

HUMAN RIGHTS PANELS OF ALBERTA

BETWEEN:

Keith Rawleigh

Complainant

-and-

Canada Safeway Limited

Respondent

DECISION

Panel Chair: Brenda Chomey

Decision Date: September 29, 2009

File Number: S2005/02/0372

Human Rights and Citizenship Commission
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Appearances

Keith Rawleigh)	
Complainant)	
)	
Director of the Human Rights and)	
Citizenship Commission)	Janice Ashcroft, Legal Counsel
)	
Canada Safeway Limited)	Trisha Gain, Legal Counsel
Respondent)	Jody Anderson, Representative
)	

Introduction

[1] This matter came before the Panel convened under the auspices of the Human Rights and Citizenship Commission, (the Commission), for a hearing pursuant to the *Human Rights, Citizenship and Multiculturalism Act* (the Act), R.S.A. 2000, Chapter H-14.

[2] Mr. Keith Rawleigh (the complainant) filed a human rights complaint in which he alleged that Canada Safeway Limited (the respondent) discriminated against him in the area of employment because of family status, contrary to section 7 of the Act which states:

(1) No employer shall

(a) refuse to employ or refuse to continue to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any person.

[3] Family status pursuant to section 44 (1)(f) of the Act, “means the status of being related to another person by blood, marriage or adoption.”

[4] The parties made lengthy oral submissions, called several witnesses, and provided the Panel with a multitude of exhibits and case law, all of which have been read, orally argued and subsequently considered. However, the Panel does not intend to set out every aspect brought forth in the submissions in this decision, or refer to every point raised by the parties. The background information as well as the relevant medical evidence portion is meant to provide what the Panel believes to be the salient points relating to the matter, and are further set out to provide guidance and rationale as to how the final decision has been reached.

Issues

1. Did the respondent discriminate against the complainant on the grounds of family status?
2. Assuming prima facie discrimination, did the respondent fulfill their duty to accommodate Mr. Rawleigh, including exploring all the reasonable accommodation options, to the point of undue hardship?

Remedy Sought by the Director

[5] The respondent pay the complainant lost wages until the end of 2007.

[6] The respondent pay to the complainant, \$9,000.00 for injury to dignity and self respect as the director submits that the respondent breached the duty of accommodation and that their treatment of Mr. Rawleigh caused increased stress to both him and his family during an extremely difficult time in their life.

[7] The respondent compensate the complainant for lost pension and benefits from March 1, 2005 to the end of 2007.

[8] The respondent pay interest on all of the above amounts pursuant to the *Judgment Interest Act Regulation*.

Background

[9] Mr. Keith Rawleigh had been an employee with Canada Safeway Limited for over 27 years at many locations throughout Alberta. He worked in different capacities, ranging from general clerk to produce manager.

[10] In June 2002, the complainant was employed as a full-time general clerk at the Northhill Store, Number 2211 in Calgary, Alberta. The complainant was working at this location in the same capacity when this human rights complaint was filed.

[11] The complainant's wife, Ms. Tracy Rawleigh had been diagnosed with retinitis pigmentosa, an often-hereditary eye condition, since the age of 11 years old. This condition is characterized by bilateral degeneration of retinal cells. The clinical symptoms include night blindness and reduced visual fields (both peripheral and central) which eventually lead to what is known as legal blindness.¹ In some instances, individuals may become totally blind which is noted to be a trait in Ms. Rawleigh's family.

[12] Currently there is no cure or effective treatment to halt or reverse the visual impairments caused by this progressive condition.

[13] Ms. Rawleigh's vision remained fairly stable between the ages of 11 to 19 years. Between the ages of 19 and 20 years old she experienced a moderate loss of vision, particularly in her peripheral field, however her other visual areas were able to compensate for these blind spots, permitting her to function independently.

¹ See Douglas Anderson et al. *Mosby's Medical, Nursing, & Allied Health Dictionary*, 5th Ed. (St. Louis, Missouri: Mosby Inc, 2002) 984. "Legal blindness" is defined as "a state of visual acuity in which no better than 20/200 is measured in the better eye with corrective lenses or a visual field of not more than 20 degrees is obtained."

[14] In 1998, Ms. Rawleigh experienced another significant loss of vision while she was pregnant with her second child. She also suffered from severe headaches. Ms. Rawleigh was a full-time teacher working for the Calgary Board of Education, teaching grades seven and eight. Ms. Rawleigh's ability to compensate for this visual loss was stressful but she was still able to adjust to her environment.

[15] In 2000, while Ms. Rawleigh was pregnant with her third child, she once again experienced a significant loss of vision and was hospitalized because of the increasing intensity of the headaches she was experiencing.

[16] Between fall 2001 and spring 2002, Ms. Rawleigh's dramatic vision loss resulted in her being deemed legally blind and becoming a registered member with the Canadian National Institute for the Blind (CNIB).

[17] The rapid progression to legal blindness was an emotionally traumatizing experience for Ms. Rawleigh. Dr. Stanley S. Smith, Ms. Rawleigh's treating ophthalmologist for over 10 years, recognized the difficulties Ms. Rawleigh was experiencing at this time and testified that she was "emotionally fragile, she needed support." Dr. Smith encouraged her to seek counseling from a psychiatrist and utilize the services offered by the CNIB to help her adjust with her visual changes. He continued to see her on a frequent basis, sometimes as often as twice per month for a number of months.

[18] In an attempt to stabilize her remaining vision, Ms. Rawleigh began to attend and receive alternative treatment at the Wellspring Clinic in Vancouver in 2002.

[19] In 2002, the Rawleigh's children were aged one, three and five.

[20] At the time Ms. Rawleigh was deemed legally blind, the complainant was employed as a full-time general clerk working the early morning shift in the produce department at the Northhill Safeway Store, number 2211. Mr. Don Austin was the store manager from May 2000 until May 2003.

[21] Part of the requirements of full-time general clerks was that they rotate through all shifts, which include night shifts. This requirement is outlined in the Collective Agreement that the respondent had in place prior to 2002 and which currently remains in force.

[22] General clerks are categorized into four areas: dairy, frozen food, produce and grocery stocking. A general clerk could work in any of these departments.

[23] The Collective Agreement outlines the scheduling requirements of three different classes of employees: full-time, unrestricted part-time, and restricted part-time.

[24] Section 10.11 (c) of the Collective Agreement, as it was in 2002, stated:

Normal night stocking shall not exceed four (4) weeks over an eight-(8) week period. Under unusual circumstances and by mutual agreement between management, the employee, and the Union, the time limit set forth in this paragraph may be altered.

[25] It is common practice in the respondent's stores for employees starting night shift to request that they complete an eight-week rotation as opposed to a four-week rotation, to assist with lifestyle adjustments, including sleep patterns, and to lessen the number of times they have to rotate on this shift over a set period of time.

[26] Section 10.11 (d) of the Collective Agreements notes:

Night shift work shall be on a fair rotation of all staff working the area concerned with the exception of the Assistant Manager and one other designated clerk.

[27] Although the Collective Agreement provides no definition or explanation as to who the "other designated clerk" is, testimony has been lead that this person would be what is understood by the respondent to be the 'third person', a management trainee.

[28] The Letter of Understanding #11 as outlined in the Collective Agreement notes:

ROTATION OF GENERAL CLERKS JOB DUTIES

The Employer will provide an opportunity for all full-time general clerks who have the ability, to rotate through various duties in the areas of frozen food, bread, dairy and night stocking.

The foregoing rotation may not, at the employer's option, include one designated full-time general clerk and those working in the Produce Department.

[29] Some of the respondent's stores operate with full-time permanent night crews, which eliminates the necessity to have the general clerks rotate onto this shift. However, once an employee leaves or transfers from the store with a permanent night crew, for example, this concept ceases to exist since there is no longer a full complement of designated employees to cover this shift. When this happens, a rotation is put into play. The rotation normally begins with the most junior employee(s) rotating into the vacant night shift position(s) first and then moves up the level of seniority with the most senior employees being the last to rotate in. The number of staff required on the night shift, as well as those employees choosing to spend eight weeks as opposed to four weeks on this shift affects the number of times per year they have to rotate onto the night crew.

[30] Night shifts are often perceived as undesirable due to the disruptions they may cause to individual's lives. The respondent acknowledges that it is a bonus to have a permanent night crew in place and is always recruiting for this shift.

[31] In spring 2002, the store manager, Mr. Austin approached the complainant about rotating on to the night crew, as concerns were being voiced about him not working his share of this shift. The complainant explained his wife's medical condition, retinitis pigmentosa, to Mr. Austin as a reason why he could not work the night crew and was seeking an exemption from this shift.

[32] The store manager was not able to grant this type of permanent exemption that the complainant was seeking. Instead they are handled by the human resources department (HR department). Mr. Austin admitted he could not remember exactly how the complainant's request played out given the number of years that have passed since the request was made. He believes that he would have asked for a letter from the complainant's wife's physician explaining why he could not work night crew, as this is a practice he has followed for employees with similar requests throughout his career as a manager.

[33] Mr. Austin could not remember receiving a letter from the complainant's wife's physician outlining her medical condition, but indicated that if he did receive a letter, he would have forwarded it to the HR department. Mr. Austin also suggested that such a letter might have been sent directly to the HR department from the complainant.

[34] No further issues or concerns arose about the complainant having to rotate onto the night shift from spring 2002 through fall 2004. The evidence is not clear as to exactly how this came about. The complainant believed that he had an exemption from working the night crew based on a letter provided from Dr. Smith, dated April 10, 2002. Mr. Austin could not honestly recall if there was any type of exemption in place in light of the time that has passed. When questioned about whether there had been any exemptions given to employees who could not work the night crew, Mr. Austin testified that he was not aware of any. However, Mr. Austin related an incident from his personal experience concerning an employee who unable to work the night crew. This employee was reclassified into the role of a cashier as a means to accommodate his inability to work the night crew, since cashiers do not work nights.

[35] The complainant indicated that he provided Mr. Austin with the letter from Dr. Smith, who then would have forwarded it to the HR department. He further stated that Mr. Austin spoke with him about a week later and indicated the "the letter was a valid reason for staying off night crew, and he said I would be exempt for nights for that reason."

[36] The complainant does not believe that a permanent night crew was in place after he sought an exemption, and recalls the store having to rotate staff through days and nights.

[37] Evidence had been led that Store 2211 may have had an established permanent night crew at some point, beginning in 2002 and lasting until September or August 2004. If a permanent night crew was in place, this would have meant that the complainant

would not have had to rotate onto the night crew thereby negating the necessity of securing an exemption from this shift.

[38] Mr. Austin cannot recall with certainty whether after the complainant indicated that he could not work the night crew because of his wife's medical condition, a permanent night crew was established. Scheduling of employees for all shifts falls under the role of the assistant manager. Likewise, Mr. Austin does not recall any issues about the complainant not working nights.

[39] Mr. Rob Toews assumed the role of store manager in May 2003 until January 2004. He indicated that he was not aware if there was or was not an established night crew and further stated, *Obviously I didn't have a problem with the night crew of anybody having problems in rotation when I was there. So there would have been a permanent night crew in place. And when I say "permanent" I mean they didn't need a rotation at the time.*

[40] Mr. Toews testified that he had heard from another individual whom he can't recall with certainty, *that we had somebody that had been asking not to go onto the night crew. Further, we weren't in a position at the time that I had to make a decision or address that because we had a crew in place, but I don't specifically remember Keith coming to me personally.*

[41] Mr. Gordon Morrison started as an assistant manager in October 2003 until January 2007. As assistant manager, Mr. Morrison would have been in charge of the scheduling of employees. He testified that this store had a permanent night crew in place from the time of his arrival until August or September 2004, when one of the permanent night crew members was transferred to another store. It was at this time that the permanent night crew ceased to exist.

[42] No schedules from the respondent Store 2211 were presented to the Panel as evidence to attest that they did in fact have a permanent night crew in place from sometime in 2002 until August or September 2004.

[43] There was no indication that any of the evidence presented from the complainant or the witnesses was false or misleading regarding either the belief that an exemption was in place or that a permanent night crew was operating during this time period.

