need to have my work duties modified to such that I can nurse him [her child] at 8:00 am. 12:00 pm and 2:30 pm."

[31] The grievor went on as follows (Exhibit U1, Tab 9):

> *To make this possible, it would be greatly appreciated if I could work full time from home for the hours of 6am-2pm. This would allow me to nurse him at 8:00am just before he is taken to daycare. My home is located 10 min from the daycare so a quick visit to nurse at noon would be possible. Completing my work day at 2:00pm will allow me to nurse him at 2:30 pm.*

[32] The grievor added a passage from the Ontario Public Health Association to the effect that employers who supported their breastfeeding employees could reap such benefits as the following (Exhibit U1, Tab 9, page 2):

> *i. Less absenteeism — breastfeeding women are less likely to be absent from work to tend to a sick child.*
>
> *ii. Improved worker productivity, morale and loyalty — women whose employers have recognized and assisted them in their goal of continued breastfeeding have improved work satisfaction.*
>
> *iii. Less staff turnover — breastfeeding women are more likely to return to work, resulting in less staff turnover. This enables employers to keep trained, experienced and motivated staff.*

[33] In her evidence, the grievor elaborated on the reason for her request. She testified that by November 2012, her son, who was about 9.5 months old, was still breastfeeding. His schedule was 08:00, 12:00, 14:30 and then early in the evening. Her proposal for a 06:00 start to her workday at home would have enabled her to nurse her son before her husband took him to daycare at 08:00. The daycare was only a few minutes' drive from her home, so she could go there at noon and again at 14:30 to nurse him.

[34] The grievor did not receive a formal reply to her request until January 25, 2013. She found the delay very stressful.

[35] On January 25, 2013, she had a conversation with Mr. Battiston and another supervisor. They were not prepared to grant her request to telework five days per week following her return to work in March. They did offer her the option of taking an

extended leave without pay pursuant to clause 18.09 ("Leave without pay for care of immediate family") of the relevant collective agreement. In an email she sent on January 25, the grievor confirmed that Mr. Battiston and the supervisor had ". . . denied [her] request to accommodate [her] work duties so that [she could] continue to breastfeed [her] son" (Exhibit U1, Tab 11, page 1). She expressed her disappointment with the decision and went on to explain as follows (Exhibit U1, Tab 11, page 1):

> *Due [sic] the many health problems with my last son, I decided to research more into breastfeeding. I discovered that even the World Health Organization says, quote, 'recommends nursing for at least two years or more. Human breast mild [sic] is the healthiest form of milk for babies. Breastfeeding promotes health and helps to prevent a number of diseases.' Along with many other physical benefits. As noted in the links below.* [links omitted] *As you know, my desire is to return to work on March 4, 2013. In a time when staffing is short, my teleworking can offer much support to our District.*
>
> [Emphasis in the original]

[36] The grievor concluded her email with the request that they reconsider their denial and "help accommodate [her] son's breastfeeding schedule during [her] return to work following maternity leave." She added that "to take a leave of absence from work will place financial hardship on [her] family."

[37] I note that other than the reference to her other son's health problems, at no point in her testimony did the grievor suggest that her newest child had any condition, illness or disease that made breastfeeding after one year of age a physical or medical necessity, either as the sole source of nourishment or as a supplement. What she did say in direct examination was that breastfeeding "was not something you can stop and start." She added as follows that she never expected to need a medical note or letter to support her request: "because to me breastfeeding is so natural . . . so why do I need a medical issue to nurse my son?" Nevertheless, she asked for and received a note from her family physician, dated December 18, 2012, which stated that she was "currently breastfeeding her infant son." Her doctor added that she "plans to continue breastfeeding for the foreseeable future," concluding as follows (Exhibit U1, Tab 10): "She is requesting that she be authorized to work from home, as she did prior to her delivery, in order to continue breast feeding [*sic*]. I support her request with this matter."

[38] Counsel for the employer objected to the introduction of the doctor's letter on the grounds that the doctor was not present for purposes of cross-examination. I allowed the letter into evidence and stated that I would consider his objection when weighing the evidence.

[39] The grievor's supervisors were not prepared to reconsider their decision to deny her request to telework five days per week. Accordingly, on January 27, 2013, she emailed Mr. Battiston and the other supervisor to accept their offer of extended leave for March 4 to June 28, 2013, with a return-to-work date of July 1, 2013 (Exhibit U1, Tab 12, page 2). The extended leave application she submitted at the same time referenced clause 18.09 of the relevant collective agreement (Exhibit U1, Tab 12, page 1).

[40] Mr. Battiston replied on January 28, stating that her request had been approved (Exhibit U1, Tab 12, page 2).

[41] On February 27, 2013, the grievor emailed Mr. Battiston, copying Mr. Baggio, the regional director and her direct supervisor. She stated as follows: ". . . to clarify that when I requested and accepted unpaid leave under Article 18.09 it was only because I was told that my original request sent to you on Nov 27, 2012 to telework was denied and I felt that it was my only recourse to my situation" (Exhibit U1, Tab 13, page 1). She acknowledged her understanding as follows:

> *[That the CWDO] is currently dealing with a shortage of EL's due to recent retirements, not to mention that March is one of our busiest months,* [and] *therefore I truly believe that I could once again be a productive EL if I was allowed to work from home as I have done in the past, rather than not working or contributing to CWOD [sic] at all.*

[42] The grievor went on to say that she was "adamant about breastfeeding [her] son and wish to continue to try and pursue a teleworking arrangement" (Exhibit U1, Tab 13, page 1). She closed by asking Mr. Battiston to reconsider her original request. She then forwarded a copy of this email to Mr. Kohl, her union representative.

[43] The grievor did explore the possibility of finding a daycare closer to the Burlington office that would have permitted her to maintain her breastfeeding schedule while working physically in the office. On March 4, 2013, at 17:26, she advised Mr. Kohl that she had been informed that morning as follows: ". . . my daycare

of choice [Peekaboo Daycare in Burlington], that supports visits from me during the day to nurse, has an opening for both my children" (Exhibit E3, Tab 9, page 4). She proposed a schedule that had her teleworking on Tuesday and Friday from 06:30 to 16:00 and working out of the office on Mondays, Wednesdays and Thursdays on the following modified schedule that would allow her to visit her son at the daycare to nurse him (which would take about 45 minutes; Exhibit E3, Tab 9, page 4):

> *8:00am – start work*
> *9:30am – leave office to go nurse (approx 45 min)*
> *2:30pm – leave office to go nurse (approx 45 min)*
> *3:00pm – finish work for the day (A finish time of 3pm on these days will allow me to return home in time to get my son off of the bus at 4:15 pm.*

[44] Mr. Kohl took this proposal to the grievor's supervisors. He responded to her at 19:12 on March 4 as follows (Exhibit E3, Tab 9, page 4):

> ***GOOD NEWS*** *... with some slight modifications, your work at home for two days and in the office for the other three days is acceptable to Lou* [Battiston] *and John* [Baggio].
>
> *The only issues are as follows:*
>
> *1) The hours you 'work' must equal 37.5 hours for one week – this does not include your lunch breaks or the time associated to breast feeding [sic].*
>
> *2) The maximum time that will be allowed for this arrangement will be one (1) year or less, if you choose.*
>
> *PLEASE NOTE, that Lou reviewed your proposal and found that the 'working hours' do not total 37.5 hours. They only add up to 32.75 Hrs over the course of a week.*
>
> [Emphasis in the original]

[45] Mr. Kohl told the grievor that he would call her to discuss the issue.

[46] The result of the discussion was called a "counter proposal," although, strictly speaking, it would more properly be called an amendment to the grievor's original proposal. Mr. Kohl emailed Mr. Battiston and Mr. Baggio at 20:54 on March 4 to describe the grievor's new proposal. He explained that the grievor had confirmed the availability of a daycare [Peekaboo Daycare] that was about 3.5 km or approximately 5 minutes' drive from the Burlington office. On that basis, she was prepared to work at

the office three days per week (Mondays, Wednesdays and Thursdays) and to work the other two days from home. However, she asked for the following items.

[47] First, the grievor wanted the temporary time frame enlarged from one year to one-and-a-half years because she was ". . . just not sure how long [her] son will require breastfeeding and chooses [*sic*] to request the additional time, <u>just in case</u>" (emphasis in the original; Exhibit E3, Tab 9, page 3).

[48] Second, she wanted ". . . the breast feeding [*sic*] to be included in [her] paid hours of work and does not wish to forfeit [her] lunch breaks, [she] will however count [her] two 15 minute, paid coffee breaks towards the breastfeeding time." Her proposed schedule was to be as follows (Exhibit E3, Tab 9, page 3):

> *Mon/Wed/Thurs = 08:00 to 15:00 (less 0.5 hr lunch) = 6.5 hrs X <u>3 days = 19.5 hrs.</u> (which includes associated breast feeding [sic] times)*
>
> *Tues./Fri. = 7:00 to 16:30 = 9.5 hrs. (less 0.5 hr. lunch) = 9.0 hrs X <u>2 days = 18.0 hrs</u> (which includes associated breast feeding [sic] times)*
>
> ***GRAND TOTAL for the week = <u>37.5 hrs.</u>***
>
> [Emphasis in the original]

[49] Third, she was prepared "to keep the Tuesday and Friday hours close to the core office hours as suggested. [Her] new Tuesday/Friday hours would be 7:00 to 16:30" (Exhibit E3, Tab 9, page 3).

[50] On March 5, 2013, at 13:56, the grievor emailed Mr. Kohl. She expressed her appreciation with ". . . [him], Lou and John . . . taking the time to try and accommodate [her] breastfeeding needs." She added that she understood that she was ". . . in the wrong in thinking that [she] could ask for paid breaks to go breastfeeding" but added that she was ". . . just not sure where [she] can pull these hours from [her] schedule to do it." She explained that the ". . . scheduling situation is very stressful, hence why [her] first proposal was to telework full time." She also understood that ". . . being present in the office is important and [she has] therefore come up with an alternate schedule proposal." She thought that it would ". . . help prevent the need for [her] to leave the office and interrupt the day" (Exhibit E3, Tab 9, page 2). Her proposed schedule was to be as follows:

> ***Mon, Wed and Thurs***
> *6:00am to 8:30am – Telework*
> *8:30am – nurse (then travel to office)*
> *10:00am – start work in office*
> *2:30pm – Finish work to go nurse*
>
> ***Telework Schedule:***
> ***Tues and Friday***
> *7:00am - 4:30pm*
>
> [Emphasis in the original]

[51] On March 5, 2013, at 14:25, Mr. Kohl advised Mr. Battiston that the grievor had ". . . reconsidered the option of a Daycare facility in Burlington" (Exhibit E3, Tab 9, page 1). She was presenting a new proposal that ". . . eliminates the need for a Burlington daycare and having to transport her sons to Burlington." The schedule that she proposed ". . . removes the need for IC [Industry Canada] to cover her breastfeeding time and the associated travel time to & from a daycare" and was as follows (Exhibit E3, Tab 9, page 1):

> *The work time starts and stops before and after breastfeeding sessions:*
>
> *6:00 to 08:30 = 2.5 hrs. + 10:00 to 14:30 = 4.5 hrs. (-0.5 lunch) = 4.5 hrs X 3 days = 19.5 hrs.*
>
> *07:00 to 16:30 = 9.5 hrs. (-0.5 lunch) = 9.0 hrs X 2 days = 18.0 hrs*
>
> ***GRAND TOTAL for the week = 37.5 hrs.***
>
> [Emphasis in the original]

[52] Mr. Baggio responded at 14:38 on March 5. He stated that the proposal was under consideration (Exhibit E3, Tab 9, page 1).