[44] The evidence relating to the complainant's exemption from the night crew may have in fact been an incorrect assumption on the part of the complainant. That the real reason he was not required to rotate on night shift from May 2002 until the later part of 2004 was because a permanent night crew was in place. Nevertheless, until sometime later in 2004, the question of the complainant having to rotate onto the night crew was not an issue.

[45] No concerns were raised by the complainant's previous store managers or assistant manager, regarding the complainant's quality of work. In fact, the consensus

was that they were pleased with his work and the complainant was offered a promotion to second man in charge of produce in 2002 at another store and then again in 2004 at his current Store 2211. The complainant indicated that he declined both of these positions out of concern for his wife's health.

[46] Ms. Rawleigh continued teaching until January 2003 since her vision was somewhat stabilized. However, she was still experiencing personal difficulties handling the continuing loss of her vision and was seeking counseling through her job. Ms. Rawleigh was also continuing to experience excruciating and debilitating headaches, so much so that she would pass out at times. It was at this time that the Calgary Board of Education suggested that Ms. Rawleigh give up her classroom position. Ms. Rawleigh went on medical leave in January 2003.

[47] In late January 2003, Ms. Rawleigh experienced a medical emergency in which the initial impressions based on her symptoms were that she was suffering a stroke. As a result of this incident, Ms. Rawleigh was diagnosed with Chiari 1 malformation.² Diagnostic imaging, specifically a magnetic resonance imaging (MRI) indicated that Ms. Rawleigh's cerebellar tonsils were approximately seven millimetres below the level of the foramen magnum and that there was very poor flow of the cerebrospinal fluid around the cerebellar tonsils. Prior to receiving this diagnosis, Ms. Rawleigh was being seen through the Headache Clinic and was at one time prescribed sumatriptan (Imitrex), an anti-migraine drug.

[48] Aside from experiencing severe headaches, which were attributed to the Chiari 1 malformation, Ms. Rawleigh suffered from dizziness and balance issues.

[49] Ms. Rawleigh was referred to the Neurosurgical Clinic at the Foothills Medical Centre on March 24, 2004 and was examined by Dr. Mark Hamilton, a neurosurgeon. Surgical intervention was recommended to assist Ms. Rawleigh to alleviate or at least lessen her symptoms, most specifically the severe headaches she was experiencing. After careful consideration, Ms. Rawleigh consented to brain surgery. The procedure was scheduled to proceed sometime in November 2004.

[50] In late August or early September 2004, there appeared to have been a change in the status of the permanent night crew since one member was transferred to another store, which lead to the necessity of rotating the general clerks onto the night crew. The complainant contends that in late summer 2004, he was asked by Mr. Morrison to run the dairy department. This was a day shift position and there was no mention at this time that he would have to rotate on to night crew.

[51] Mr. Morrison testified that he informed the complainant in late August or early September 2004, that he would have to rotate on to the night crew and was informed by

² See Douglas Anderson et al. *Mosby's Medical, Nursing, & Allied Health Dictionary*, 5th Ed. (St. Louis, Missouri: Mosby Inc, 2002) 341. "Chiari's malformation" is defined as "a congenital anomaly in which the cerebellum and medulla oblongata, which is elongated and flattened, protrude into the spinal canal through the foramen magnum."

the complainant that he had an exemption from working night crew. From Mr. Morrison's testimony it is difficult to ascertain if and when the complainant approached him to inform him that he was exempt from night crew, whether it was early in the fall or later. Mr. Morrison testified that he and his store manager, Mr. Jeff Halliday, looked at the complainant's file at store level to see if there was an exemption on file. Mr. Morrison also stated that he believed that Mr. Halliday contacted the HR department to further investigate if there was anything at the corporate level about an exemption from night shift.

[52] The issue relating to the complainant's exemption was deferred to Mr. Halliday based on Mr. Morrison's testimony. However, Mr. Morrison indicated that he scheduled the complainant to be one of the last to rotate into the night crew as he was waiting to hear back from the HR department or Mr. Halliday as to whether there was, in fact, an exemption in place.

[53] Mr. Morrison indicated that he received a phone call from the Union office from either Mr. Dave Smith or Mr. John Leeyus. The phone call was regarding the filing of a grievance if a fair rotation of the night crew was not enforced and further that he received an in-office visit from Ms. April Albrecht, who he believed was acting as a Union relief person at the time regarding the same issue, which was specifically directed to the complainant's status. However both Mr. Smith and Ms. Albrecht testified that they did not at anytime contact Mr. Morrison regarding the enforcement of a fair rotation on night crew. In fact, Mr. Smith testified that the first contact he had with either the complainant or management at Store 2211, was when the complainant contacted him for assistance, since the complainant was having difficulty securing the necessary time off to attend to his wife after her surgery.

[54] Ms. Albrecht also testified that the first and only contact that she had with the complainant was after she observed him and Mr. Halliday having a conversation in one of the aisles in the store and at the conclusion of the conversation the complainant appeared "very visibly distraught." It was at this time that Ms. Albrecht engaged in a conversation with the complainant since she had worked as a Union counselor previously, and thought the complainant might need some help. Upon listening to the complainant's concerns regarding the time off he was seeking to take care of his wife, Ms. Albrecht approached Mr. Halliday in an attempt to better understand what the complainant was saying since she noted that "sometimes when people are upset, they don't hear everything." Ms. Albrecht indicated that Mr. Halliday informed her that,

It was not the member - - the employee that was unwell, it was the wife, that it was none of her business, and that if she didn't mind her own business, he would have her transferred back to Canmore where she came from.

[55] The events leading up to Ms. Rawleigh's confirmed surgery, November 15, 2004, are somewhat muddled in terms of how the complainant and the witnesses recall the chronology of events, specifically in terms of whether a leave of absence (LOA) was initially sought or a medical leave, that being defined as stress leave for the complainant.

[56] The complainant testified that he spoke with Mr. Halliday prior to submitting the LOA form indicating that he would need time off to assist his wife at home after surgery. The complainant further testified that he discussed with Mr. Halliday his interactions with his general practitioner, Dr. Brown, regarding stress leave. The complainant was then informed by Mr. Halliday that he should complete and submit an LOA form and see what the HR department has to say about it.

[57] An undated Request for Leave of Absence form was completed by the complainant and submitted to Mr. Halliday. The leave requested was from November 15, 2004 until December 11, 2004. The form also indicated that letters were attached outlining the reason for the request. A letter from Dr. Hamilton, dated October 13, 2004, indicating that Ms. Rawleigh would require “in home support for at least three weeks following the surgery” is believed to have accompanied this form, as well as a letter from Dr. Brown indicating that the complainant “is unable to work Nov 15 –Dec 6 for medical reasons.”

[58] Mr. Halliday noted in the comments portion of the Request for LOA form that he discussed this matter with Ms. Jody Anderson, the human resource advisor for this store. He noted the complainant still had one week of vacation left and this should be incorporated into his LOA.

[59] The complainant did not wish to use up his vacation time as part of the LOA as he had booked time off over the Christmas holidays in order to aid his wife’s recovery and be able to watch their three children since school would be out.

[60] Evidence supports the fact that Mr. Halliday was not happy about the timing of the complainant’s requested time off since it was close to Christmas, one of the busiest times of the year for the store.

[61] Confusion arose as to the amount of time off the complainant required to help care for his wife after surgery. Initially, Mr. Halliday believed that the three weeks noted in Dr. Hamilton’s letter incorporated the time Ms. Rawleigh would be recovering in the hospital. This led Mr. Halliday to inform the complainant that he would have to return to work on December 4, 2004 as opposed to December 11, 2004.

[62] This misunderstanding relating to the time off led to an unpleasant phone call, first between the Mr. Halliday and the complainant and then Ms. Rawleigh. It was not until the day following this incident that Mr. Halliday acknowledged that the LOA would be in effect until December 11, 2004. The HR department was clear as to the amount of time the complainant was requesting off; it was just a misunderstanding between Mr. Halliday and the complainant at the store level.

[63] The complainant was advised through a letter from Ms. Anderson, dated October 29, 2004, that he would have to use his one-week vacation entitlement up prior to having a personal LOA granted.

[64] The complainant contacted his Union shortly after receiving the letter regarding his perceived denial of a LOA and indicated that he would be having his general practitioner complete the medical forms for a stress leave application. These forms were completed and submitted to the respondent's insurance carrier Sun Life on or about November 9, 2004.

[65] On Monday November 8, 2004 Ms. Rawleigh attended the emergency room since she was suffering from a severe headache and dizziness. The complainant contacted customer service at his store and left a message that he would not be in to work that day since he had to take his wife to the hospital.

[66] The complainant returned to work on Wednesday November 10, 2004 since November 9, 2004 was his scheduled day off. Upon returning to work he was called into Mr. Halliday's office, to discuss the issue of his absence on Monday. The complainant indicated that Mr. Halliday informed him that he could not take a sick day for someone other than himself, and suggested that he should have dropped his wife off at the emergency room and attended work.

[67] Mr. Dave Smith, the Union representative for the complainant's store, was contacted by the complainant regarding the difficulties he was experiencing securing his LOA and the incident regarding taking a day off to attend with his wife in the emergency department. When Mr. Smith spoke with Mr. Halliday, he was "non-committal" regarding the time off for the complainant's wife's surgery, he remarked that it was a busy time of year, and that the complainant's wife couldn't have picked a worse time to have surgery.

[68] Mr. Smith then contacted Ms. Anderson to discuss the LOA issue. Mr. Smith indicated that Ms. Anderson knew about Ms. Rawleigh's medical condition in which she equated to night vision difficulties, and that at night cabs could be called or an ambulance in an emergency. Ms. Anderson did not ask for more medical information regarding Ms. Rawleigh. In this same conversation, Mr. Smith testified that Ms. Anderson told him that Safeway was no longer accepting second-party illnesses as grounds for an exemption.

[69] On Thursday November 11, 2004, the complainant's wife's grandmother, who resided in British Columbia, passed away. The Rawleigh's were under a tremendous amount of personal stress at this time with Ms. Rawleigh's surgery scheduled to take place in a few days. As well, Ms. Rawleigh's parents, who reside in British Columbia, were present in Calgary to support her, and had to make the difficult choice of not returning to British Columbia to attend to funeral arrangements.

[70] The complainant indicated that he informed Mr. Morrison on November 11, 2004 of a death in the family and notified him that he would attend work on November 12, 2004 but would not be in on November 13, 2004. The complainant contends that Mr. Morrison informed him that if he did not come into work on November 13, 2004, he would be considered AWOL (absent without leave).

[71] Mr. Morrison recalls that the complainant missed two shifts as a result of this death in the family.

[72] No formal documentation was provided by the respondent to indicate that the complainant was absent two shifts versus one.

[73] The complainant was so distressed by the cumulative events and how management at his store handled his pending leave from work that he attended his general practitioner's clinic and received a Certificate of Absence from Work, which indicated that he would be off work for a minimum of four weeks effective November 12, 2004 and received a prescription for a low dose antidepressant, amitriptyline, to facilitate sleep.

[74] Ms. Rawleigh's surgery went ahead as scheduled on November 15, 2004. At this time the complainant was unsure if he was on an LOA for compassionate reasons or a medical leave, the latter of which would result in receiving of disability pay.

[75] The complainant received a letter from Sun Life Financial, dated November 29, 2004, which indicated that his claim for short term disability benefits was denied based on the information they received.

[76] On November 29, 2004, Mr. Morrison sent an email to Ms. Anderson inquiring about the complainant's ability to rotate onto night crew now that his wife had had surgery. He indicated that this was a big issue in the store with all of the general clerks, and that he agreed with their position. Further he suggested that the complainant should be working the night crew or be reclassified as a cashier.

[77] Sometime in early December 2004, Mr. Smith arranged for arbitration dates to be set down in February 2005 for the issues relating to the denial of Sun Life Financial benefits and sent a letter to the complainant indicating that a meeting should be set to meet with the Union's legal counsel prior to the arbitration.

[78] The complainant returned to work as scheduled for the week of December 12, 2004. After his scheduled days off around Christmas time the complainant returned to work on December 29, 2004. He was unable to find his name on the schedule and approached Mr. Morrison to inquire about this. He was informed at this time he was scheduled to go on to night crew.

[79] Mr. Morrison indicated that he makes up schedules two weeks in advance.

[80] The complainant was informed by Mr. Morrison that he did not have an exemption from night crew and referred him to Ms. Anderson.

[81] The complainant contends that he contacted Ms. Anderson to discuss the exemption issue and was informed that he didn't need the exemption anymore since his

wife was cured by the surgery. The complainant explained the difference between the Chiari malformation and her eye condition, that the two were not connected. Apparently, Ms. Anderson had no further medical information on Ms. Rawleigh since 2002, when Ms. Anderson testified that she had received Dr. Smith's letter. The complainant at this point undertook to secure updated information as soon as he could.

[82] The complainant further indicated that after he spoke with Mr. Halliday about his exemption and again with Ms. Anderson, Ms. Anderson informed him that Safeway no longer recognized second party illnesses.

[83] Ms. Anderson testified that the use of the term 'second party illness' was her own terminology, that the respondent had no formal policy dealing with a 'second party illness.' Further, Ms. Anderson indicated that this was the first time that she had encountered a request for an accommodation, not for the employee themselves, but family members.

[84] The complainant sent a letter to the HR department, dated December 29, 2004, which was received on January 3, 2005, requesting a transfer to another store. The complainant acknowledges that the denial of his exemption prompted him to ask for a transfer to Store 285. The complainant indicated that he had been in contact with the produce manager over a number of years and that this manager encouraged him to join his department.

[85] The complainant attended his physician's clinic shortly after the exchange took place between store management and Ms. Anderson. He received a note from his physician indicating that he would be "Away due to illness, Jan 3→10/05" and provided it to Mr. Halliday. Mr. Halliday forwarded this note on to Ms. Anderson with the following commentary, *Jody, please give me a call on this. He was scheduled to go on nights and he handed me this yesterday. He was scheduled to go on nights this week.*

[86] The complainant contacted the Union regarding the refusal of Safeway to accommodate his exemption from the night crew. Mr. Smith was away on vacation at this time but was aware of the matter and instructed the relief Union representative, Ms. Cindy Roulston, to speak with the complainant.

[87] Ms. Roulston met with the Rawleighs on January 7, 2005 to discuss their concerns. As a result of this meeting, Ms. Roulston contacted Ms. Anderson to try to arrange a meeting with all the concerned parties. Ms. Roulston testified that when she spoke with Ms. Anderson, she refused to meet, and that she indicated that Safeway was no longer accommodating the complainant due to his wife's illness and that there will be no transferring to Store 285 since they did not need him. Ms. Roulston recalls that Ms. Anderson was very firm and adamant in her comments and "her tone did not invite any further conversation on this issue."

[88] After this conversation, Ms. Roulston contacted the Union lawyer to get a legal opinion. As a result of this phone call two grievances were filed.

[89] The Union filed two grievances on behalf of the complainant on January 7, 2004. The first of which sought a reinstatement of “the accommodation that the employee enjoyed until January 1, 2005 whereby he did not work night crew” as well “that as part of the accommodation that the affected employee be transferred to a store closer to his home.” The second grievance focused on a “cease and desist of harassment” directed to the complainant by the managers as well as reimbursement for lost pay which was related to the complainant’s denial of Sun Life benefits from his earlier claim.

[90] Ms. Roulston indicated that shortly after filing the grievances, Ms. Anderson contacted her and a meeting was set for January 13, 2005.

[91] Ms. Anderson testified that they did not hold the meeting earlier as requested because she was hoping to deal with Mr. Smith on this matter as opposed to a relief representative who was only going to be covering for one week.

[92] The complainant provided the HR department with three letters on January 11, 2005. The first of which was a letter from the complainant, outlining his wife’s medical conditions; retinitis pigmentosa and Chiari malformation. The complainant’s description of the symptoms associated with Chiari malformation addressed several severe symptoms, namely, “throat closing off when lying flat, vomiting in her sleep and seizures.” Neither Ms. Rawleigh nor Dr. Hamilton indicated that she suffered from any of these specific symptoms. The letter further provided information on how these medical conditions impact his wife and their three young children, particularly in relation to possible safety concerns that could arise if Ms. Rawleigh did not have assistance at night. Finally, the complainant reiterates his belief that until recently, the respondent had been accommodating his family status concern.

[93] The second letter provided was from Dr. Smith, dated January 3, 2005, which states,

Mrs. Tracy Rawleigh has a serious eye problem that makes her legally blind and she does not function well with her limited vision particularly at night. It is therefore extremely important for her to have her husband home at night incase there is an emergency in their home, so he should not be on a night shift.

[94] The final letter provided by the complainant is undated and is from Ms. Diane Roski MSW, RSW, clinical counselor/supervisor with CNIB. The letter indicates:

Total night blindness may make managing family and home activities more difficult during night time hours. These increased difficulties may be of concern when children are present and additional resources are not available.

[95] The meeting took place on January 13, 2005. Ms. Anderson, the complainant, Mr. Halliday, and Ms. Roulston, were present.

[96] Prior to this meeting, Ms. Anderson indicated that she honestly believed that the retinitis pigmentosa and the Chiari malformation were interwoven conditions and that the brain surgery Ms. Rawleigh underwent would 'cure' what she believed was the focal concern, night blindness. Prior to the receipt of the January 11, 2005 letters from the complainant, Ms. Anderson relied upon information provided by Mr. Halliday. The reliance on Mr. Halliday's information led to her mistaken belief that Ms. Rawleigh only had a night vision problem, which could create an issue if an emergency arose at night time since Ms. Rawleigh could not drive the children to the hospital. Ms. Anderson admits that she did not investigate further into Ms. Rawleigh's Chiari malformation and the symptoms which she suffered. Based on the information that she had, she believed that once Ms. Rawleigh had the surgery, there would be no further issue regarding the complainant's contention that he was exempt from night crew.

[97] Once Ms. Anderson realized that the complainant's situation was much different than what she originally thought, she explored options in relation to accommodating him on a permanent basis.

[98] At the January 13, 2005 meeting, Ms. Anderson offered the complainant a transfer from the position of a full-time general clerk to that of a full-time cashier as a means to accommodate his family issues, since cashiers do not have to work night crew. The movement from a clerk to that of a cashier would result in a job re-classification and a cut in hourly pay from \$17.59 to \$16.77.

[99] No other offers in terms of accommodating the complainant's family issues were put forth by the respondent at this meeting.

[100] The complainant and Mr. Smith, who took over for Ms. Roulston after the January 13, 2005 meeting, felt the offer of a reclassification to that of a cashier and reduction in pay was a demotion for someone with over 20 years' experience. Ms. Roulston also testified that at Safeway *there is an unwritten hierarchy. The general clerks are on the top, courtesy clerks are on the bottom, and the cashiers fit someplace in the middle.* Ms. Roulston testified that in her opinion, it would have been considered a significant demotion to move to a cashier after being a general clerk for over 20 years. Ms. Roulston, at the time of the hearing, was just short of having worked 20 years with Safeway as a cashier.

[101] At the January 13, 2005 meeting, the complainant reiterated his request for a transfer to Store 285 to take on the position of the third person (management trainee) in the produce department as noted in his December 29, 2004 letter. Ms. Anderson indicated in her testimony that the complainant was on the transfer list to Store 285, but was unclear what his standing was, since transfers are based on seniority. Ms. Anderson further testified that she informed the complainant that the district manager, Mr. Mark Leswick, would not consent to having the complainant transfer into this position of third person, based on the complainant's past history of reverting back to a general clerk from a produce manager.

[102] The complainant also suggested that he would accept a transfer to another store as a second man, preferably on the north side of Calgary, which would mean he would not have to work the night crew as per the Collective Agreement. He also raised the possibility of changing to part-time unrestricted at his own store if he did not have to work night crew, in which case Mr. Halliday informed him that night shifts would be required.

[103] The meeting concluded with the only firm offer of accommodating being made was that of a reclassification and salary cut. Ms. Anderson at this time also verbally acknowledged that she would look further into a transfer to another store and the implications of a reduction to part-time status.

[104] The evidence from both the complainant and Ms. Anderson suggest that they spoke with one another sometime after the meeting about the possibility of bakery sales positions, variety clerks and the complainant inquired into how a part-time position would work if he returned to school. For various reasons, these other suggestions were not actively pursued.

[105] The complainant sent a letter to the HR department on January 17, 2005, which reads in part,

I am writing this letter because I am in need of an accommodation for my job as a General Clerk...I am asking for an accommodation to be made, enabling me to stay off of night crew. Over the past 2 1/2 years, the accommodation has been made, allowing me to work full time and be at home to meet my wife's needs. After talking to Jodi Anderson at Human Resources, it was made clear to me that the accommodation would not be made for me to remain a full time General Clerk. I have been told, by Human Resources that going part time or having my job reclassified would be my only alternatives. I feel that this contravenes the Human Rights Act, on the Family Status Grounds and the Duty to Accommodate.

Because Canada Safeway refuses to accommodate me...I will reluctantly, give up my full time status and become a part time employee.

[106] Ms. Anderson testified that she offered the complainant what she thought was the very best accommodation, based on his situation, since transfers to other areas such as bakery sales, floral etc. would not offer as good a salary. As well, she indicated that a transfer to bakery sales, for example, would not offer as much flexibility in scheduling given the restricted hours worked and the number of employees in the department. This was felt to be a disadvantage to the complainant. She further indicated that she recommended against moving to permanent part-time, since part of her job was to assist in minimizing the affects that an accommodation may have on the employee, particularly in relation to changes in net take home pay. Her goal was to ensure that the employees' take home pay remained as close as possible to their previous pay.

[107] Ms. Anderson reiterated her aforementioned position regarding a reclassification to a cashier position as Safeway's best offer of accommodation in a letter dated January 19, 2005 and stressed that she would like the complainant to reconsider his decision of stepping down to part-time. However, she indicated that if this is what he wished to do, she would make the change happen.

[108] In a letter dated February 11, 2005 sent to the HR department, the complainant formally requests that his status of a full-time employee be changed to that of part-time. The complainant indicates that "because Canada Safeway refuses to accommodate me as a full-time General Clerk, even though it does not cause them any undo hardship" he requested to go to part-time.

[109] The evidence suggests that sometime after the February 11, 2005 letter was sent, the complainant and Ms. Anderson spoke, which led to the final letter that the complainant sent to the HR department, dated February 17, 2005. The complainant reiterated his belief that what the respondent was offering him in terms of an accommodation was not acceptable and that he felt he was the one making the accommodation. He concluded the letter stating that he would like to have his status changed to part-time and that he would be pursuing his human rights complaint.

[110] The complainant officially moved to part-time restricted status in early March 2005 and was subsequently transferred to the Thorncliffe Safeway, 2243. As a part-time restricted employee, the complainant would fall into the group of employees who would receive their work hours last, behind the full-time and part-time unrestricted employees. By moving to restricted status, the complainant would ensure that he would not have to work on the night crew, but he would not have guaranteed work hours.

[111] Testimony was given by Mr. Smith, indicating that the Dalhousie and Thorncliffe stores had permanent night crews at the time the complainant was requesting a transfer. Further, Ms. Roulston noted that the store that she was working at, Store 212 also had a permanent night crew in place.

[112] In relation to the two grievances that were filed, the Union withdrew them on or around January 10, 2005. Mr. Smith indicated that this was an error on their part, since they assumed that the complainant did not want to proceed with the upcoming arbitration that was set for February 2005. Mr. Smith testified that he inadvertently forgot to include the statement "please contact me in writing" in the letter he sent out in December and since he did not hear back from the complainant, he mistakenly assumed that he did not want to pursue this matter. Mr. Smith indicated that he went on holidays shortly after sending this letter out and missed the call the complainant made inquiring about the forthcoming arbitration. Once this mistake was realized, Mr. Smith spoke with legal counsel for the Union and it was felt that the grievances could not be reinstated. The Union knew that the complainant put in a formal complaint with the Alberta Human Rights and Citizenship Commission and they put their support behind him.