[53] The grievor then escalated her discussions to include Ms. Bossy. On March 6, Ms. Bossy noted in an email that following discussions with Corporate Labour Management Relations, it had been determined that the employer could not proceed with the grievor's latest proposal because ". . . the work context has changed considerably since she [the grievor] has been away which no longer allows for the accommodation she is seeking" (Exhibit E3, Tab 10, page 2). However, "in order to try to respect the Duty to Accommodate Policy, we would be ready to offer the following options:"

a. That the grievor work from home one day a week, and in the Burlington office four days a week, working a minimum of 7.5 hrs a day when in the Burlington office;

b. That the grievor work part-time, or

c. That the grievor continue on leave-without-pay until she feels that her nursing is complete" (Exhibit E3, Tab 10, page 2).

[54] Ms. Bossy forwarded those options to Mr. Kohl and the grievor on March 6, 2012 (Exhibit U1, Tab 14). The grievor replied to Ms. Bossy on March 7, seeking the following clarification with respect to the first option (Exhibit E3, Tab 10, page 2):

> *In that 7.5 hour work day if I use two 30 min unpaid nursing sessions can I add those times to the day I telework? So within the 4 days x 4 hours of nursing sessions to work 4 extra hours on my telework day. Or are you implying that I have to work a 7.5 hour day plus 1 hour of unpaid for nursing. Therefore each of the 4 days in the office would include 7.5 paid hours + 0.5 lunch + 60 min total unpaid time to nurse = 9 hr day to come into Burlington office?*

[55] Following further discussions between Ms. Bossy and the grievor, Ms. Bossy emailed the grievor on March 8 to ask whether she would reconsider the part-time work option. The grievor replied as follows (Exhibit E3, Tab 10, page 1):

> *Thank you for getting back to me. Unfortunately, working part time is not an option for me. The cost to put my children in a Burlington daycare would cost $2,040/month. I would be working to just cover the cost of daycare.*
>
> *It appears that my original request to work full time would be the best suited option with accommodating my breastfeeding. I would avoid loss of pay and or the need to make up any paid time taken to go nurse. Unfortunately it's not up to me . . . .*

[56] In the end, the grievor and the employer reached an impasse. The grievor maintained her desire to telework five days per week to accommodate her son's breastfeeding schedule; the employer was not prepared to allow her to telework more than one day per week. Accordingly, on March 28, 2013, the grievor filed an individual grievance pursuant to section 208 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). She alleged as follows:

> *Management has discriminated against me on the grounds of sex and family status when they failed to comply with the Canadian Human Rights Act regarding my request for accommodation. Management has also failed to respect Article 61.01 of the Collective Agreement between Treasury Board and Local 2228 of the IBEW.*
>
> *I have a need to change the way I work because of breastfeeding. Management has forced me into an unsuitable situation and the hardship of having to take leave without pay.*

[57] By way of remedy, the grievor requested an order that her employer comply with the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "the *CHRA*") ". . . regarding 'sex and family status' and that Management respect its obligations as prescribed in the Canadian Human Rights Commission, Duty to Accommodate Policy" as well as under the relevant collective agreement. She also asked for the following (Exhibit U1, Tab 1):

> *That I be allowed to work from home full time, Monday to Friday between the hours of 7:00am to 3:00pm to accommodate breastfeeding my son until March 2014.*
>
> *That based on the effective date of March 4, 2013* [her original return-to-work date] *I be compensated for any lost wages and benefits that resulted due to the denial of my request and having to accept leave without pay during the time that an acceptable accommodation policy could have been arranged.*

[58] The grievance was forwarded to the employer on April 3, 2013 (Exhibit E3, Tab 11, page 1).

[59] The grievor's grievance proceeded through the first, second and final levels of the grievance process and then was referred to adjudication before the former Board on October 21, 2013 (Exhibit U1, Tab 5). On October 29, 2013, notice of the grievance was given to the CHRC. The prohibited grounds of discrimination were stated as sex and family status. The corrective action sought was "[a]ccommodation on the grounds of sex and family status with a workweek that would allow [the grievor] to breastfeed her child until March 2014, and compensation for all lost wages and benefits due to the employer's denial of the request" (Exhibit U1, Tab 6).

[60] The grievor eventually weaned her son and returned to work full-time as of October 1, 2013. Between March 28 and October 1, she used a combination of leave

without pay and vacation, gradually edging back to full-time work on October 1. During that period, the parties continued to negotiate over how the employer might accommodate the grievor's desire to continue breastfeeding her son. Counsel for the grievor advised that he intended to call evidence concerning those negotiations, stating that it was relevant to the issue of whether the employer had made good-faith efforts to accommodate the grievor. He also submitted that the grievance was in essence a continuing grievance precisely because it involved an alleged failure to accommodate and that, accordingly, evidence of an ongoing refusal to accommodate was relevant and admissible.

[61] Counsel for the employer, for his part, objected strenuously to the introduction of such evidence. He submitted that it was privileged for one or both of two reasons. First, they were settlement negotiations which, by definition, had to be considered privileged; otherwise, parties to a dispute would never try to settle an issue for fear that any concessions made during those negotiations would be used against them in the event the matter did not settle. Second, he submitted that negotiations between the parties during the various stages of a grievance process are treated as privileged for the same reason. He relied upon Gorsky and Usprich, *Evidence and Procedure in Canadian Labour Arbitration* (Toronto, 1994), vol. 1, c. 4.1; *Schenkman v. Treasury Board (Public Works and Government Services Canada),* 2004 PSSRB 1; and *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33.

[62] Counsel for the employer also repeated his objection that even if the evidence were introduced, it ought not to be used to change the nature of the grievance from one of a request for a five-day telework schedule to something less.

[63] I ruled that given the nature of the grievance, the evidence ought to be introduced on a provisional basis. I did so because if there was a duty to accommodate, then evidence as to whether the employer made efforts to accommodate after the grievance was filed might be relevant. The duty to accommodate is a flexible duty that requires the cooperation of both the employer and the employee, as well as, to a lesser extent, the union. It requires ongoing discussions. Hence, the fact that some of those discussions or investigations took place — or did not take place — after a grievance was filed might be relevant in the event that a finding were made that there was a duty to accommodate. I also noted that in both *Melanson* and *Schenkman*, similar evidence was admitted on a provisional basis, with

the adjudicators in both cases subsequently ruling in the end that the evidence was not relevant (and hence not repeated in their decisions).

[64] As a result, I allowed into evidence, on a provisional basis subject to my ultimate ruling as to relevance or privilege, the evidence in question. The evidence also included what was introduced as Exhibit E2, Tabs 14 to 36, consisting of emails and correspondence between the employer and the grievor or her representative after the date on which the grievance was filed. Having considered all the issues and the evidence, I am satisfied that the post-grievance evidence was not relevant. My reasons for so concluding are set out in my analysis and decision. Accordingly, I will not recount the post-grievance evidence at this point nor refer to it in my decision.

V. Submissions

A. For the grievor

[65] The grievor's representative commenced by observing that there was little or no dispute on the facts. He noted that all the witnesses had given their evidence in a straightforward and candid fashion. The issues then were essentially those of law rather than of credibility.

[66] The grievor's representative referred to article 61 of the relevant collective agreement, which forbids discrimination on the basis of, among other things, sex and family status. He also relied on subsection 3(1), section 3.1, paragraph 7(*b*) and section 10 of the *CHRA*. He submitted that the total effect of those provisions is to forbid an employer from establishing or pursuing policies that have the effect of depriving an employee of employment opportunities on a prohibited ground of discrimination and in particular on the basis of sex or family status or a combination of both. Sections 7 and 10 read as follows:

> ***7.*** *It is a discriminatory practice, directly or indirectly,*
>
> *(*a*) to refuse to employ or continue to employ any individual, or*
>
> *(*b*) in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*
>
> . . .

> ***10.*** *It is a discriminatory practice for 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.*

[67] The grievor's representative submitted that employment policies or requirements that had an adverse impact on a woman's decision to breastfeed her child could be considered discrimination on the basis of either or both sex or family status. It was discrimination on the basis of sex in that only women could breastfeed. It was discrimination on the basis of family status in that breastfeeding stemmed from a woman's status as a parent with obligations and responsibilities with respect to the care and nourishment of her child.

[68] The grievor's representative submitted that the jurisprudence is clear that the act of breastfeeding is unique to women and hence is a sex-based characteristic. Hence, any discriminatory conduct with respect to breastfeeding is discrimination based on sex. He referred to *Poirier v. British Columbia (Ministry of Municipal Affairs, Recreation & Housing),* [1997] B.C.H.R.T.D. No. 14 (QL) ("*Poirier*"), at para 7 and 8; *Cole v. Bell Canada,* 2007 CHRT 7 ("*Cole*"), at para 59 to 64; and *Carewest v. H.S.A.A.* (2001), 93 L.A.C. (4th) 129 ("*Carewest*"), at para 76 to 78.

[69] The grievor's representative acknowledged that the onus of establishing a *prima facie* case of discrimination based on sex or family status rested on the grievor. He submitted that the test had been met.

[70] The grievor's representative then turned to the Federal Court of Appeal's recent decision in *Canada (Attorney General) v. Johnstone,* 2014 FCA 110 ("*FCA-Johnstone*"). He submitted that while that decision was made in the context of family status discrimination, its principles apply equally to one of sex discrimination. He submitted that the Court's statements at paragraph 68 that prohibited grounds of discrimination based on family status ". . . generally address immutable or constructively immutable personal characteristics . . ." and at paragraph 71 that ". . . the parental obligations

whose fulfilment is protected by the *Canadian Human Rights Act* are those whose non-fulfilment engages the parent's legal responsibility to the child" supported the grievor's case.