Relevant Evidence Related to Ms. Rawleigh's Medical Conditions

Ms. Tracy Rawleigh

[113] Ms. Rawleigh testified that she had been diagnosed with retinitis pigmentosa since the age of 11. Her vision remained relatively stable until the age of 19 or 20, when she began to experience significant visual loss at different times over the next decade. Ultimately, in spring 2002, Ms. Rawleigh was classified as being legally blind. There exists a strong family predisposition of retinitis pigmentosa, resulting in total blindness in Ms. Rawleigh's case.

[114] In early 2003, Ms. Rawleigh was diagnosed as suffering from Chiari 1 Malformation, which eventually lead to surgical intervention on November 15, 2004. The surgery alleviated the worst of the headaches from which she suffered, but she continued to experience dizziness and weakness and balance issues, especially when arising from a prone position. These problems, coupled with her loss of vision, particularly night vision, created a safety concern when she was alone at night with the children.

[115] It was evident from Ms. Rawleigh's own testimony and her response to hearing the testimony from the complainant, her ophthalmologist, Dr. Smith, and her neurosurgeon Dr. Hamilton, that she was and still is experiencing difficulties psychologically adjusting to her vision loss.

[116] The trauma of undergoing brain surgery affirmed her own mortality and she expressed her fear of dying. In addition, her grandmother's death, just days before her surgery, coupled with the negative experiences her husband was dealing with at work during this period, had a significant impact on her life. She felt very unstable at this time.

[117] Ms. Rawleigh testified that the complainant had an exemption from working the night crew for the two and a half years prior to January 2005 because of her visual impairments. When the complainant was told that he was no longer exempt from the night crew, Ms. Rawleigh secured a letter from Dr. Smith, dated January 3, 2005, which briefly addressed her visual impairments and the difficulties she faced in terms of safety if the complainant was not home at night.

[118] Under cross-examination, Ms. Rawleigh indicated that she is fine taking care of the children and herself when she is up and mobile, but it takes approximately 30 minutes for her to get up and function from a prone position as a result of the dizziness, visual impairments and weakness she experiences, particularly in her arms.

[119] Ms. Rawleigh explained the steps she took to find assistance to help out at home when the complainant was scheduled to go on to the night crew. The expense and inconvenience did not make this a viable option.

[120] Ms. Rawleigh adamantly denied that having the complainant present during the night was a personal preference, but rather that it was “because of [her] health and because of the concerns for the safety of our family.”

Dr. Mark Giles Hamilton

[121] Dr. Hamilton testified that he is an associate professor of neurosurgery in the Department of Clinical Neurosciences at the University of Calgary and works with adult and pediatric patients. As well, he is chief of pediatric neurosurgery, head of the adult surgical neurooncology program, and head of the adult hydrocephalus program.

[122] Dr. Hamilton has an extensive history of publication in both peer-reviewed journals as well as book chapters. He also has over 100 abstracts and presentations as part of his professional and academic practice.

[123] Dr. Hamilton was qualified as an expert in neurosurgery.

[124] Dr. Hamilton explained that in his practice he had probably seen a couple of hundred or more patients suffering from Chiari malformation; adults, children and infants. He had performed approximately 100 operations on such patients.

[125] Dr. Hamilton provided an overview of what Chiari malformation is, how it is usually diagnosed, typical signs and symptoms and treatment options. He further testified that headaches are a big problem with this condition, as well as tinnitus (ringing in the ears). Dizziness, vertigo and problems with balance are also relatively common, and have been reported to be as high as 50-57 per cent. In his written report dated March 16, 2009, he indicated that 50-75 per cent of patients present clinically with headaches.

[126] The surgical procedure for Chiari malformation in Dr. Hamilton’s own words was described as “a pretty big operation” lasting anywhere from two and a half to four hours. Individuals have to weigh the pros and cons of such an undertaking.

[127] Dr. Hamilton first saw Ms. Rawleigh in March 2004 regarding her Chiari malformation as outlined in his letter dated March 24, 2004. In this letter he stated:

This patient has not quite reached her line in the sand in terms of wanting to move forward with surgical therapy. She is struggling to deal with her visual issues at this time and is managing.

[128] When examined as to the meaning of this statement, Dr. Hamilton likened this reference to his belief that people “at times they feel they can be dying from a Chiari malformation, but they are not” and that they have to reach a point, “the line in the sand” where they understand what benefits the surgery can have in relation to the pain they are experiencing.

[129] Dr. Hamilton indicated that the success rate with surgical intervention on someone with a specific headache pattern and appropriate exam that there is an 80-85 per cent probability of relieving a component(s) of their headache.

[130] In evidence is a letter dated January 25, 2005 from Dr. Hamilton to Ms. Rawleigh's general practitioner, Dr. Fridhandler. Dr. Hamilton indicated that "she is done well from the headache point of view" however "she has some dizziness that has not resolved" and further that "generally she has difficulty getting going in the morning but when she is able to get going, she is okay." Dr. Hamilton felt that a lot of these symptoms, with the exception of the headache, had resolved and were old and unchanged. In the closing of this letter, Dr. Hamilton suggested that Ms. Rawleigh be referred to the Dizziness Clinic for further assessment of this issue.

[131] Ms. Rawleigh was assessed at the Dizziness Clinic by Dr. Beth Lange who forwarded her impressions to Dr. Hamilton as outlined in a letter addressed to him on April 12, 2005. No definitive answer was provided as to why Ms. Rawleigh suffered from dizziness when she sits or stands up quickly.

[132] In a letter sent from Dr. Hamilton to Ms. Rawleigh's general practitioner dated July 30, 2007, he noted that she has had what appears to be a reoccurrence of dizzy spells that started approximately six months prior to Dr. Hamilton assessing her.

[133] In a letter prepared for this hearing, dated March 16, 2009, Dr. Hamilton indicated:

The combination of the difficulties with significant headache, dizziness, and the blindness from the retinitis pigmentosa have made it very difficult for Tracy Rawleigh to function without assistance, especially at night time.

[134] Under cross-examination, Dr. Hamilton testified that he is not an ophthalmologist but he understands enough of retinitis pigmentosa to say that when someone has been deemed legally blind, the difficulties they face are more pronounced at night.

[135] Dr. Hamilton was not able to offer a complete answer to the question relating to the necessity of having someone present at night time to assist Ms. Rawleigh, since this is a very complex question to pin down with a definitive yes or no.

[136] Dr. Hamilton in his testimony did not believe that Ms. Rawleigh was malingering or being devious in relation to her symptoms. He also indicated that individuals with Chiari malformation may have a worsening of pain during the night as opposed to the day since there are often distracters in play during the day such as background noise and participation in activities.

Dr. John H. Wong

[137] Dr. Wong testified that he is currently an attending neurosurgeon at the Calgary Foothills Hospital Medical Centre, assistant professor at the University of Calgary, and President of the Alberta Neurological Society. He has been in independent practice since 2001. He also indicated that he had completed a fellowship in cerebral vascular (strokes and aneurisms) neurosurgery.

[138] Dr. Wong has an extensive history of publications in both peer-reviewed journals as well as book chapters. He also has moderated or co-directed several professional courses and completed numerous presentations as part of his professional and academic practice with an interest primarily in the area of stroke and blood vessel problems in the brain.

[139] Dr. Wong was qualified as an expert in neurosurgery.

[140] Dr. Wong indicated that he has worked with patients who have Chiari malformation as part of his general practice. Further, he testified that surgical intervention for this condition does not necessarily cure it, since residual symptoms may persist. He acknowledged that headaches are a predominant symptom of this condition, and that dizziness may occur but it might be difficult at times to link it to Chiari malformation versus another condition.

[141] Dr. Wong noted that Chiari malformation can have a number of neurological symptoms that are more difficult to pinpoint exactly.

[142] Dr. Wong testified that it is his practice to recommend that anyone having any type of brain operation, whether it be for Chiari or a brain tumour etc., would be wise to have some sort of assistance at home initially, so that the person can recuperate and recover. This is especially true for those with young children.

[143] Dr. Wong was unable to provide a definitive answer as to how long post-operatively Ms. Rawleigh would require someone at home, since it varies with the individual, but he suggested that it would take a few to several weeks for a patient with a successful surgery to return to a normal lifestyle.

[144] Dr. Wong was specifically asked to comment on Dr. Hamilton's letter dated March 16, 2009, which noted that, the physical symptoms, namely significant headaches, dizziness and blindness "have made it very difficult for Tracy Rawleigh to function without assistance, especially at night time." Dr. Wong stated that the patient "would be the best judge of how difficult it would be to function in that regard, and so if there was anticipated difficulties, they may need additional help during the daytime or night time as they are recuperating from surgery." Dr. Wong stated that he "would not necessarily make it a lifelong duration of aid at home." Dr. Wong noted that Dr. Hamilton did not indicate what assistance Ms. Rawleigh would need and to what degree.

[145] Dr. Wong testified that if he had a similar patient in a similar situation, he believes that constant medical supervision is not indicated but it would be very helpful.

[146] Dr. Wong indicated that assessing the psychological or psychosocial needs of his patients is very important and that this information would be gathered from meeting with the patient and or their family or significant others.

Dr. Stanley S. Smith

[147] Dr. Smith testified that he has been a practicing ophthalmologist for close to 40 years and has been the past chief of ophthalmology at the Calgary General Hospital, Rockyview General Hospital and is currently acting chief of ophthalmology at the Calgary Regional Health Authority.

[148] Dr. Smith was qualified as an expert in ophthalmology.

[149] Dr. Smith indicated that he has worked with approximately 20 families who have retinitis pigmentosa. Dr. Smith reviewed what retinitis pigmentosa is and testified that there is no cure or treatment for the condition, but in the future stem cell research may provide some hope.

[150] Dr. Smith has been treating Ms. Rawleigh since 1989 and would normally see her on average every six months until 2001 when the visits became more frequent due to Ms. Rawleigh's rapid deterioration in vision. In May 2002, Dr. Smith saw Ms. Rawleigh in his office as indicated in his notes, and recommended that she seek counseling with a psychiatrist and register with the CNIB. He testified that Ms. Rawleigh was not coping well with "losing significant amount of her visual field" as well she "was not managing well" and broke down during this visit when he "pointed out to her that the future did not look very promising for her in terms of her vision."

[151] Dr. Smith testified that he saw Ms. Rawleigh six more times between May and November 2002 since he felt she "was so emotionally fragile, she needed support." "She needed him to reassure her that she was still seeing."

[152] Dr. Smith acknowledged that he wrote a letter on behalf of Ms. Rawleigh at her request to the complainant's employer, dated April 10, 2002, since Ms. Rawleigh was "losing confidence in managing at home at night, especially with three young children."

[153] On January 3, 2005, Dr. Smith wrote a further letter on Ms. Rawleigh's and the complainant's behalf. Dr. Smith testified that, although Ms. Rawleigh was six weeks post-op from her Chiari surgery, based on his medical opinion and coupled with his belief that she was both managing and coping poorly, experiencing a loss of confidence, it was imperative that the complainant be at home at night to assist with the parenting of the children. Dr. Smith went on further to testify that with Ms. Rawleigh deemed legally blind, "with three young children at home, it was not a safe, healthy environment for the kids, plus, emotionally she was fragile because of her brain surgery as well."

[154] Dr. Smith disagreed with the opinion evidence presented by Dr. Mark Bourdeau, an optometrist, retained by the respondents to provide evidence on Ms. Rawleigh's visual condition in a letter dated April 23, 2009. Dr. Smith based his comments on the fact that Dr. Bourdeau had never seen nor treated Ms. Rawleigh, and did not fully understand her situation or her ability to cope with her vision loss. He further disagreed with Dr. Bourdeau's opinion that Ms. Rawleigh could use other aids to assist her at night, particularly sleeping with the lights on.

[155] Under cross-examination, Dr. Smith indicated that it would not be impossible for Ms. Rawleigh to function alone at night but extremely difficult. He further stated that in his opinion it would be easier for someone who was born blind or legally blind to cope than to have to lose vision over time. He went on to state that in Ms. Rawleigh's case, she wasn't coping very well mentally with her increasing visual loss.

[156] Dr. Smith testified that it didn't have to be the complainant who needed to be home at night but a responsible adult. However, Dr. Smith understood that their families could not help and they couldn't afford to hire someone to stay with Ms. Rawleigh at night while the complainant was at work.

Dr. Mark Bourdeau

[157] Dr. Bourdeau testified that he had been a practicing optometrist for the past seven years and is currently in private practice and also works at the Rockyview Hospital in the Sight Enhancement Clinic. As part of his practice he provides his clients with prescriptions for glasses, contact lenses, assesses the needs of low vision clients and assists them with counseling and how to use particular aids.

[158] Dr. Bourdeau was qualified as an expert in optometry with a special interest in sight enhancement.

[159] Dr. Bourdeau provided a brief overview of the role an optometrist versus that of an ophthalmologist and indicated that in his role of an optometrist, he is able to spend a significant amount of time with his clients. He could easily spend one hour to discuss treatment and prognosis, and if necessary he refers his client on to a low vision assistant who then assists the client with trying out different visual aids.

[160] Dr. Bourdeau testified that as part of his practice he would refer his client to other specialists for further testing or to confirm his diagnosis, such as retinitis pigmentosa.

[161] Dr. Bourdeau stated that Ms. Rawleigh, based on a review of her treatment notes, would be able to assist herself and her children in the event of an emergency at night through the use of a telephone or by having appropriate lighting in the house. He further stated that he is better qualified than Dr. Smith in assessing how "functionally vision impacts day-to-day life" since Dr. Smith does not do this every day. Further, that Dr.

Smith is a surgeon, “but he doesn’t counsel and care for patients with low vision in how to meet their daily needs.”

[162] Dr. Bourdeau disagreed with Dr. Smith’s opinion that all patients with retinitis pigmentosa go blind. This is a misconception and it depends on the type of retinitis pigmentosa they have, and in fact, less than one per cent of people go completely blind. However, during cross examination Dr. Bourdeau admits that he was not aware of Ms. Rawleigh’s specific family circumstances in which three immediate family members went completely blind as a result of retinitis pigmentosa.

[163] Dr. Bourdeau, when asked to share his opinion on his experience with working with other patients who have been deemed legally blind and specifically how they coped, he equated the emotional process his patients go through, to the five stages of dying, as identified and described by Elisabeth Kubler-Ross, namely, denial and shock, anger, bargaining, depression and acceptance.

[164] Dr. Bourdeau was not able to provide a specific answer when asked by the respondent’s counsel in regards to his opinion about whether someone who was experiencing emotional instability, as a result of their loss of vision would require someone to be present over the night time hours to assist in the case of an emergency. Dr. Bourdeau stated that given the layers of complexity with such an instance, he did not believe he was qualified to comment on this issue. He further indicated that it would be in the patient’s best interest to confer with a psychologist or perhaps the CNIB low vision counselors on such issues.

[165] Dr. Bourdeau testified that he felt that people who lose vision over time adjust better both from an emotional and psychological perspective than someone who loses their vision suddenly.

[166] During cross-examination, Dr. Bourdeau testified that he was aware of Ms. Rawleigh’s problems with dizziness, but based his opinion solely on addressing her retinitis pigmentosa.

Analysis of Expert Evidence

[167] The Panel believes that all of the medical experts who provided testimony, both written and oral in this matter were credible, that they provided their expert opinions on the information that they had before them. However, the distinguishing factor between Dr. Hamilton and Dr. Smith versus Dr. Wong and Dr. Bourdeau was that the former doctors had direct hands-on experience in working with Ms. Rawleigh and were able to develop a mutual trust and rapport with her. All of the doctors acknowledged that trust and rapport are important factors to have in a doctor/patient relationship. Further they all touched on the importance of dealing with psychological needs of their patients. Dr. Smith, who knew and worked directly with Ms. Rawleigh for over 10 years prior to the filing of this complaint, acknowledged that Ms. Rawleigh needed help to assist her with the struggles she was facing regarding her vision loss. Dr. Bourdeau testified that he

could not attest to Ms. Rawleigh's psychological challenges since he did not personally know her and that he was basing his opinion on the information with which he had been provided. With these considerations in mind, the Panel believes that the evidence provided by Dr. Hamilton and Dr. Smith provides a clearer and more relevant assessment as to both the medical and psychological challenges Ms. Rawleigh experienced.

1. Has the complainant established prima facie discrimination?

[168] The onus is on Mr. Rawleigh to show that he has been discriminated against by Canada Safeway Limited in the area of employment on the grounds of his family status.

[169] The burden of proof rests with the complainant to establish a prima facie case of discrimination. Such a case is made out if the complainant establishes, on the balance of probabilities that the acts of discrimination occurred in the circumstances of the case. The Supreme Court of Canada set forth the framework in dealing with matters of discrimination in the case of *O'Malley v. Simpson Sears*.³ The Court noted that it is not necessary to prove that discrimination was intentional to find a violation of the human rights legislation has occurred. An employment rule, neutral on its face and honestly made, can have discriminatory effects. It is the result or the effect of an act which is important in determining whether discrimination has occurred. If such a burden is met, the onus shifts to the respondent to prove, on a balance of probabilities, that the contravention was reasonable and justifiable in the circumstances.

[170] The Court in *O'Malley* also made a distinction between what is seen as direct discrimination versus adverse effect discrimination. Direct discrimination occurs when:

An employer adopts a practice or rule which on its fact discriminates on a prohibited ground.

Adverse effect discrimination occurs when the employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

[171] The *O'Malley* decision has not only set down the framework for handling discrimination, it also addressed the second component of this issue, that of the duty to accommodate to the point of undue hardship on the part of the employer. However it is important to note that in that particular case, the focal point of discrimination was based on religious grounds, not on family status.

³ *O'Malley v. Simpson Sears* (S.C.C.)(1986) 7 C.H.R.R. D/3102

[172] The Supreme Court of Canada revisited the conventional approach of categorizing discrimination as “direct” or “adverse effect” in the *Meiorin*⁴ decision and subsequently collapsed the two approaches into a unified one for several reasons as follows:

- 1) *The distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify: few cases can be so neatly characterized;*
- 2) *It is disconcerting that different remedies are available depending on the stream into which a malleable initial inquiry shunts the analysis;*
- 3) *The assumption that leaving an ostensibly neutral standard in place is appropriate so long as its adverse effects are felt only by a numerical minority is questionable: the standard itself is discriminatory because it treats some individuals differently from others on the basis of a prohibited ground, the size of the “affected group” is easily manipulable, and the affected group can actually constitute a majority of the workforce;*
- 4) *The distinctions between the elements an employer must establish to rebut a prima facie case of direct or adverse effect discrimination are difficult to apply in practice;*
- 5) *The conventional analysis may serve to legitimize systemic discrimination;*
- 6) *A bifurcated approach may compromise both the broad purposes and the specific terms of the Human Rights Code;*
- 7) *The focus by the conventional analysis on the mode of discrimination differs in substance from the approach taken in s. 15(1) of the Canadian Charter of Rights and Freedoms*

[173] Since the *O’Malley* and *Meiorin* decisions, several notable cases have arisen at various levels, from tribunals to that of the Courts of Appeals which have specifically explored the concept of prima facie discrimination on the basis of family status and form the arguments put forth by the director and respondent in relation to their application to the case at hand.

Director’s Arguments Regarding Prima Facie Discrimination

[174] The director argued that the tests outlined in the *Brown v. Canada (Department of National Revenue, Customs and Excise)*⁵, *Johnstone v. Canada (Attorney General)*⁶ and *Hoyt v. Canadian National Railways*⁷ decisions should be the starting point after the legislation in examining discrimination on the grounds of family status. However, in the alternative, the director suggested that the test used in the *Health Sciences Association of British Columbia v Campbell River & North Island Transition* (Campbell River) decision could be used, but emphasized that the standard used in this case is more stringent and requires a change to the conditions in employment which results in a serious interference with family obligations.

⁴ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R.

⁵ *Brown v. Canada (Department of National Revenue, Customs and Excise)* [1993] C.H.R.D. No. 7

⁶ *Johnstone v. Canada (Attorney General)* [2007] F.C.J. No.43

⁷ *Hoyt v. Canadian National Railways* [2006] C.H.R.D. No. 33

[175] The director highlighted several aspects of the *Brown* decision as evidence that the principles contained in this decision were good law when examining discrimination of the grounds family status, namely:

...the evidence must demonstrate that the family status includes the status of being a parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, the Complainant was unable to participate equally and fully in employment with her employer.

[176] The tribunal in *Brown* went on further to say:

...the obvious dilemma facing the modern family wherein the present socioeconomic trends find both parents in the work environment, often with different rules and requirements. More often than not, we find the natural nurturing demands upon the female parent place her invariably in the position wherein she is required to strike this fine balance between family needs and employment requirements.

[177] The tribunal concluded:

...within the context of “family status” of a parent’s right and duty to strike the balance couple with a clear duty on the part of the employer to facilitate and accommodate the balance within the criteria set out in the Alberta Dairy Pool case. To consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of “family status” as a ground of discrimination.

[178] The director noted that the Court in *Johnstone* overturned the Canadian Human Rights Commission decision to dismiss this case, since it felt the Commission erred in law, in its application of discrimination. The Court noted that the Commission’s application of the “serious interference” test for identifying family status discrimination appeared to have been taken from the *Campbell River* decision. Further that the *Campbell River* decision set an inordinately high standard for the complainant to meet the prima facie discrimination test and noted that the adoption of the serious interference test for identifying family status discrimination also “fails to conform with other binding authorities which have clearly established the test for a finding of *prima facie* discrimination”.

[179] The Court commented:

...while family status cases can raise unique problem that may not arise in other human rights contexts, there is no obvious justification for relegating the type of discrimination to a secondary or less compelling status...I would also add that to

limit family status protection to situations where the employer has changed a term or condition of employment is unduly restrictive because the operative change typically arises within the family and not in the workplace. The suggestion by the Court in Campbell River, that prima facie discrimination will only arise where the employer changes the conditions of employment seems to me to be unworkable and, with respect, wrong in law.

[180] The Court in *Johnstone* acknowledged that “the law is not well settled with respect to the balancing of competing workplace interests insofar as family status accommodation is concerned.”

[181] The director noted that the *Hoyt* decision was one of the first to criticize the test set out in the *Campbell River* decision. The tribunal in *Hoyt* disagreed with the Appeal Court’s analysis and stated:

Human rights codes, because of their status as ‘fundamental law,’ must be interpreted liberally so that they may better fulfill their objectives...It would, in my view be inappropriate to select out one prohibited ground of discrimination for a more restrictive definition.

[182] The director addressed the test set out in *Campbell River* as an alternative to the tests set out in the *Brown*, *Johnstone*, and *Hoyt* decisions and acknowledged that it is a more stringent standard but that the complainant’s facts would meet the criteria.

[183] Justice Low, writing for the Court in *Campbell River*, felt that the tribunals in both *Brown* and *Woiden*⁸ fused together “the issues of *prima facie* discrimination and accommodation.” *Prima facie* discrimination is found whenever there is a conflict between a job requirement and a family obligation and that an overly broad definition of the scope of family status utilized which is ‘unworkable.’ The Court concluded that both of these decisions were unhelpful in determining whether discrimination occurred.

[184] The Court also rejected the Union’s ‘open ended’ concept of family status because, if adopted, it “would have the potential to cause disruption and great mischief in the workplace.”

[185] The Court set its own test for *prima facie* discrimination on the basis of “family status”:

If the term “family status” is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to prima facie discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that prima facie case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious

⁸ *Woiden v. Lynn* [2000] C.H.R.D. No. 18

interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a prima facie case.