[71] The grievor's representative referred to the test the Court set out at paragraph 93 of its decision. The Court held that in order to establish a *prima facie* case of discrimination on the basis of family status, a claimant had to show the following:

> *. . . (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.*

[72] The grievor's representative submitted that all four factors were established in this case. The first was obvious. With respect to the second, the grievor's representative submitted that breastfeeding was an immutable or constructively immutable characteristic of a woman's gender (in that only women can breastfeed). He emphasized that the decision to breastfeed was not simply a matter of personal choice. The choice to breastfeed was made on the birth of the infant, and once made, became an aspect of the mother's legal obligation to nourish her child. Since it was part of the woman's legal obligation, as a parent, to nourish her child, that obligation could not be adversely affected by an employer without being considered *prima facie* discriminatory on the basis of sex and, indeed, of family status.

[73] On this point, the grievor's representative emphasized that the issue did not turn on whether the infant had particular medical or physical needs that required breastfeeding (as was the case in *Cole* and *Carewest*). Instead, the issue turned solely on a mother's initial decision as to how she would nourish her child. Once she elected to give effect to her legal obligation to nourish her child by breastfeeding, she was entitled to continue as long as she wanted to, without discrimination. When questioned on whether there was any limit on how long a decision to breastfeed could be sheltered under this principle, the grievor's representative relented slightly, submitting that she could do so for "a reasonable period."

[74] Turning to the third requirement, the grievor's representative submitted that the grievor had attempted to come up with alternative solutions, but none was reasonably available. And finally, the employer's refusal to let her telework from home five days per week was more than a trivial or insubstantial interference with her ability to fulfill her legal obligation to continue breastfeeding her child.

[75] The grievor's representative then turned to the issue of the employer's duty to accommodate. He noted that the grievor had made her original request well in advance of her scheduled return-to-work date, yet the employer had failed to provide a quick response. The response that finally came simply denied her request, offering only to permit her to go on extended leave without pay. No other alternatives were offered. The grievor then offered to modify her request to include fewer days of teleworking, to which the employer's initial response was that it would allow her to telework two days per week, which it then withdrew, offering her only one day per week of teleworking. No explanation was given for the employer's refusal to grant the grievor's original request or for its subsequent withdrawal of its original offer to let her telework two days per week, other than that downsizing had occurred. However, there was no evidence to suggest that the Burlington office had suffered as a result of the downsizing. Nor was there any evidence to explain why having the grievor telework five days per week was somehow worse for the employer's operations than having her off work without pay. In short, the employer had failed to come up with any reasonable counter proposal to the grievor's request for accommodation.

[76] By way of conclusion, the grievor's representative submitted that I should find that a *prima facie* case of discrimination on the basis of sex or family status or both had been made out, that the employer had failed to accommodate the grievor, and that as a result she had suffered damage and loss. By way of remedy, he submitted that I ought to order compensation in the following form:

a. the leave she was required to take between March and July 2013;

b. reinstatement of the vacation time she had to use during that same period;

c. damages for having to end breast-feeding [sic] by October 1, 2013 instead of March 2014;

d. damages under the CHRA as noted in the submissions of the CHRC; and

e. that [I] reserve jurisdiction with respect to the implementation of the award in the event the parties were not able to come to an agreement.

B. <u>For the employer</u>

[77] Counsel for the employer commenced his submissions with the observation that this was an important case for the employer, one for which the decision could have profound impacts on its organization. As he had done at the beginning of the hearing, he emphasized that this grievance was about a request to telework from home five days per week to accommodate the grievor's desire to breastfeed her child after a year of maternity leave. It was not about any other form of possible accommodation or any different number of teleworking days. He submitted that the discussions and negotiations that had taken place after the grievance was filed were not relevant to the issue of whether the grievor had established a *prima facie* case of discrimination. Such evidence might become relevant only after a finding that the grievor had established such a case.

[78] Counsel for the employer relied heavily upon the recent decision in *FCA-Johnstone*. He submitted that that decision represented a significant elaboration of the law with respect to discrimination on the basis of family status. He pointed to the test necessary to establish a *prima facie* case, already discussed in this decision, and submitted that on the facts of this case, the grievor could not satisfy the second and third criteria, which are the following:

> *. . . (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; and (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible . . . .*

[79] Counsel for the employer submitted that the "legal responsibility" of a parent in a case like this is the obligation to provide nourishment to his or her child. That obligation is engaged in breastfeeding cases only if the child has some medical need that can be satisfied only in that fashion. If not, then breastfeeding cannot by itself satisfy the condition. Insofar as the "reasonable efforts" test was concerned, the grievor had not established that she had considered or had tried any alternate arrangements. For example, at one point, she had indicated that she had found a daycare close to the Burlington office that would have allowed her to keep her breastfeeding schedule but then had decided not to pursue that option and eventually

returned to her original proposal. Accordingly, counsel submitted that the grievor had not met the test set out in *FCA-Johnstone* and accordingly had failed to establish a *prima facie* case of discrimination.

[80] In the alternative, counsel for the employer submitted that there was a "softer" test with respect to establishing a *prima facie* case. In making this submission, he relied upon the decision in *Coast Mountains School District No. 82 v. BC Teachers' Federation* (2006), 155 L.A.C. (4th) 411 ("*Coast Mountains*"). He emphasized that the case before me involved a mother who was returning to work after a year-long maternity leave. He submitted that the submission of counsel for the grievor — that a choice to breastfeed automatically triggered the duty to accommodate — had been made to and rejected by the arbitrator in *Coast Mountains*. A choice of one of several possible options is simply a personal choice that does not attract protection under human rights legislation or provisions in a collective agreement.

[81] Counsel for the employer then submitted that even had the grievor established a *prima facie* case, the evidence did not establish a failure on the employer's part to accommodate her. The duty to accommodate is not a one-way street. The employee must cooperate in the process and is not entitled to have his or her choice among several alternatives, each of which represents a suitable accommodation. That is a choice the employer is entitled to make. He cited *Spooner v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 60, and *King v. Treasury Board (Correctional Service of Canada),* 2011 PSLRB 122. In this case, the employer had made efforts before the grievance was filed to accommodate the alternatives that the grievor had initially proposed, efforts that were frustrated when the grievor elected to return to her original proposal.

[82] Turning to the questions of *bona fide* occupational requirements and undue hardship, counsel for the employer referred to the test in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3, as explained in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hyrdo-Québec, section locale 2000 (SCFP-FTQ),* 2008 SCC 43. The employer's duty to accommodate does not abrogate the employee's duty to work or at least to fulfill the basic obligations of his or her job. Counsel also pointed out that there is no procedural duty to accommodate once a case of undue hardship is made out, and cited *Canada (Human Rights Commission) v. Canada (Attorney General) and Cruden,* 2014 FCA 131.

[83] In this case, the employer had experienced downsizing over the years. It had fewer employees available to do the work that had to be performed both in the office and via on-site visits. In April 2012, the employer made a good-faith decision that it could no longer allow employees to telework, save for exceptional circumstances, and certainly not for five days per week. To require the employer to abrogate this decision by letting the grievor telework from home five days per week for a year or more was an undue hardship on the small workforce and on the employer's operations. In this case, the basic duties of the job required work to be performed at the office at least four days per week (which the employer had offered to the grievor), a condition the grievor had argued she was unable, or at least unwilling, to agree to. The grievor was trying to force her employer to create a new job for her and pay her for it, which was something that *Hydro-Québec* did not obligate it to do.

[84] Counsel for the employer then turned to the authorities relied upon by counsel for the grievor. He submitted that they could all be distinguished on their facts. In some, the employers had acted completely unreasonably, failing to make even a modicum of effort to accommodate their employees. Moreover, they all predated the decision in *FCA-Johnstone* and could no longer safely be relied upon. So, for example, the decision in *Cole* that <u>any</u> adverse impact was discriminatory could no longer be considered correct in law.

[85] Counsel for the employer concluded by submitting that the grievance should be dismissed.

C. <u>For the CHRC</u>

[86] Counsel for the CHRC did not attend the hearing. Its written submissions were filed before the hearing commenced. As a result, the CHRC stated as follows at paragraph 3 that its submissions were made on the basis of its understanding that the grievor's allegations were that:

> *i. the work schedule imposed by the employer had an adverse differential impact on Ms Flatt, as a nursing mother, and*
>
> *ii. the employer could have accommodated Ms Flatt's schedule of breastfeeding without undue hardship by offering her a telework arrangement.*

[87] Counsel for the CHRC noted at paragraph 4 of its submissions that the CHRC did not represent any party but that it ". . . instead acts in its role as a representative of the public interest, providing submissions concerning the general interpretation or application of the CHRA . . . ."

[88] Counsel for the CHRC submitted at paragraph 5 that the human rights issues raised in this case were the following:

a. could the grievor prove a *prima facie* case of discrimination;

b. if so, could the employer establish some alternate non-discriminatory explanation for its conduct, for example, one based on a *bona fide* occupational requirement; and

c. if not, what remedies were appropriate.

[89] Counsel for the CHRC commenced his submissions with an analysis of the general principles applicable to cases of alleged discrimination. With respect to the initial onus on a complainant to establish a *prima facie* case, he referenced at paragraph 17 the decision in *FCA-Johnstone* and its comment that the test was "necessarily flexible and contextual." (I note that counsel for the CHRC nowhere referenced the Federal Court of Appeal's discussion of what was necessary to establish a *prima facie* case of discrimination on the basis of family status.)

[90] Dealing with the first issue, counsel for the CHRC submitted at paragraph 20 that "[e]stablished human rights case law holds that differential treatment of a mother based on the fact that she is breastfeeding is a form of sex discrimination, and strongly suggests that it is also a form of discrimination on the basis of family status." In support of this proposition, he cited at paragraph 21 the Canadian Human Rights Tribunal's (CHRT) decision in *Cole* and the arbitration decision in *Carewest*.

[91] Counsel for the CHRC went on to submit at paragraph 24 that ". . . human rights decision-makers [*sic*] have rejected suggestions that breastfeeding is a question of personal preference that does not warrant human rights protection, without proof of medical necessity," again citing *Cole*.

[92] Counsel for the CHRC then turned to the question of whether the grievor had been subject to adverse differential treatment based on sex or family status or both. Again citing *Cole* and *Carewest*, he submitted at paragraphs 25 to 28 that work

schedules that interfered with or made impossible a mother's breastfeeding schedule did constitute adverse differential treatment based on either or both grounds.

[93] Counsel for the CHRC, at paragraphs 29 to 37, then turned to the issue of what an employer had to demonstrate in terms of its duty to accommodate and whether undue hardship could be established. He concluded at paragraph 38 by noting the Board's ability to award damages of up to $20 000.00 for pain and suffering and special compensation of up to $20 000.00 if the discrimination was wilful or reckless.

D. Reply on behalf of the grievor

[94] Counsel for the grievor submitted that this was a continuing grievance and that, as such, evidence of what took place after the grievance was filed was relevant. Time does not stop when a grievance is filed, at least in the case of a grievance based on discrimination and on an employer's failure to accommodate an employee.

[95] With respect to the decision in *FCA-Johnstone*, counsel for the grievor submitted that on the facts, the employer had recognized its duty to accommodate. It was uncontradicted that the employer had attempted to accommodate the grievor, albeit not to the extent necessary. It was too late at the hearing for the employer to argue that the duty to accommodate had not been triggered. Moreover, in the negotiations that took place before the grievance was filed, the employer, not the grievor, had fundamentally altered its position. It had initially offered her the chance to telework two days per week but then unilaterally changed the proposal to only one day.

[96] As far as *Hydro-Québec* was concerned, the central issue was whether the employer's standard for employment was rational. But in the case before me, the employer's position — which was that the grievor could either telework one day per week or take an extended leave of absence with no pay — made no rational sense. If the April 2012 policy change was based on a decrease in staff size, how could it make sense to do without the grievor working during her extended leave? Would it not have made more sense and have been more rational from the viewpoint of the employer's operations to have the grievor teleworking for five days per week rather than not working? Surely, some meaningful work was better than none. There was no evidence that it had been impossible for the employer to accommodate her. Others — including the grievor — had teleworked in the past. Nor was there any evidence from any other

employee in the office to the effect that the grievor's teleworking would have had an adverse impact on his or her work.

VI. Analysis and decision

[97] This grievance raises difficult questions to which there have been few logical answers. Are work requirements that impact on an employee's breastfeeding schedules discrimination and, if so, are they discrimination on the basis of sex or family status or both? And does the distinction, if any, matter? What is necessary for a grievor to establish a *prima facie* case of discrimination on the basis of breastfeeding? What duty, if any, does an employer have to accommodate an employee who is breastfeeding, and how far — and for how long — does that duty extend? Some of these questions are addressed in what follows.

[98] Before proceeding, I need to deal with two of the issues raised in the submissions of counsel.

[99] First, I do not accept that the employer's initial attempt to come up with some form of accommodation constituted an admission that the grievor had in fact established a *prima facie* case of discrimination — or indeed that the employer had any duty to accommodate. Most rational and reasonable employers, acting in good faith, will in ordinary course listen to and consider an employee's request for accommodation. That does not mean that they agree that there is a duty to accommodate; it means only that they are being considerate employers. That is what good labour relations is all about. A finding that such discussions constitute an admission that an accommodation is necessary would cast a chill on good-faith labour relations. Moreover, such discussions often take place between employees and union representatives on the one hand and front-line supervisors or managers on the other. The latter operate at a low level in an employer's management structure and generally lack the authority necessary to bind the employer; that is, they are not one of the contracting parties; see, for example, *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans),* 2010 PSLRB 112, at para 76. And finally, such questions are essentially legal ones based on findings of fact made by an adjudicator. The fact that a manager may believe that there is some duty to accommodate does not determine or limit an adjudicator's responsibility to decide the issue; see, for example, *Ahmad v. Canada Revenue Agency,* 2013 PSLRB 60, at para 126, as confirmed in *Ahmad v. Canada Revenue Agency*, FC File T-1122-13.

[100] Second, and dealing with the issue of the scope of the grievance, in my opinion, the grievance with which I am concerned is the one that was filed, which stated that the employer failed to accommodate the grievor's desire to breastfeed her child by permitting her to telework five days per week. That was the grievor's original request in November 2012, and it is the request that ultimately grounded the grievance that was filed in March 2013. It is true that between those dates, the grievor did suggest that she might be prepared to telework fewer days, provided certain other changes were made to her work schedule. However, it remains the case that in the end, she backed away from those proposals and returned to her original request in its original form. Had she grieved simply that she had not been accommodated, she would have left open the possibility of some form of accommodation other than five days of teleworking. But that is not what she did. She grieved that the accommodation of her breastfeeding required a specific, particular and precise form of work. Hence, that is the grievance with which I will deal.

A. Are work requirements that impact an employee's breastfeeding schedule discrimination and, if so, is it discrimination on the basis of sex or family status or both?

[101] At the hearing, the parties relied on only four reported cases dealing with the issue: *Poirier, Carewest*, *Cole*, and *Coast Mountains*. The first three are problematic. The fourth, *Coast Mountains*, while in my opinion better reasoned, is nevertheless weakened by its reliance on *Poirier*.

1. *Poirier*

[102] The conclusion that any adverse impact on a woman's breastfeeding of her child is discrimination on the basis of sex has its origin in *Poirier*. Unfortunately, the analytical and conceptual underpinning of that decision — and its conclusion — does not bear close scrutiny.

[103] In *Poirier*, the complainant gave birth to her daughter on August 31, 1990. Between December 17, 1990 (when the child was 3 1/2 months old), and March 1991 (when she was 6 months old), the complainant's child was brought to her at her workplace for 1.5 hours each day between 12:30 and 14:00 for breastfeeding. The complainant's lunch hour comprised one hour. She continued to work for part of that time while breastfeeding. If her daughter would not settle during feeding, the

complainant would take her to the first-aid room, where the relative quiet was conducive to feeding the child.

[104] During this period, the respondent in that case had no formal policy with respect to breastfeeding in the workplace. Before starting her arrangement, the complainant had discussed it with her supervisor and her co-workers. All had agreed that there would be no difficulty with the arrangement. And there was none, until the complainant happened to attend some workplace seminars during the lunch hour while breastfeeding her child. After that, the respondent received several complaints (one written, the rest verbal) from other women about the fact that the complainant breastfed her child during the seminar while men and women were present.

[105] As a result of the complaints, the respondent developed an informal policy as follows:

a. it was inappropriate to have children attending the workplace, and a more formal policy would soon be developed; and

b. the policy applied to everyone, but for the time being, the complainant could continue to bring her child to the workplace for breastfeeding.

[106] Shortly after that, the complainant's supervisor asked her to breastfeed her child somewhere other than in the workplace for two weeks ". . . in the hopes that the controversy in the Ministry over her breastfeeding in the workplace would cool down" (paragraph 17 of the agreed statement of facts in *Poirier* ("the ASF")).

[107] After this request was made, the complainant never again had her child brought to the workplace for breastfeeding. She testified that "the message being sent to [her] was that [her] child was not welcome at the worksite and this made [her] unable to relax enough to breastfeed at [her] work station [*sic*]" (paragraph 18 of the ASF).

[108] The complaint in *Poirier* was that the respondent had discriminated against the complainant on the basis of sex (contrary to British Columbia's *Human Rights Code*; "the *Code*") when it refused to allow her to continue to breastfeed her child at work during her lunch hour or at lunch-hour seminars that it presented. The complaint proceeded before the BC Human Rights Tribunal (BC HRT) on the basis of an agreed statement of facts.

[109] All three parties— the complainant, her employer and the Deputy Chief Commissioner of the BC Human Rights Commission — agreed that discriminating against a woman because she was breastfeeding was prohibited; see page 10. However, both the complainant and the Deputy Chief Commissioner asked the BC HRT to consider the issue of whether discrimination on the basis of breastfeeding was discrimination because of the following (at page 11):

> a. *there were no reported Canadian cases which can be relied on as precedent for this proposition, and the Commission considers that a reasoned judgment on this issue will have significant value in future decisions; and*
>
> b. *Such a judgment would also give the Commission considerable assistance in the early resolution of complaints based on this ground.*

[110] The following questions were put to the BC HRT:

> a. Was discrimination based on breastfeeding prohibited by the *Code*?
>
> b. Did the respondent discriminate against the complainant?
>
> c. Did the respondent accommodate the complainant to the point of undue hardship?

[111] The BC HRT commenced its analysis with the observation that ". . . if discrimination on the basis of breast-feeding [*sic*] is not a form of sex discrimination, [the tribunal member had] no jurisdiction to proceed" (at page 11). The BC HRT then determined whether it could find jurisdiction.

[112] The BC HRT noted that there were no precedents on the issue. It turned to the Supreme Court of Canada's decision in *Brooks v. Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219, which noted that "[d]istinctions based on pregnancy can be nothing other than distinctions based on sex or, at least, strongly, 'sex-related'". The BC HRT cited a passage from that decision, which in turn quoted a passage from one of the factums, the concluding part of which was the following:

> *. . . The capacity for pregnancy is an immutable characteristic, or incident of gender and a central distinguishing feature between men and women. A distinction based on pregnancy is not merely a distinction between those who are and are not pregnant, but also*

> *between the gender that has the capacity for pregnancy and the gender which does not.*

[113] Following this quote, at page 12, the BC HRT immediately came to the following conclusion: ". . . the same reasoning applies to breast-feeding. The capacity to breast-feed is unique to the female gender. I conclude therefore that discrimination on the basis that a woman is breast-feeding is a form of sex discrimination" (*sic* throughout).

[114] The BC HRT then concluded as follows:

a. discrimination on the basis of breastfeeding was discrimination on the basis of sex (para. 8);

b. the respondent's informal policy that no children were allowed at the workplace ". . . had an adverse effect on the complainant as a breastfeeding mother" (at paragraph 21) and hence was discrimination on the basis of sex, contrary to section 13 of the *Code* (see paragraph 26); but

c. the complainant had ". . . not established a *prima facie* case that she was discriminated against with respect to or denied an accommodation, service or facility customarily available to the public because of her sex," contrary to section 8 of the *Code* (see paragraph 26; also, see paragraph 27).

[115] There are a number of difficulties with *Poirier*.

[116] *Poirier* was a decision of first-instance. Its genesis as a "friendly" application amongst parties that was restricted by jurisdictional issues to human rights legislation is hence unfortunate for two reasons.

[117] First, and as already noted, all the parties agreed that the rule in question was not only discriminatory but discriminatory on the basis of sex. Applications based on such agreements can be unfortunate, because they may deprive a decision maker of both the factual context and the reasoned arguments that are ordinarily available to him or her when parties contest issues. The decision maker's reasoning may thus become abbreviated, and result-oriented. While such truncation may not trouble the parties (who have already agreed on the result), it may pose a problem when the resulting decision is relied upon as a precedent in future cases.