[186] The director argued that even with the application of the more strict/narrower test, that of the serious interference, as set out in the *Campbell River* decision, the Court found in favour of the appellant, the mother of a behaviourally challenged child. In *Campbell River*, the appellant was provided with approximately seven weeks' notice that her scheduled work hours would be changing. This change in her work schedule directly impacted her ability to provide after school care to her disabled child. The Court held that the employer's change to the appellant's work schedule was a serious interference to her family obligations and "the arbitrator erred in not finding a prima facie case of discrimination on the basis of family status."

[187] The director compared the facts set out in *Campbell River* to the case at hand and noted that in *Campbell River* the appellant was provided a significant amount of time regarding the change in her work schedule; whereas in the present case, the complainant was not provided any real notice regarding his scheduling onto the night crew, a matter of days, and that this change in the condition of his employment resulted in a serious interference with a substantial parental or family duty.

[188] The director referenced four recent Alberta Human Rights and Citizenship Commission Panel decisions, namely; *Van Der Smit*⁹, *Workeneh*¹⁰, *Tequila Night Club*¹¹ and *Walsh*¹² in which instance the Panels failed to find prima facie discrimination. All of these decisions were subsequently overturned on this point. The director argues that the courts are indicating that the human rights panels have been using too high of a standard in determining prima facie discrimination.

[189] The director highlighted the Courts' recognition of circumstantial evidence in the finding of prima facie discrimination, particularly in the *Workeneh* and *Tequila Night Club* decisions.

[190] The director submits that the facts in this case meet the specific tests for family status discrimination set out in *Brown* and *Johnstone* as well as the general tests relating to discrimination utilized in *O'Malley*, *Meiorin*,¹³ *Grismer*,¹⁴ *Hydro-Quebec*¹⁵ and the four aforementioned Queen's Bench cases.

⁹ *Van Der Smit v. Alberta (Human Rights and Citizenship Commission)*, 2009 ABQB 121

¹⁰ *Workeneh v. 922591 Alberta Ltd.* 2009 ABQB 191

¹¹ *Alberta (Human Rights and Citizenship Commission Panel) v. Tequila Bar & Grill Ltd.*, 2009 ABQB 226

¹² *Walsh v. Mobil Oil Canada*, 2008 ABCA 268

¹³ *Supra* note 4

¹⁴ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868

¹⁵ *Hydro-Quebec v. Syndica de employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ)*, [2008] 2 S.C.R. 561

[191] The director argues that, under the principles of fairness, if medical evidence was going to be used as a rationale for limiting accommodation, this should have been conveyed to the Rawleighs at the earliest possible time in order to allow them to have secured the necessary medical documentation. The director further argues that Safeway, for a short period of time, implemented a policy of not recognizing second party illnesses and that it was this policy of refusing to acknowledge the need for family status accommodations that was prima facie discriminatory.

Respondent's Arguments Regarding Discrimination

[192] The respondent acknowledges that memories fade over time and much of their witnesses' testimony was based on documentary evidence. The respondent believes the same holds true for the complainant and his wife, even though, they assert their memories of how the events unfolded are correct.

[193] The respondent argues that during the complainant's time at Store 2211, a permanent night crew was in place in one shape or form and that the requirements as outlined in the Collective Agreement regarding a fair rotation onto night crew were enforced. They further indicate that during the complainant's time at Store 2211 when a night crew rotation was in place that the complainant did not have to rotate on, since a permanent night crew was secured prior to the complainant's rotation coming into play.

[194] The respondent argues that there never was any exemption/accommodation granted to the complainant excusing him from working night crew as evidenced by the testimony from the complainant's previous managers and assistant manager; Mr. Austin, Mr. Toews and Mr. Morrison.

[195] The respondent further argued that the HR department had nothing on file regarding an exemption/accommodation from night crew for the complainant and it was not until sometime in the latter part of 2004 that they were apprised of the complainant's 'belief' that he had an exemption/accommodation from the spring of 2002 based on a letter provided by himself and Dr. Smith.

[196] The respondent acknowledges that it did not have in their possession the store scheduling relating to the time in question which would have solidified whether there was in fact a permanent night crew, since Safeway follows a two-year records disposition schedule. The respondent reiterates their position that any exemption/accommodation from night crew would have been dealt with at the HR department level and not the store level.

[197] The respondent argues that had an exemption/accommodation been in place regarding the complainant, the store managers and their assistants would have known, since this would have had to be factored in as part of the store scheduling. It would also have had an effect on the employee morale at the store.

[198] The respondent notes that the HR department was approached regarding the complainant's 'belief' of his exemption from the night crew, and that Ms. Anderson acknowledges having spoken with Mr. Halliday regarding this matter and informed him that there was no record of an accommodation having been made. Ms. Anderson left the matter with Mr. Halliday to discuss with the complainant.

[199] The respondent contends that the complainant was aware that he was going to have to rotate onto night crew since he informed Mr. Morrison that he could only do a four-week rotation pursuant the Collective Agreement as opposed to the eight-week rotation most clerks choose.

[200] The respondent argues that they saw the complainant's request for the leave of absence and the complainant's belief that he had an exemption from night crew as two wholly unrelated issues. The respondent further argues that they did not ask for more detailed medical information relating to the Chiari malformation, since there were no concerns about providing the complainant with the leave of absence he was seeking.

[201] The respondent notes that the request for transfer letter dated, December 29, 2004, from the complainant was just that, a request to transfer to another store, since there was no mention in the letter that the transfer was being sought as a result of family obligations.

[202] The respondent acknowledges that two Union grievances were filed on behalf of the complainant in early January 2005. The HR department subsequently received a detailed letter written by the complainant outlining his wife's health concerns and the reasons he felt he could not work the night shift, along with a letter from Dr. Smith who indicated that it was extremely important for the complainant to be home at night and a letter from the CNIB. The respondent notes that during Dr. Smith's testimony and during cross-examination, he acknowledged that it didn't necessarily have to be the complainant who was home at night.

[203] The respondent submits that the complainant has not demonstrated that his wife's medical conditions prevented her from being able to care for herself and/or her children at night.

[204] The respondent argues that it was not until the receipt of the aforementioned letters that they understood that the surgery for the Chiari malformation would not correct the vision issue, the retinitis pigmentosa, that these were two totally separate conditions. It was at this time that Ms. Anderson sought leave from her superiors to look at possible accommodations for the complainant, even though she did not having any supporting documentation from Dr. Hamilton.

[205] The respondent referred the Panel to the *O'Malley* decision as a starting point for what constitutes prima facie discrimination and specifically noted:

Difficulty arises when the question is posed of how far the person is entitled to go in the exercise of his religious freedom. At what point in the profession of his faith and the observance of its rules does he go beyond the mere exercise of his rights to enforce upon other conformance with his beliefs? To what extent, if any, in the exercise of his religion is a person entitled to impose a liability upon another to do some act or act, some obligation he would not otherwise have done or accepted?" ... how far can an employee compel her employer in the conduct of its business to conform with, or to accommodate, such practices?

[206] The respondent lead the Panel through a brief review of the *McGill University*¹⁶ case and focused on the concurring reasons of Justice Abella, McLachlin and Bastarache, specifically the Court's quandary of where does one draw the line? How far can an employee compel the employer to conform with or accommodate one's practices? The Court noted: "even if the employer's conduct is not discriminatory, there is a legal duty to justify all distinctions."

[207] The respondent further pointed to Justice Abella's view that:

...The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly. And that ...what flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory... It is the link between that Group membership and the arbitrariness of the disadvantaging criteria or conduct, either on its face or in its impact, that triggers the possibility of a remedy.

[208] The respondent submits that the test set forth in *Campbell River* is the most appropriate authority in prima facie discriminatory family status matters and distinguished the complainant's case on the premise that his circumstance was not "extraordinary." The respondent further argued that as in *Campbell River*, there had to be something more than a mere conflict between a work requirement and a family obligation in order to establish prima facie discrimination. The respondent notes that *Campbell River* is a British Columbia Appeal Court decision and has been applied in other tribunal decisions and outside British Columbia.

[209] The respondent argues that the *Woiden* and *Brown* decisions, unlike *Campbell River*, circumvent the prima facie discrimination element and moves directly into the duty to accommodate argument thereby making these decisions less persuasive in terms of the interpretation of family status in the employment context.

[210] In terms of *Hoyt* and *Johnstone*, the respondent believes that in both of these decisions the Courts only addressed the concerns they had with the application of the substantial interference test, but more importantly, they did not offer guidance in terms of what the appropriate test should be.

¹⁶ *McGill University Health Centre (Montreal General Hospital) v. Syndicat des Employe's de L'Hospital General de Montreal*, 2007 SCC 4

Findings and Analysis

[211] The Panel has been provided with evidence that the complainant held the belief that he had an exemption, an accommodation, which did not require him to work the night crew between May 2002 and sometime into the latter portion of 2004 based on his wife's medical condition, retinitis pigmentosa. The complainant's belief was grounded in the fact that he provided letters, both from himself outlining his wife's visual condition and the concerns he had if she was alone at night along with a letter from Dr. Smith, dated April 10, 2002, which detailed Ms. Rawleigh's current visual status. The evidence suggests that this information was at some point provided to the respondent, leading the complainant to believe that he was exempt from the night crew.

[212] The Panel acknowledges that a significant amount of time had passed between when the first letters were provided to the employer in 2002, outlining the reason the complainant sought an accommodation, to that of 2004 when the allegation of discrimination took place and finally to time of this hearing. Memory does fade and individuals often have different perceptions of how events play out. However, the Panel has accepted the evidence of the complainant. As already noted, memory fades, but when individuals experience difficult and traumatic situations they are often able to recall in great detail how the events played and the Panel believes that this is the case in this matter.

[213] The Panel believes that it is not a fatal flaw, if in fact, the reason the complainant did not work the night crew between May 2002 and the later portion of 2004 was because there was a permanent night crew in place as opposed to the complainant having been granted an accommodation, since the factors that lead to the alleged discrimination began in late 2004.

[214] The Panel finds that there exists some confusion on the part of the respondents as to how the events played out between May 2002 and October 2003. In the original written submissions provided to the Panel the respondents indicated:

Between April 2002 and October 2003, the Complainant was not scheduled to rotate through the night shift. Given the relative abundance of General Clerks at the time, the Store Manager allowed the Complainant to be exempt from the night shift rotation for compassionate reasons.

However during oral testimony there was no evidence lead that this was how the events played out. In fact, Mr. Austin, who was the store manager in April 2002, where the complainant was working at this time does not recall personally giving an exemption to the complainant and further testified that such an exemption would have to go through the HR department.

[215] Ms. Anderson also testified that an accommodation of the nature that the complainant ‘believes’ he had, would have had to have gone through the HR department and would not be dealt with at the store level since this would have been seen as a permanent accommodation as opposed to a lesser level temporary accommodation which could have been dealt with at the store management level.

[216] There has been some discrepancy in terms of when the complainant was informed that he would have to rotate onto the night crew. Mr. Morrison testified that he informed the complainant in late August or early September of this change. However, Ms. Anderson originally testified that she was contacted in the latter fall of 2004 by Mr. Halliday regarding this matter and then later indicated that her first contact regarding this matter was in the late summer or early fall 2004. The complainant testified that Mr. Halliday approached him in October 2004. The Panel is inclined to believe that the issue of rotating onto night crew was first addressed in October 2004.

[217] Both Mr. Morrison and Ms. Anderson testified that they believed Mr. Halliday had spoken with the complainant, informing him that Safeway did not have anything on file regarding an exemption from night crew.

[218] Mr. Morrison was obviously aware that the complainant did not have an exemption from working night crew as evidenced in an email dated November 29, 2004 to Ms. Anderson, wherein he inquired that since the complainant’s wife had had the surgery, can he [the complainant] be placed on night crew?

[219] The testimonies of the complainant, Ms. Anderson, Ms. Roulston, and Mr. Smith all acknowledge that the term “second-party illness” was used when the complainant was inquiring about his accommodation from night crew in 2004 when he was informed that he would have to go onto this rotation.