[118] Second, the fact that the matter was dealt with under human rights legislation rather than under a collective agreement meant that the analytical tools available to the decision maker were more limited than they might otherwise have been. Had, for example, the matter been considered as a grievance under a collective agreement, an analysis of the respondent's abrupt and rather arbitrary shifts in its policies and rules about breastfeeding could have been dealt with as a question of the reasonableness of the employer's exercise of its rule-making powers: see, for e.g., *KVP Co. Ltd v. Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73, and *Communications, Energy and Paperworkers' Union of Canada, Local 30 v. Irving Pulp & Paper Ltd*, 2013 SCC 34.

[119] For these reasons it is in my view important to unpack the reasoning in *Poirier* to make clear the underlying rationale of the decision. This in turn brings us to the decision and reasoning in *Brooks*, which *Poirier* relied upon and purported to apply.

[120] *Brooks* involved an employer's group insurance plan. The plan provided weekly benefits for loss of pay caused by accident or sickness. The plan covered pregnant employees. However, the plan excluded pregnant women from coverage for a period commencing the tenth week prior to her expected week of confinement and ending the sixth week after the week of confinement. The exclusion applied regardless of whether the woman in question was off work during the exclusion period because of an accident, a sickness, or a pregnancy-related disability.

[121] At issue by the time the case got to the Supreme Court of Canada was whether the exclusion was discriminatory and, if so, whether it constituted discrimination on the basis of sex or family status. In considering the first question – whether the exclusion was discriminatory – the Court referenced its earlier decisions in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd*, [1985] 2 SCR 536 and *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114. Discrimination in these cases is understood as arising where a rule or practice or standard adopted by an employer "imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force:" *O'Malley, supra*, at p. 551. On this analysis the exclusion in *Brooks* was clearly discriminatory. It separated out a particular group-pregnant women – and imposed a penalty (denial of benefits to which they would

otherwise be entitled under the plan) solely because they were pregnant (or more exactly, at a particular stage in their pregnancy).

[122] Having determined that the exclusion was discriminatory, the Court then moved on to the question of whether it was discriminatory because of sex. It was in the context of this discussion that the Court adopted the appellant's submission that "[t]he capacity for pregnancy is an immutable characteristic, or incident of gender and a central distinguishing feature between men and women:" p. 1244*c*. That being the case, distinctions based on pregnancy "can be nothing other than distinctions based on sex or, at least, strongly 'sex related':" p. 1244*d*.

[123] The important point here is that the analysis required by *Brooks* is a two-step process. But the decision in *Poirier* – no doubt because of the agreement of the parties – ended up eliding the two steps into a simple declaratory statement. It is accordingly necessary to revisit the analysis to determine whether it supports its conclusion.

[124] Was the employer's action in *Poirier* discriminatory? Did it, in other words, impose, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force? The difficulty here is that on the facts the employer (a) was not barring breastfeeding forever, but only for two weeks to allow feelings to cool, and (b) barred breastfeeding because it had created strong reactions in some of its other employees, and (c) was hoping to develop policies that would enable it to navigate the treacherous waters between the advocates and opponents of public breastfeeding. Indeed, the complainant appeared to be reacting as much to the fact that some other employees were unhappy with her decision to breastfeed in public as she was with the employer's rather inept efforts to please everyone (thereby pleasing no one). Such actions do not in the circumstances strike me as being discriminatory within the meaning of *Brooks*.

[125] The other weakness of *Poirier* with respect to this question is that there was no discussion about whether the employer's policies constituted discrimination on the basis of family status. The lack of discussion seems odd, given that at the time what was then s. 8(1) of the BC *Human Rights Code* did prohibit discrimination with respect to terms or conditions of employment because of "family status … [or] sex." But the parties before the HRT, *and* before the court in an application for judicial review of an earlier decision of the BC Human Rights Commission in the same matter, proceeded on the assumption that discrimination in the workplace on the basis of breastfeeding was

discrimination on the basis of sex alone: see, for e.g., *Poirier v. British Columbia (Council of Human Rights)*, [1996] BCJ No. 1795; in *Poirier* the HRT referred only to the prohibited ground of sex when it quoted what was by then s. 13(1) of the *Code*.

2. *Carewest*

[126] *Carewest* was a grievance under a collective agreement. The grievor was a permanent part-time therapist who had taken a nine-month pregnancy leave. At the end of that time, her child would not take the bottle and was not taking solid foods. The child's ". . . only source of nourishment . . . was through breastfeeding every three hours" (at paragraph 10). She asked for a further extension (to the one-year mark) of unpaid maternity leave. The collective agreement provided that extensions ". . . due to ill health of the mother or the child shall not be unreasonably denied" (at paragraph 2). Discipline and dismissal were subject to the requirement of just cause. The employer in that case rejected her request. The grievor then filed a grievance alleging violations of the collective agreement's management rights, no discrimination and leave of absence provisions. The grievance was filed before her initial return to work date. When she then advised the employer that she would not be returning on that date so that she could continue breastfeeding and further advised it that she was not resigning, it terminated her. She then grieved the termination as well.

[127] In considering the issue of discrimination, the arbitrator noted that there were not many reported cases in the area (at paragraph 70). He considered one, *Grace Hospital v. British Columbia Nurses' Union* (1984), 16 L.A.C. (3d) 263, a pre-*Brooks* decision that had dismissed a grievance involving a request for extended leave if the grievor was unable to return to work for "reasons related to birth," on the grounds that the medical certificate that had been relied upon did not provide sufficient proof that she was unable to work for reasons related to birth. (The decision in *Grace Hospital* is not surprising given that the medical certificate in question simply stated that the grievor "will be absent from work . . . for medical reasons.") The other decision considered was *Poirier*. The arbitrator adopted the result in *Poirier*, concluding at paragraph 78 that breastfeeding, ". . . although a matter of choice at birth, is, as noted in *Brooks*, 'an immutable characteristic or incident of gender and a central distinguishing feature between men and women'." He went on as follows:

> *. . . The changes that a woman undergoes that allows her to breast-feed her child are unique to the female gender. A*

> *woman who decides to breast-feed her child should not be viewed in the same way as a parent who decides to place their child in a day care centre. Breast-feeding is a choice only a woman can make at birth but, once made, benefits the woman, her child and society as a whole. Breast-feeding in my view is as intimately connected to child birth as pregnancy is to child birth and should be safeguarded in the same way. I therefore agree with the conclusions in the* Poirier *decision ". . . that discrimination on the basis that a woman is breast-feeding is a form of sex discrimination."*
>
> [*Sic* throughout]

[128] Having reached this conclusion, the arbitrator allowed the two grievances. In allowing them, he grounded his decision solely on the issue of whether there had been discrimination on the basis of sex. He expressly rejected the union's argument that the employer's refusal of leave on the facts was unreasonable under the collective agreement; see paragraph 90. However, one must say that it is difficult to understand how on the facts before him it could have been found that the employer's decision — in the context of a part-time employee's request for unpaid leave to breastfeed a child whose only source of nourishment at the time was breast milk — could have been considered anything other than unreasonable within the meaning of the collective agreement. One is also hard-pressed to understand how the employer's decision to terminate such an employee on such facts could ever be considered to have been made for just cause. One would have thought on the principle of Occam's razor that a ruling based on the wording of the collective agreement, rather than the more complex and less-developed issue of whether breastfeeding is discrimination on the basis of sex (and if so, to what extent), would have been sufficient.

[129] The other point insofar as this discussion is concerned is the fact that there was no consideration in that case of which prohibited ground — sex or family status — applied in the case of breastfeeding. In my view, such a discussion was open to the arbitrator, for while the collective agreement did not prohibit discrimination on the basis of family status, the Alberta *Human Rights, Citizenship and Multiculturalism Act* (R.S.A. 1980, c. H-11.7) did; see paragraphs 2 and 3.

3. ***Coast Mountains***

[130] This was another arbitration decision. The grievor, a full-time teacher, sought and obtained a one-year maternity leave pursuant to the terms of her collective agreement. The collective agreement provided that on return from maternity leave, a

teacher would be returned to the same position — that is, as a full-time teacher — she had held on the commencement of her leave. Shortly before she was to return, she applied for extended maternity leave (which under the collective agreement was available for those ". . . who choose not to return to work . . ." (see paragraph 4)) by way of applying to work part-time during mornings, with the afternoons taught by another teacher who also wanted to work part-time. Her reason for the application was as follows: "I was still breastfeeding, and my child wasn't sleeping well, so I wanted a part-time extended leave so I could adjust to being a new parent before returning to the classroom full time [*sic*]" (see paragraph 17).

[131] The employer rejected the grievor's request. She grieved on the grounds that she had been discriminated against on the basis of sex or family status under the *Code*.

[132] The arbitrator first considered whether discrimination on the basis of family status was in play. He followed the decision of the BC Court of Appeal in *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society,* 2004 BCCA 260 ("*Campbell River*"), which had held that a *prima facie* case of discrimination on the basis of family status was made out when a change in a condition of employment ". . . results in a serious interference with a substantial parental or other family duty or obligation of the employee." In the case before him, the arbitrator concluded that the test had not been met. It could not be suggested that the grievor's situation was "anything but commonplace" (see paragraph 39). The baby was in good health. The grievor's position was no different from that of many other new mothers who would prefer to return from maternity leave to a period of part-time rather than full-time work. He noted as follows at paragraph 39:

> *. . . if the Union is correct that prima facie discrimination based on "family status" has been proven, that same finding would have to be made in virtually every instance of a full-time employee being denied a request for part-time work for a period at the conclusion of her maternity leave, subject only to the employer being able to show undue hardship. . . .*

[133] The arbitrator then turned to discrimination on the basis of sex. On that point, he agreed with *Poirier* that discrimination with respect to breastfeeding was discrimination on the basis of sex; see paragraphs 42 and 43. However, in this case, the grievor (unlike in *Carewest*) had offered no evidence as to the following (at paragraph 48):

> *. . . why expressing her milk for bottle-feeding to her child by her child's caregivers would not have compensated in terms of the child's nourishment for the reduced frequency of breast feedings [sic]; and nor was there any suggestion . . .* [that the employer] *would have stood in the way of . . .* [the grievor] *having her child brought to her . . . for breast feeding [sic] . . . .*

[134] Again applying the test in *Campbell River*, the arbitrator concluded that ". . . while working full-time was not as she would have preferred it, there was no evidence that that was the only mode of organization available to her" (see paragraph 48). The evidence fell short of establishing ". . . the causal link between the adverse treatment allegedly experienced by [the grievor], on the one hand, and the options given to her by the School Board, on the other, that is required by the Human Right's Code prohibitions against discrimination [because of sex] . . . ."

[135] The arbitrator denied the grievance.

4. *Cole*

[136] In *Cole*, the complainant's child was born with a congenital heart defect. He had to undergo angioplasty when he was only four months old. He was likely to require more surgery when he got older. Given her child's condition, her doctors ". . . recommended that she breastfeed him for as long as possible in order to strengthen his immune system" (see paragraph 4). Expert evidence was introduced at the hearing to the effect that children with congenital heart defects were prone to bacterial infections and that breastfeeding made them less susceptible to such infections and made them better able to fight them off if they contracted them.

[137] The complainant followed her son's physicians' instructions and breastfed him until he was seven months old. She then introduced him to some solid food. By the time he was almost a year old, he had settled into a breastfeeding routine of three to four times a day: at 06:30, 16:30, between 21:00 and 22:00, and sometimes during the night.

[138] The complainant initially requested one hour of unpaid personal leave per day to nurse her baby. Since her regular shift usually ended at 16:00, her request would have enabled her to leave work at 15:00, join her son at her caregiver's house and nurse him by 16:30. That request was denied. The complainant then ". . . pared down her request to what she viewed as a bare minimum . . ." and simply asked that the end

of her shift be fixed at 16:00 (see paragraph 57). She made this request because, on occasion, possibly three times a year, she had to work until 16:15. The employer asked her to submit medical documentation ". . . confirming the accommodation that she required due to her son's health problems" (see paragraph 18), which she did (although the note itself simply stated — as is unfortunately all too typical in cases involving medical notes — that she had been advised to leave work at 16:00 "for medical reasons"; see paragraph 20). The note was reviewed by the employer's "Disability Management Group" ("DMG"), which had been set up to maintain the privacy and confidentiality of employee's medical information. The DMG felt that the note was not sufficiently detailed and requested another. This time, the doctor's note said she should leave at 16:00 for 12 months "for prevention of recurrent mastitis" (see paragraph 23). This note was deemed sufficient, and the complainant was assigned exclusively to 08:00 to 16:00 shifts for a 12-month period ending May 24, 2002. (At that point, her child would have been over two years old.)

[139] In March 2002, as the end of the 12-month period was approaching, the employer advised the complainant that new medical documentation would be required to support an extension of the existing accommodation. In what appears to have been a failure of communication between the various people involved (the DMG, its medical advisors, the complainant, her supervisors and her physician), an exchange occurred of increasingly detailed (but still somewhat elusive) reports from the complainant's physician and the DMG and its medical advisor as to the reason for the fixed-shift accommodation. In the end, the complainant resigned herself to the expectation that she would eventually be required to work later shifts. Accordingly, she stopped her son's 16:30 feeding in October 2002 (by which point he was roughly two-and-a-half years old), and by March 2003 (when he was three), she had weaned him altogether. However, one should note that the employer did not in fact remove her from the fixed shift schedule until March 2003. (There was some confusion between the parties as to who had communicated what to whom until March 2003. The fact remains that she had not been removed from the fixed shift she had been placed on until March 2003).

[140] Ms. Cole filed her human rights complaint with the CHRT in April 2004, more than a year after she weaned her child. Her original allegation was that she had been discriminated against on the basis of sex and family status. The CHRT noted that the reasoning in *Poirier* — that a distinction based on breastfeeding was a distinction based on sex — could support a parallel conclusion with respect to a distinction based

on family status. However, the complainant's submissions and evidence at the hearing focused on discrimination on the basis of sex rather than family status. That being the case, the CHRT elected to dismiss that part of the complaint based on family status. It then turned to the issue of discrimination based on sex.

[141] The CHRT's first step was to follow the decision in *Poirier* to the effect that ". . . discrimination on the basis that an individual is breastfeeding is a form of sex discrimination" (see paragraph 50). I note that again no discussion took place of whether the discrimination might be based on family status as opposed to sex, even though the former was also a prohibited ground under the *CHRA*. The CHRT then went on to ask whether the complainant had established a *prima facie* case of differential treatment on the basis of her sex.

[142] On the facts, the employer had agreed to the complainant's request that she be provided with a guaranteed 08:00 to 16:00 work schedule to enable her to continue breastfeeding her child. Despite that accommodation, the CHRT concluded that the complainant had established a *prima facie* case of discrimination based on sex. It reached this conclusion because the employer had rested its decision on medical evidence from the complainant's doctor. Why was this wrong? Because, according to the CHRT, by doing so the employer had converted the issue "into a medical issue" (see paragraph 57). In the CHRT's, view the employer ". . . never addressed this request as that of a nursing mother . . . [but as that of] an ill or disabled employee" (see paragraph 63). In so doing, the employer was subjecting her to conditions and specifications that it would not have imposed on a male employee (see paragraph 63). According to the CHRT, that established "[a] *prima facie* case of differential treatment based on Ms. Cole's sex . . ." (see paragraph 64).

[143] I pause to note that the CHRT's reasoning on this point is, with respect, obscure. The basic fact is that the employer did accommodate the complainant's request to be granted a fixed end time to her shift for a year. That being the case, it is difficult to understand how the employer's reason for its decision to grant the accommodation that had been requested — medical support — converted its accommodation into discrimination.

[144] The CHRT then turned to the question of whether the employer, as the CHRT put it, had answered the *prima facie* case against it.

[145] The CHRT commenced its analysis by noting that once a *prima facie* case had been made out, an employer could establish that it was not acting in a discriminatory fashion if its denial of the original request and then its request for medical support were based on a *bona fide* occupational requirement or that to accommodate the complainant would impose undue hardship on it. The CHRT noted the employer's argument that since the complainant's request for an accommodation had been based on her infant son's medical condition (and the consequent need to breastfeed him as long as possible), it was reasonable for the employer to ask for medical support. The CHRT rejected this argument at paragraph 69 because of the following:

> [It did] *not take into account a fundamental point. Why should the son's health be a consideration when dealing with Ms. Cole's request? Should it make any difference what motivation this parent may have had when making her request for some time off work to breastfeed her child? . . . .*

[146] The CHRT went on as follows at paragraph 70:

> *Thus, although Ms. Cole advised Bell management of her own prime motivation for continuing to breastfeed her baby after returning to work, Bell's reaction should only have been to consider this request as that of any mother making a request to her employer for measures that would enable her to continue breastfeeding her child. Bell's requirement that Ms. Cole provide* medical *proof to support the request was not justified. Bell may have had some basis to impose this condition if it had any reason to question whether Ms. Cole had indeed given birth 12 months earlier or doubted her sincerity when she explained that she was still breastfeeding her child. But there is no evidence before me of any such question or doubt ever having been raised in this case.*
>
> [Emphasis in the original]

[147] Underlying the CHRT's analysis appears to be the assumption that a breastfeeding woman needs no fact other than that she is breastfeeding to trigger an employer's duty to accommodate her. It does not matter whether the request is made at six weeks or six months or a year or, it would appear, at any stage in the child's development. It does not matter if other arrangements would make it possible for her to maintain her breastfeeding schedule and work commitments at the same time. All that would appear to matter in the CHRT's analysis is whether the mother is breastfeeding. On such an analysis, an employer would never be entitled at any point to seek ". . . some independent proof of her need to breastfeed her child" (see paragraph 78).

[148] The CHRT's reasoning, again with respect, becomes even more difficult to follow when it turned to the next question: Had the employer established ". . . that it made every possible accommodation short of undue hardship" (see paragraph 79)? The CHRT found that it had not, stating as follows at paragraph 79:

> *In the present case, not only has Bell failed to establish that it made every possible accommodation short of undue hardship, but there is no evidence indicating that Bell ever tried to accommodate Ms. Cole's request* as a mother *to breastfeed her child. Her original request for PGU* [Personal Grant Unpaid] *time off work was strongly discouraged. Her subsequent petition to receive a guaranteed 4:00 p.m. end of shift was not properly addressed. While it is true that in fact she was assigned fixed shifts for the following year, it was not to accommodate Ms. Cole's needs as a mother, but rather as a disabled or ill person. As I have already explained, this mischaracterization later resulted in a potential loss of her guaranteed shifts and forced her to repeatedly return to her physician to obtain one new medical report after another.*
>
> [Emphasis in original]

[149] Again, and with respect, the employer's defence to the charge of discrimination was in effect that it did accommodate the complainant by granting her the accommodation she had requested. Thus, there was no issue of undue hardship. Hence, it is unclear why the CHRT thought that there was. Missing too is any explanation of why the employer's decision to accommodate the complainant's request based on a medical report that she needed to leave at 16:00 to breastfeed for 12 months "for prevention of recurrent mastitis" (see paragraph 23) was not an accommodation of her request "as a mother." (One might also point out that the employer could hardly be faulted for treating the request as one based on medical reasons when the complainant's doctor had herself presented it in that fashion.)

[150] By way of conclusion to the analysis so far, and having considered these four decisions carefully, I must say that the analogy drawn in *Poirier* and the other decisions between pregnancy and breastfeeding is problematic. I acknowledge that the ability to breastfeed — to lactate — is a physical condition that is "an immutable characteristic, or incident of gender" (as noted in *Brooks*) in the same way that pregnancy is. But breastfeeding is different. It is a subset of and an expression of a larger complex of factors stemming from the relationship between a parent and an infant.

[151] The basic foundation blocks of that relationship are the nourishment of the child and, as importantly, the establishment and maintenance of the bond between a parent and her child through the act of nourishment and close physical contact. That purpose can be served by breastfeeding. But it can also be served (and often is) by nourishing an infant with milk that has been pumped, by formula provided by a mother who for whatever reason (either necessity, personal choice or physical inability) cannot breastfeed, or by a father or male parent.

[152] All of this is to suggest that breastfeeding is as much, if not more, an expression of "family status" — that is, the relationship between a parent and a child — as it is of gender. It recognizes that breastfeeding — that is, the decision to nourish an infant and bond with it by way of breastfeeding — is not "immutable." It is instead a choice — a choice mediated by a variety of physical, personal and social factors. It may be a choice heavily weighted in favour of breastfeeding (particularly in the early weeks or months of an infant's life), but it is nevertheless a choice about how that relationship is to be mediated. Stating this also recognizes that the ability to mesh work with breastfeeding will alter and shift as the child ages and as the parent's personal and social situation changes over that time.

[153] In short, breastfeeding is a function of a balancing of various personal choices and circumstances that flow from a relationship between two individuals (parent and child), the nature of which evolves over time and as the family unit grows or shrinks in size and composition. It may be a choice that is to be encouraged — even strongly encouraged — by society, but it is not an "immutable" characteristic of gender.

[154] The other point is this: to assert a protected status to the choice of a mother to fulfill her desire to nourish and bond with her child by way of breastfeeding is, in a sense, to denigrate a woman's choice (whether through personal preference, physical inability or social situation) to fulfill that desire in another way, for example, by bottle feeding, whether with formula or breast milk that has been pumped. It may also denigrate those who wean their children from breastfeeding earlier rather than later.