[220] Ms. Anderson acknowledged that she believed that Ms. Rawleigh’s retinitis pigmentosa and Chiari malformation were interwoven conditions and that the brain surgery she underwent would cure her night blindness, resulting in, the complainant no longer needing an exemption/accommodation from night crew. Ms. Anderson further indicated that when she spoke with Mr. Smith regarding the confusion of the complainant’s LOA, she did not raise the issue of accommodation or the necessity of updated medical information since the issue was not addressed, and she believed Mr. Halliday had spoken with the complainant about it. However, Mr. Smith recalls Ms. Anderson indicating at this time that Safeway was not accepting second-party illnesses and that is why she did not ask for updated medical information. The Panel is inclined to believe the version of Mr. Smith.

[221] Ms. Anderson at no time sought to request more medical information about Ms. Raleigh’s medical conditions even after having conversations with the complainant, Ms. Roulston and Mr. Smith at the end of 2004 and beginning 2005, regarding the accommodation issue from nights since she felt the issue was moot after Ms. Rawleigh had her surgery.

[222] Ms. Anderson did not meet with the complainant, his Union representative, Ms. Roulston, and his store manager, Mr. Halliday until after she received the two Union grievances and the letters from the complainant and Dr. Smith, dated January 5, 2005. The Panel believes that it was the filing of the grievances that led to the January 13, 2005 meeting since prior to this time Ms. Anderson was operating under the view that second-party illnesses were not being accepted.

[223] Ms. Anderson acknowledged that staff morale and following the Collective Agreement were important considerations when looking at permanent accommodations such as the one the complainant was seeking. However, she expressed concerns that “once you start opening the Pandora’s box ... suddenly you are going to have a lot of people who can’t work the night crew.”

Credibility

[224] The Panel has drawn a negative inference from the unwillingness of the respondent’s witness, Mr. Halliday, to participate in this hearing. Mr. Halliday was set to provide evidence on two occasions but chose not to at the last moment. The option was available to the respondents to subpoena Mr. Halliday, but they did not because Mr. Halliday resides in another province, British Columbia, and had “expressed a severe desire not to come and not to testify.” Justice Martin, in her decision in the *Tequila Nightclub*,¹⁷ case indicated that “a trier of fact certainly has the discretion to draw negative inferences” for failing to call witnesses with direct knowledge of the matter, which is what the Panel has done in this case.

[225] From the written and oral evidence that was provided , the Panel believes that Mr. Halliday was a material witness, a witness who had direct knowledge as to how the events played out, since he was the store manager at the time the complainant made his formal complaint with the Commission.

[226] Throughout the hearing, Mr. Halliday was continuously referred to as the person through whom the key issues and the circumstances leading up to this complaint flowed. For example, when the initial issue arose regarding the complainant being informed that he was scheduled onto the night crew in 2004 and the complainant responding that he had an exemption, the matter was passed on to Mr. Halliday to further investigate when nothing was found at the store level regarding the accommodation. Both Mr. Morrison and Ms. Anderson testified that they believed Mr. Halliday spoke to the complainant about no accommodation having existed, yet the complainant indicated he was never informed of this prior to being scheduled on night crew after Christmas holidays. Mr. Halliday also was a pivotal player in how the complainant’s LOA played out, as noted in the testimony of several witnesses. Likewise, Ms. Anderson testified that it was Mr. Halliday who provided her with the information regarding Ms. Rawleigh’s visual issues,

¹⁷ *Director of The Alberta Human Rights and Citizenship Commission and Khalid Alibhai v. Tequila Bar and Grill Ltd. operating as Tequila Nightclub* (February 25, 2009) ABQB (oral decision)

which mistakenly led her to believe that Ms. Rawleigh only had a night blindness concern and that the brain surgery she was to have would cure it.

[227] Counsel for the respondent does not believe that an adverse inference should be drawn from Mr. Halliday's unwillingness to participate in this hearing nor for their decision not to subpoena him. Ms. Gain based her arguments on a Nova Scotia Court of Appeal decision, *Davison v. Nova Scotia Government Employees Union*¹⁸ that examined a lower Court's decision of failing to draw certain adverse inferences against the Union by not calling three witnesses. Justice Cromwell in writing for the Court the cited an Ontario Court General Division case, *MacMaster (Litigation guardian of) v. York (Regional Municipality)*¹⁹ which stated at paragraphs 25-26 that the inference is permissive, not mandatory. Noted at paragraph 28:

An adverse inference with varying weight attached to it may occur in circumstances where a party fails to call a material witness, and it is apparent from all of the other evidence in the case that the witness, who was particularly and uniquely available to that party, would have been able to help the court by giving evidence on a material issue.

[228] Ms. Gain further provided an excerpt from the Evidence and Procedure in *Canadian Labour Arbitration* Volume 1 which noted:

An unexplained failure to call a witness who might reasonably be expected to testify may give rise to an inference that his or his testimony would be unfavourable. However, there is some support for the proposition that this inference should not be drawn as to fill a gap in the case of the party who has the burden of proof.

[229] The Panel does not believe that the evidence that Mr. Halliday may have provided would have 'filled in the gap' of the case but would have greatly assisted the Panel in understanding exactly how the chain of events and more specifically, communication flowed between the parties since the evidence suggests that messages were not being conveyed and misinformation may have been passed on.

[230] The Panel was fully prepared and expecting to hear Mr. Halliday's testimony over the telephone when he decided not to for some unexplained reason. The Panel has drawn an adverse conclusion towards Mr. Halliday's stance in this case, since he has demonstrated a continuous disregard and overall blatant rejection of this whole process. Had Mr. Halliday felt that he was justified in his actions, he should have been prepared to testify to that effect.

[231] The Panel surmises that there was a breakdown in the lines of communication between Mr. Halliday and the complainant, and that for some unknown reason Mr.

¹⁸ *Brenda Davison, Chris Davison, Mark Dawe, Anne Hollis (The "Truro Employees) v. Nova Scotia Government Employees Union ("NSGEU")*, 2005 NSCA 51

¹⁹ *MacMaster (Litigation guardian of) v. York (Regional Municipality)*, [1997] O.J. No. (Gen. Div.)

Halliday chose not to inform the complainant that no exemption/accommodation from night crew was found at either the store or HR level in October 2004, since no evidence has been presented to the contrary.

[232] The Panel believes and the evidence suggests that Mr. Halliday provided medical information to Ms. Anderson regarding the complainant's wife's visual and Chiari malformation conditions that were misleading or uninformed.

[233] The Panel acknowledges that the starting point in deciding whether the complainant was prima facie discriminated against on the grounds of family status in the area of employment is the legislation. The definition of family status under the Act is broad and specifies that family status "means the status of being related to another person by blood, marriage or adoption." The complainant and his wife meet this definition.

[234] The Panel has utilized the view of the Court in *Meiorin* in its rationale or justification of finding that the complainant's situation met the definition of family status under the Alberta human rights legislation. The Court stated:

Although the various human rights statutes have an elevated legal status, they remain legislative pronouncements and, in the absence of a constitutional challenge, this Court must interpret them according to their terms, and in light of their purposes.

And further noted:

This Court has held that, because of their status as "fundamental law", human rights statutes must be interpreted liberally, so that they may better fulfill their objectives.

[235] The *O'Malley* decision set the initial standard for dealing with prima facie discrimination cases and defined what direct and adverse effect discrimination are. Subsequently, the *Meiorin* decision collapsed these two approaches into one unified one.

[236] The Panel finds that based on the facts in this case, whether the adverse effect discrimination definition as outlined in *O'Malley* or the unified approach taken by the court in *Meiorin* is applied, the complainant was prima facie discriminated against.

[237] The Panel acknowledges that the employer, Safeway, for genuine business reasons, adopted the standards of a rotation through the night crew for general clerks. This stance was echoed in the terms of the Collective Agreement. This standard is neutral in its face and was applied equally to all the employees who were in the same job classification as the complainant. However, the complainant had a unique family status situation, which made the implementation of this standard discriminatory to the complainant's unique needs.

[238] When the facts of this case are applied to the decisions that have dealt specifically with the ground of family status, most notably *Brown*, *Hoyt* and *Johnstone*, as well as *Campbell River*, the Panel finds that prima facie discrimination occurred.

[239] The terms of the complainant's employment were changed when he was informed that he would have to rotate onto the night crew. For over two years the complainant believed that he was exempt from this shift based on his wife's visual concerns. This change in his scheduling, with only a few days notice, substantially impacted both his parental and family obligations. The complainant had no opportunity to secure assistance at night time. These facts fall into line with the more stringent standard set out in *Campbell River*.

[240] It was wholly unreasonable to expect that the complainant's family and friends could assist on such short notice and for such a significant amount of time, four weeks at a time, several times per year. The complainant's wife attempted to secure the services of an outside agency, but the cost was prohibitive; in excess of the complainant's salary. As already noted, the Panel believes that the complainant, in his mind had and in actuality did have an exemption, an accommodation from working the night crew. No substantive evidence has been provided to the contrary. Had the schedules for the time period in question been available, this would have answered this question.

[241] The Panel notes, that even if the complainant did not actually have an exemption/accommodation, and that it was pure coincidence that he never had to rotate onto the night crew for over two years, the conduct of the employer was nevertheless discriminatory.

[242] The Panel disagrees with the Court's belief noted in *Campbell River*, that an open-ended concept of family "would have the potential to cause disruption and great mischief in the workplace." These sentiments were conveyed by Ms. Anderson, "once you start opening the Pandora's box...suddenly you are going to have a lot of people who can't work the night crew." The Panel believes that every case must be weighed on its own merits and unique circumstances. To support the belief that the floodgate may be opened to opportunistic individuals is very dangerous and possibly discriminatory.

[243] The Panel believes that the actions of the respondent and, more specifically Mr. Halliday, directly led to the prima facie discrimination against the complainant. As well, Ms. Anderson's lack of experience in dealing with family status matters and her mistaken belief that Safeway was no longer accepting second party illness compounded the discrimination.

2. If the respondent did discriminate against Mr. Rawleigh did they accommodate him to the point of undue hardship?

[244] With the Panel having found that the respondent did discriminate against the complainant on the grounds of family status in the area of employment, the onus shifts to

the respondent to prove that they accommodated the complainant to the point of undue hardship.

[245] The Court in *Meiorin* devised a three-step test that should be adopted for determining whether an employer has established, on a balance of probabilities, that a prima facie discriminatory standard is a bona fide occupational requirement (BFOR). The test is as follows:

1. the standard was adopted for a purpose that is rationally connected to job performance;
2. the particular standard was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose;
3. the standard is reasonably necessary to the accomplishment of that legitimate purpose. This includes a requirement to demonstrate that it is impossible to accommodate without undue hardship.

[246] The *Meiorin* decision set forth the guiding principles that should be considered in situations where a duty to accommodate issue arises and at what point has the notion of undue hardship been met.

Director's arguments regarding duty to accommodate to the point of undue hardship

[247] The director submits that in the application of the three-part *Meiorin* test, the respondent did adopt a standard for a purpose rationally connected, a neutral workplace condition which meets the first part of the test.

[248] In terms of the second part of the test the director specifically addressed the “good faith/bona fide” element. The director submits that the behaviour and specific comments directed at the complainant, notably regarding the timing of his wife’s surgery and dropping her off at the emergency room and attending work, along with the circumstances in which the complainant was scheduled onto night crew, namely the lack of notice in terms of scheduling, were not done in good faith.

[249] The director contends that the third part of the test in this particular case, that of the employer accommodating the employee to the point of undue hardship, had not been met and provided a multitude of case law to argue the point.

[250] The director cited two Supreme Court of Canada (SCC) decisions as the starting point in the argument that the third part of the *Meiorin* test was not met, namely *Via Rail*²⁰ and *Hydro-Quebec*²¹.

[251] The director first referred the Panel to paragraph 130, last sentence in *Via Rail*:

²⁰ *Council of Canadians with Disabilities v. Via Rail Canada Inc.* (2007), 59 C.H.R.R. D/264, 2007 SCC 15

²¹ *Supra* note 15

The point of undue hardship is reached when reasonable means to accommodate are exhausted and only unreachable or impracticable options for accommodation remain.