[155] One detects a whiff of that denigration in the comment of the arbitrator in *Carewest* that "[a] woman who decides to breastfeed her child should not be viewed in the same way as a parent who decides to place their child in a daycare centre." The immediate response to that statement is surely, "Why not?" Why should women who make different choices about how to nurture and provide for their children be placed

in different categories, one protected, one not? Would it not be better to analyze the pressures placed upon parents to balance the demands of work and those of family in the same way?

[156] In a case like this, the basic social value that we are considering protecting is surely that of establishing a solid nourishing and nurturing bond between an infant and his or her mother. The bond is established by regular feeding and physical contact, which is provided by breastfeeding or by bottle feeding, whether by the parent alone or by others (such as daycare providers) in the context of an overall parental relationship. And that bond is the bond of a loving parent, not the physical accident of gender.

[157] For these reasons, I have concluded that discrimination on the basis of breastfeeding, if it is discrimination, is discrimination on the basis of family status rather than of sex or gender.

B. What is necessary to establish a *prima facie* case of discrimination on the basis of breastfeeding?

[158] Having determined that discrimination on the basis of breastfeeding is discrimination on the basis of family status, I turn to the question of the *prima facie* case that must be established to trigger an employer's duty to accommodate an employee on the grounds of family status. This in turn drags us into the lively debate between arbitrators, courts and human rights tribunals over what is necessary to establish a *prima facie* case of discrimination on the basis of family status.

[159] Until today, there have been two lines of authority with respect to this question. One line, most strongly pressed by the CHRT and other human rights tribunals, is as the CHRT articulated in *Brown v. Canada (Department of National Revenue),* 1993 CanLII 683 (CHRT) ("*Brown*"), and in *Johnstone v. Canada Border Services*, 2010 CHRT 20 ("*Johnstone*"). The test articulated in those decisions seems to suggest that a *prima facie* case is established when, as a result of a parent's duties and obligations as a parent, he or she is unable to participate equally and fully in the obligations or opportunities of work. This is the test urged on me by the grievor's representative in the case before me.

[160] The other line, most commonly found in arbitration decisions, found its most authoritative expression in the BC Court of Appeal's decision in *Campbell River*. As

already noted, the Court in *Campbell River* held that a *prima facie* case of discrimination on the basis of family status is made out only when a change in a condition of employment ". . . results in a serious interference with a substantial parental or other family duty or obligation of the employee." Many arbitrators, while doubting that the test is triggered only in the case of a change in a condition of work, have nevertheless agreed that a *prima facie* case requires a serious interference with a substantial familial duty.

[161] The CHRT rejected the *Campbell River* test because it thought that it led to differential tests for discrimination when there should be only one. Its view, as expressed in such decisions as *Brown* and *Johnstone*, was (as already noted) that there was only one test and that a case was made out the moment a workplace condition had any adverse impact on an employee's obligations as a parent. However, I should note that a close analysis reveals that the adverse impact on parental obligations that *Brown* and *Johnstone* both dealt with was always substantial and serious.

[162] For example, in *Brown*, the complainant was a customs agent required to work shifts. Her husband was a police officer who also worked shifts. The complainant had a child and went on a 17-week maternity leave. When her leave expired, she asked her employer to place her on day shifts because she had not (despite her best efforts) been able to find suitable care for her infant overnight for those times that she and her husband both had to work nights. Her request was refused, and as a consequence, she had to go on extended (and unpaid) maternity leave. (Added to this was evidence that the employer was treating the complainant differently than other employees.) One would think that such facts revealed a serious interference with a substantial (not to mention legal) parental obligation. A parent with a 17-week-old infant who has searched diligently but unsuccessfully for suitable child care is hardly in a position — legally or practically — to leave the child alone at night in the event that she and her spouse both have to work.

[163] Similarly, one can say that on the facts that were before the CHRT in *Johnstone*, the same test was in effect applied, despite the CHRT's protestations to the contrary. In *Johnstone*, the CHRT first agreed ". . . that not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence . . ." but went on to state that ". . . this is not the argument put forward in the present case." Rather, the argument advanced by Ms. Johnstone was ". . . that

such protection should be given where appropriate and reasonable given the circumstances as presented" (emphasis added; all quotes are from paragraph 220 of *Johnstone*).

[164] The CHRT then noted at paragraph 221 that the case it had before it was ". . . a real parent to young children obligation and a substantial impact on that parent's ability to meet that obligation" (emphasis added). Accordingly, it was not necessary for the CHRT ". . . to address any and all family obligations and any and all conflict between an employee's work and those obligations"

[165] One should bear in mind that the "substantial impact" on a "real parent to young child obligation" the CHRT was considering involved an employee in a workplace that required its employees to work shifts over 4 days per week so that all shifts together covered 24 hours per day, 7 days per week and to work shifts that were irregular and unpredictable and that employee

a. had two young, preschool children;

b. had a husband who worked for the same employer subject to the same shifts and so was not predictably available to look after their children;

c. had family members who could look after their children three days per week but not the fourth day; and

d. had tried unsuccessfully to find suitable third-party daycare for any period outside normal daycare hours (see paragraphs 17 to 20, 25 and 26).

[166] With this background, the CHRT turned to the question of family status and to whether it included child care responsibilities as follows at paragraph 233:

> *This Tribunal finds that the freedom 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.*

[167] The CHRT, at paragraph 234, "[h]aving found that the enumerated ground of 'family status' does include childcare responsibilities of the type and duration

experienced by Ms. Johnstone . . .” (emphasis added), then turned to the question of whether she had made out a *prima facie* case of discrimination. It noted the existence of the debate over what was necessary for a *prima facie* case of discrimination due to family status. It characterized the *Campbell River* decision as adopting “a new and greater test” that was rejected in *Hoyt v. Canadian National Railway,* 2006 CHRT 33, which it rejected as well (see paragraph 237). It went on as follows at paragraph 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.*

[168] Accordingly, at paragraph 242, the CHRT found that Ms. Johnstone had made out a *prima facie* case of discrimination. The difficulty of course is that the *prima facie* test purportedly adopted by the CHRT in *Johnstone* does not appear to square with either the facts before it or its own statement as to what it was not considering — that is, the everyday tensions between work and family life. In short, the fact scenario before the CHRT in *Johnstone* on its face (and on the CHRT’s comments about the facts) suggests a trigger more in line with that established in the *Campbell River* case.

[169] Given this analysis, I find it difficult to accept that the threshold test was in fact (or in law) as low as the CHRT suggested in *Brown* and *Johnstone*. The principle expressed in those decisions — that any adverse impact on the obligations attendant upon family status establishes a *prima facie* duty to accommodate — did not fit the facts actually before the CHRT in those cases. Those facts more closely fit those in *Campbell River* and hence would appear to better support the test set out in that decision.

[170] What this is to say is that despite the difference in the formulations of the test for discrimination on the basis of family status, the approach of the CHRT in *Brown* and *Johnstone* is and was the same as that in *Campbell River*. Both sides of the apparent debate were dealing with the same types of fact scenario. The scenarios all involved work obligations or rules that had serious impacts on substantial family obligation which the parents in question had made concerted efforts to solve – but to no avail. The difficulty then with the CHRT’s formulation of the test is thus not its application in *Brown* and *Johnstone*, but rather the fact that the way that it is worded –

that any adverse impact on the obligations attendant upon family status establishes a *prima facie* duty to accommodate – risks trivializing human rights legislation. As was noted in *FCA-Johnstone* at para. 69:

> *It is also important not to trivialize human rights legislation protection to personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities. These types of activities would be covered by family status according to one of the counsel who appeared before us, and I disagree with such an interpretation.*

[171] A focus on – and recognition of – the facts in *Hoyt* and *Johnstone* highlights the importance in family status discrimination cases of isolating and distinguishing those adverse impacts that are the result of *family status* discrimination from those that are the result of personal life style choices made by (in this case) an employee. Take, for example, a rule that requires employees to come to work at 7:00 a.m. Take two employees, one of whom live 10 minutes from work, the other who lives 1 hour away. Both have to get their children to daycare facilities close to home. Both of the facilities open at 6:30 a.m. In such a scenario the employer's rule poses no problem for the first parent. For the second, however, the rule may make it impossible for the parent to get to work on time. The question then becomes this: is the resulting impact a function of family status discrimination? Or is it a function of the second parent's decision (for whatever reason) to live 1 hour away from work, or to use a daycare that is not closer to his or her work place?

[172] Being in a family carries with it certain basic personal obligations and costs that any person would in ordinary course shoulder himself or herself. To adopt the formulation of the test set out in *Hoyt* and *Johnstone* without recalling the actual facts from which it sprang is to suggest that family status always trumps the obligations of work and always triggers the duty to accommodate. Such a result, as noted above in *FCA-Johnstone*, would be to trivialize human rights legislation. As if not more importantly, it would be in practice unworkable. It would mean that an employee with existing work obligations could require the employer to change those obligations for him or her simply through the personal decision to have a child or to raise or nurture that child in a particular way. Given the almost infinite variety of the modern family, the result could be the Balkanization of the workplace as each employee established his or her own personal accommodation tailored to his or her own family situation.

[173] These practical and theoretical difficulties are in my opinion the cause of the continued debate over the proper test. It also recommends to me the view that the duty not to discriminate on the basis of family status is triggered not simply because a work commitment has some impact on an employee's family obligations but rather because there is a significant impact on a substantial aspect of those obligations, an approach that has been repeatedly preferred for that reason in most arbitral decisions; see, for example, *Canadian Staff Union v. Canadian Union of Public Employees,* [2006] N.S.L.A.A. No. 15 (QL); *International Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc.,* [2009] O.L.A.A. No. 447 (QL); *Alberta (Solicitor General) v. Alberta Union of Provincial Employees,* [2010] A.G.A.A. No. 5 (QL) ("*Jungwirth*"); *Ontario Public Service Employees Union v. Ontario (Liquor Control Board of Ontario),* [2012] O.G.S.B.A. No. 155 (QL) ("*Thompson*"); and *Alliance Employees Union, Unit 15 v. Customs and Immigrations Union,* [2011] O.L.A.A. No. 24 (QL) ("*Loranger*").

[174] All these decisions came down on the side of a *prima facie* test that required of the complainants something more than simply an adverse impact on their family statuses.

[175] In my respectful opinion, a close reading of both the Federal Court decision in *Attorney General of Canada v. Johnstone and CHRT*, 2013 FC 113 and the Federal Court of Appeal decision in the appeal from that decision - being *FCA-Johnstone* – reveal a recognition of the difficulties associated with a low threshold. Both in my view suggest a threshold higher than that urged upon me by counsel for the grievor. Justice Mandamin in the lower court said that the test was "whether the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way" see paragraphs 125 to 128. The Federal Court of Appeal bridged the apparent gap between the *Johnstone* and *Campbell River* tests in a slightly different – but no lesser - manner by starting with the observation that the test was "flexible and contextual" at paragraphs 82 and 83. It went on to find that what was required to satisfy a *prima facie* case had to take into account ". . . the particular nature of the prohibited ground at issue"; see paragraph 85. That being the case, the test in the case of family status discrimination had to take into account the following fact (at paragraph 88):

> *Normally, parents have various options available to meet their parental obligations. Therefore, it cannot be said that a childcare obligation has resulted in an employee being*

> *unable to meet his or her work obligations unless no reasonable childcare alternative is reasonably available to the employee. It is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a* prima facie *case of discrimination will be made out.*

[176] In my respectful view, this is to all intents and purposes closer to the approach advocated in *Campbell River* than it is to the one advocated by the CHRT in *Johnstone*. This conclusion finds support in the fact that the Federal Court of Appeal expressly stated at paragraphs 89 and 90 that "this principle" (the one enunciated in paragraph 88 of *FCA-Johnstone*) was "recognized" in *Jungwirth*, *Thompson*, *Loranger* and *Wright v. Ontario (Office of the Legislative Assembly),* [1998] O.H.R.B.I.D. No. 13 (QL) ("*Wright*"); see paragraphs 89 to 91 of *FCA-Johnstone*. The first three arbitral decisions expressly adopted the *Campbell River* side of the debate. *Wright* did not refer to *Campbell River* but did arrive at a similar conclusion; see paragraphs 309 to 311 of that decision.

[177] At paragraph 93, immediately after the Federal Court of Appeal's endorsement of these decisions, it arrives at its test for a *prima facie* case of discrimination on the basis of family status, as follows:

> *I conclude from this analysis that in order to make out a* prima facie *case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show*
>
> *i. that a child is under his or her care and supervision;*
>
> *ii. that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to personal choice;*
>
> *iii. that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and*
>
> *iv. that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.*
>
> [Emphasis added; paragraphing added for ease of reading]

[178] Accordingly, I am satisfied as a result that the test to be applied in a case like the one before me is the one enunciated by the Court in *FCA-Johnstone* and that that test requires more than has been submitted by counsel for the grievor. It is one that focuses on the particular facts of the case within the context of the particular family. It is one that looks for a serious interference with a substantial obligation that arises only after the grievor has exercised his or her due diligence to find a solution that does not involve the employer. And it is one that is triggered only after the grievor's efforts have proven unsuccessful.

C. Has the grievor made out a case of *prima facie* discrimination on the basis of family status?

[179] I come now to the question of whether the grievor has made out a *prima facie* case of discrimination on the basis of family status, thus triggering the duty to accommodate her and her son's breastfeeding schedule. I will answer this question by applying the four elements of the test set out in *FCA-Johnstone.*

[180] The first condition is obviously satisfied in this case. It is the second and third that are problematic.

[181] Dealing with the second condition, a parent's legal responsibility is to nourish his or her child. How a parent fulfills that responsibility is a question of choice. Breastfeeding is one such choice, but it is not the only one. Sometimes the range of choices may shrink to one — for example, when the physical needs or illnesses of the child, as in *Cole* or *Carewest*, dictate that nourishment be supplied by way of breastfeeding. In such cases, the choice is no longer a choice, it is a legal responsibility. But in the case before me, there was no evidence to suggest that the grievor's choices were so restricted. Her child was one year old. There was no evidence of any physical condition or illness that made breastfeeding a necessity. Indeed, on the grievor's own evidence, the child was — or at least was to be — in daycare. Such evidence goes no further than establish that the grievor wanted — chose — to continue breastfeeding her child after he reached the age of one. It does not establish that her choice amounted to a legal responsibility.

[182] There is also the question of the evidence of the schedule that the grievor wanted the employer to accommodate. The grievor never explained why teleworking five days per week was necessary for her child when teleworking two days in the past

with her previous children had been sufficient. This lack of explanation is particularly troubling given the grievor's passing reference to the problems with breastfeeding that her most recent child had experienced. If teleworking two days per week had been acceptable in respect of a child who did have difficulties (whatever they were), it is difficult to understand why a child with no apparent difficulties would necessitate a longer telework week.

[183] I turn now to the third condition outlined in the *FCA-Johnstone* test, which is that the grievor made reasonable but unsuccessful efforts to satisfy her son's breastfeeding schedule through reasonable alternative solutions. Again, the evidence falls short. There was at least one "reasonable alternative" solution to teleworking five days per week that would have enabled the grievor to maintain the breastfeeding schedule she said she wanted to protect. The grievor's evidence was that she had located an available daycare spot that was close to the Burlington office. The fact that, as the grievor said, she "would be working to just cover the cost of daycare" does not alone establish that it was not a reasonable alternative. Life — whether alone or with family dependents — and the choices associated with it always entail certain costs that one works to cover. Moreover, such choices are generally the result of a cost-benefit analysis that includes but is not always restricted to their economic costs. The fact then that one might have to work to cover the cost associated with a particular choice is not in and of itself sufficient to make that choice unreasonable. The situation might have been different in this case had the cost of the daycare been so disproportionate that it would have adversely affected the ability of the grievor and her spouse to provide the other necessities of life. But there was no evidence to that effect.

[184] Given my opinion that the grievor's evidence fails to satisfy the second and third conditions, it is not strictly speaking necessary for me to analyze the fourth condition.

[185] It follows from what I have said so far that I was not satisfied that the grievor had established a *prima facie* case of discrimination on the basis of family status. That being the case, the employer was under no duty to accommodate the grievor's request to telework five days per week to maintain the particular breastfeeding schedule she had established.

D. Did the employer accommodate the grievor to the point of undue hardship?

[186] If I am wrong in my decision with respect to the nature of the discrimination at issue, and if in fact a *prima facie* case of discrimination is made out, I am nevertheless satisfied that the respondent satisfied what would be the resulting obligation on it to accommodate the grievor to the point of undue hardship. The test in such cases was set out in *British Columbia (Public Service Employee Relations Commissions) v. BCGSEU ("Meiorin")* as follows:

a. the employer adopted the standard for a purpose or goal rationally connected to the function being performed;

b. the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate purpose or goal; and

c. the standard is reasonably necessary to the accomplishment of that legitimate purpose or goal, in the sense that is impossible to accommodate individuals sharing the characteristics of the grievor without incurring undue hardship.

[187] The standard or rule in question was that an employee attend to perform the duties of her job at the office. The limitations on requests to telework were imposed as a result of difficulties the employer had experienced with it, caused in part by reductions in its staff. While *some* telework was still possible, it was established on the evidence that telework for five days a week for a year would exacerbate the difficulties the employer had experienced. The restriction was adopted in good faith. It was not directed at the grievor personally, nor at breast-feeding mothers in general. It applied to all employees, and was adopted in response to changes in the number of the employer's employees – but not in the amount and nature of the work that had to be performed. Notwithstanding the employer's inability to grant the grievor's request to telework from home for a year, it did try within the restraints under which it was operating to accommodate her request. The employer did discuss other possible accommodations with the grievor, but she ultimately refused to yield from her original request. Both parties have a role to play in the accommodation process, and the grievor did not explain why she needed a year (or a year and a half) of telework, or why (other than the cost) she could not use a daycare closer to work.

[188] This finding with respect to the employer's efforts to accommodate the grievor take me up to the date the grievance was filed. Given my finding that the grievor failed to establish a *prima facie* case, and my ruling in the alternative that the employer did accommodate her, it is not necessary or appropriate for me to consider whether, if I am wrong in these findings, the employer accommodated the grievor to the point of undue hardship after the date the grievance was filed. To do so would require me to consider the evidence of the negotiations between the grievor and the employer after she filed her grievance. For reasons already stated, to consider such evidence after having found that the *prima facie* test had not been met would breach the privileges associated with settlement and grievance negotiations.

VII. Conclusion

[189] For the reasons set out earlier in this decision, it is my decision that

a. discrimination on the basis of breastfeeding is discrimination on the basis of family status, not gender or sex;

b. on the facts before me, the grievor failed to establish a *prima facie* case of discrimination on the basis of family status on the test enunciated in *FCA-Johnstone* (or, all the more so, in *Campbell River*); and

c. accordingly, the employer's duty to accommodate the grievor's request to telework five days per week was not triggered.

[190] Finally, if I am wrong in my decision with respect to the issue of discrimination, it is also my decision that on the facts of this case the employer did take steps to accommodate the grievor to the point of undue hardship.

[191] In stating this, I have emphasized the importance of the facts before me for a reason. Each case stands on its particular facts. The facts of this case went far beyond the facts in *Poirier*, *Carewest* or *Cole* (in which discrimination was found). At issue here was not simply allowing an employee to breastfeed an infant at work (as in *Poirier*), allowing her to leave work at the end of her day on a fixed schedule so that she could breastfeed an infant whose poor health required that he be breastfed (as in *Cole*) or permitting her to extend an unpaid leave of absence to continue breastfeeding a nine-month-old child whose only source of nourishment was breastfeeding (as in *Carewest*). Moreover, in none of those cases was the employer being asked to significantly alter the terms and conditions of the employment contract. In this case,

on the other hand, the employer was being asked to substantially alter the terms and conditions of its SMO position for a significant period in respect of a breastfeeding schedule for a healthy child. In that sense, it was closer to the case in *Coast Mountains* (in which discrimination was not found).

[192] All this is to say that each case must be assessed and decided on the basis of its particular facts. This truism is all the more important in cases involving discrimination on the basis of family status, given the wide variety of family relationships, organization and obligations in the modern family. Had the facts in this case been different, the result might have been different as well.

[193] I might also state that neither the higher threshold established in *Campbell River* or in *FCA-Johnstone* nor the result in this case should in ordinary course stifle the rights protected by the ground of family status. Most if not all employers, when confronted with a request for accommodation due to family status, will make inquiries to determine whether an accommodation is necessary and, if so, in what way. They will do so because they know that the duty to accommodate can be triggered by such a request. Hence, the only rational way to deal with such requests is to investigate them, if only to determine whether a case for an accommodation has been made out by the employee, and if so, how the request may be accommodated, short of undue hardship.

[194] For all of the above reasons, I make the following order:

(The Order appears on the next page)

VIII. Order

[195] The grievance is dismissed.

November 13, 2014.

Augustus Richardson,
a panel of the Board