The director also referred the Panel to several paragraphs in the *Hydro-Quebec*²² beginning with paragraph 14 as noted by L'Heureux-Dube J.:

The goal of accommodation is to ensure that an employee who is able to work can do. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that those otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

In addition, the director referred the Panel to paragraphs 16 and 17, in which the Court examined the concept what undue hardship means in the context of accommodating the employee and indicated:

The test is not whether it is impossible for the employer to accommodate the employee's characteristics and acknowledges that the employer does not have a duty to change the working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his work.

The employer because of the individualized nature of the duty to accommodate and variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or light his duties -- or even authorize staff transfers -- to ensure the employee can do his work, it must do so to accommodate the employee.

[252] The director argues that in light of these decisions, the SCC views transfers as an option for accommodation and that the test is undue hardship, not reasonableness.

[253] The director referred next to the *Kemp*²³ grievance in which Safeway was the respondent as well, and was found by the arbitrator to have not accommodated the employee to the point of undue hardship. It was noted in paragraph 148 that the employer did not give the employee the opportunity to fairly assess a number of possible options, which included non-bargaining unit work or multi-store assignments because it had not used these alternatives in the past and the employee would not be interested.

²² Supra note 15

²³ *United Food and Commercial Workers, Local 401 v. Canada Safeway Ltd. (Kemp Grievance)* [2007] C.L.A.D. No.269

[254] The director submits that the respondent held a position on accommodation that was wrong in law and was revealed during the testimony of Ms. Anderson relating to how permanent versus temporary accommodations were dealt with. During Ms. Anderson's testimony, she indicated that a permanent accommodation of reclassification was offered because the complainant could not perform the duties of the entire general clerk position. Further, that reclassification was done because Safeway wants their employees to perform the whole scope of the duties, which would include working night crew if it was required.

[255] The director argues that reclassification should not be the norm, even if an injury is permanent, since doing so discounts exploring options that are unique to each individual's circumstances and that this is not what accommodation is about.

[256] The director indicates that the respondent's position on reclassification appears automatic since Mr. Morrison in his testimony suggested that the complainant should be reclassified as a cashier if he could not work the night crew. As well, from a policy perspective, an accommodation strategy such as this requires all of the sacrifice to be on the part of the employee, and none on the employer.

[257] The director argues that the position of placing all of the sacrifice on the employee was addressed in the *Oliphant*²⁴ grievance. In this case, the arbitrator in paragraph 174, indicated:

The Employer adopted a standard that all persons employed as cashiers must be able to perform all the functions of cashiers to be assigned work.

The arbitrator in paragraph 175 then applied the *Meiorin* analysis and addressed the question:

Has the Employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

In response to this question, the arbitrator indicated in paragraph 176, that the "employer's position appears to have been absolute. Unless Ms. Oliphant could do all the duties of a cashier, she could not work."

[258] The director further referred to paragraph 182 in *Oliphant* where the arbitrator noted:

In this case it appears that Employer initially decided matters unilaterally. It investigated positions once challenged, but again without any effective grievor or union input.

²⁴ *Canada Safeway v. United Food and Commercial Workers, Local 401 (Oliphant Grievance)* [2002] A.G.A.A. No. 43

[259] The director indicated that the respondent in this case has taken a position similar to that which they did in *Oliphant*, although not as stringent when they differentiated between temporary and permanent accommodation.

[260] The director then led the Panel through various excerpts from the Lepofsky²⁵ article which addressed the duty to accommodate issue and was cited in *Hydro-Quebec* and *McGill University*. On page 11 of the article under the heading of *Assessing Claims of Undue Hardship – Some General Principles*, the director referred to the following passage:

When assessing the substantive reasons advanced by an employer in opposition to a request to be accommodated, it is essential that these reasons be subjected to close and careful scrutiny. There is no reason for a board of inquiry or court to be deferential to employers in this context. Deference would give employers an undeserved shield behind which attitudes of intolerance or insensitivity, and inadequate efforts at accommodation could all be conveniently and effectively sheltered.

[261] The director further elaborated on Mr. Lepofsky's opinion on undue hardship which reads in part:

...a test which goes far beyond concerns about business inconvenience, and which clearly contemplates that required accommodation can impose some degree of hardship on a employer or other respondent.

[262] The director addressed Mr. Lepofsky's view on staff morale and Collective Agreements, which noted that any adverse impact on employee morale does not automatically excuse the employer from its duty to accommodate and that:

Even if it were assumed that disruption of the collective agreement might be considered relevant in some situations, a respondent cannot be exempted from the duty to accommodate simply because the accommodation conflicts with the terms of a collective agreement.

[263] The director pointed to Lepofsky's view on impressionistic evidence:

An employer's proffered reasons for declining to accommodate should not be accepted unless they are supported by reliable, objective and persuasive evidence showing that its concerns are well founded.

[264] In assessing the employer's efforts to accommodate an employee, the director refers to pages 13-14 of Lepofsky's article which indicates:

²⁵ M. David Lepofsky, "The Duty to Accommodate: A Purposive Approach" *Canadian Labour Law Journal*, Vol. 1 Butterworths – Lancaster House

An assessment of an employer's efforts at accommodation must go beyond the employer's substantive reasons for not accommodating... The duty to accommodate has both substantive and procedural components. One requisite step is for the employer or other parties under a duty to accommodate to undertake a thorough and adequate process of inquiry and deliberations on the request for accommodation. If an employer simply rejects a request for accommodation out of hand, without giving the matter adequate thought and attention, including a thorough exploration of the possibilities, it can hardly be said to have taken adequate steps to accommodate.

[265] The director briefly examined the seven points outlined in the Lepofsky article, on pages 14-15, which analyzed whether or not the exploration of accommodation was probative and touched on the factors Lepofsky felt were necessary to gauge the employer's general attitude towards the accommodation request, the first one which states in part:

This includes consideration of whether, the respondent believed that it was under a duty to accommodate, whether it felt that this duty should be taken seriously at the time of the request, and whether its actual conduct corresponds with its claims of good faith.

[266] The director argues that the respondent's position is wrong in law with regard to accommodation and what their duties were, and that the actions undertaken by the respondent breached their duty, as they believed there was no duty to accommodate the complainant.

[267] In *Lane*,²⁶ the director referred to the Court's position on the procedural duty to accommodate, specifically paragraph 106 which reads:

The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate.

[268] The director submits that the respondent failed in its procedural duty as the evidence indicates that Safeway had no medical exemption on file, yet they didn't follow up in any manner. As well, the respondent didn't follow up with respect to a number of accommodation options.

²⁶ *ADGA Group Consultants Inc. v. Lane*. (2008) CHRR Doc. 08-524 (Ont. Div. Ct.)

[269] *Westfair Foods*²⁷ is referenced by the director as another case in which the employer failed to meet the onus in its duty to accommodate the employee. Two of the reasons for this failure are outlined in paragraph 120, the first being, the employer's "failure to meaningfully explore alternatives..." and the second, "the failure to involve the Union and Grievor in discussions about possible accommodations."

[270] The director referred the Panel back to the *Hoyt*²⁸ decision in which the Court referenced the *Meiorin* case at paragraph 96:

An employer must demonstrate that the process or procedures adopted to assess the issue of accommodation were appropriate. An employer must be sensitive to and respectful of the skills, capabilities and potential contributions of employees requiring accommodation... an employer must investigate alternative approaches to accommodation that might be less discriminatory, and demonstrate that any alternative approach considered was rejected for appropriate reasons...an employer must be innovative and practical in assessing accommodation issues. I find that CN did not meet these process requirements.

[271] The director then directs the Panel to paragraph 98 in *Hoyt* in which the decision maker notes that no records were introduced into evidence outlining any alternative accommodations and further, in paragraph 103, the decision maker indicated that the employer had a "duty to fully and completely explore other opportunities" to the point of undue hardship, which did not happen in this instance.

[272] The director reviewed the facts in this case and linked them into the cases that were addressed. The director submits that there was no meaningful input or direction with either the complainant or the Union in regards to the offer of the cashier position as an accommodation. The evidence was clear; Ms. Anderson discussed the situation with her supervisors and was given permission to offer the cashier position, but nothing else was offered to the complainant. The search for accommodation began and ended with the offer of the cashier position without any involvement of the employee or Union as required by law.

[273] Prior to the offer of the cashier position on January 13, 2005, Ms. Anderson would not agree to meet with the Rawleighs after both Ms. Roulston and Mr. Smith made the request. Mr. Smith indicated that Ms. Anderson stated that they were not accommodating second-party illnesses, and this refusal to acknowledge their duty and meet with the interested parties breached the duty to accommodate.

[274] The director submits that the respondent provided little explanation of accommodation options since they believed that an accommodation meant moving the employee to a position where they could perform 100 per cent of their duties since this is

²⁷ *Westfair Foods Ltd. v. United Foods and Commercial Workers Local 1400* (Adamson Grievance) [2005] S.L.A.A. No. 5

²⁸ *Supra* note 7

what they had done in the past. By doing so, the director argues, this limited the respondent in regards to exploring other options. Further, the onus was upon the respondent to show that they had explored all options available, which they did not.

[275] The director suggests that transfers to other stores which had permanent night crews should have explored, but the respondent limited itself by only addressing the one transfer which the complainant put forward. The evidence presented was that transfers occur all the time and there were at least three stores at the time this incident took place which were operating with permanent night crews. The director states that the onus was on the respondent to investigate these avenues, since this knowledge was within their record keeping and business operation and referenced *Workeneh* and *Berry*²⁹ on this point.

[276] In terms of the Collective Agreement, the director suggests that an accommodation could have been facilitated via its own terms which note that the complainant could have been placed in an exempted clerk position in the produce department in his own store or transferred to another, or assigned that of the “other designated full-time clerk” who is exempted along with the assistant manager.

[277] Options of having the complainant work part-time in different departments within the same store, or even part-time at other stores could have been explored as noted in the *Kemp* and *Oliphant* grievances, but these options were never even considered. Given the number of years of service the complainant had, transfers to another store could have been explored, since the respondent would have information regarding terms of openings available to them.

[278] The director argues that it is possible that a significant number of other accommodations options could have been considered, but the respondent made assumptions of what the complainant would or would not want to do. The application of their reclassification policy was the only real offer put forward, initially as a cashier and later in the bakery department when the complainant followed up with them. The failure to explore other options was a breach of the duty to accommodate.

[279] The director submits that if an accommodation, an exemption from night crew of over two years, was no longer going to be accepted, the complainant should have been informed so that he could provide additional medical evidence. Further, the lack of notice to the complainant in terms of changing his schedule demonstrates a procedural failure to accommodate.

[280] The director argues that impressionistic evidence in relation to undue hardship should not be accepted. Ms. Anderson, in her testimony, noted the concern that Pandora’s Box would be opened if requests for exemptions from night crew were entertained, but acknowledged that the complainant’s case was the first family status request that she had ever dealt with.

²⁹ *Berry v. Farm Meats Canada Ltd.*, 2000 ABQB 682

[281] In terms of staff morale, the director acknowledges that this is a factor that must be examined when assessing undue hardship, but it must be applied cautiously and referenced the *Renaud*³⁰ case. The director contends that there was no evidence from staff members that an accommodation of the complainant either by a store transfer or otherwise would have had an affect on staff morale resulting in Safeway experiencing undue hardship.

[282] The director indicated that the complainant was very proactive in his duty to explore accommodation options; he wrote a transfer letter, spoke with people in other stores, made follow up calls to Ms. Anderson, etc. The complainant's refusing to accept the only formal offer of accommodation made by the respondent should not be seen as non-cooperation since that offer should be viewed as an option of last resort.

[283] The director argues that the behaviour of the respondent in the months leading up to the 'formal' accommodation request, specifically the disputes relating to the LOA, the scheduling, and the comments by managers, demonstrated the "heavy-handed approach" directed toward the complainant's needs with respect to his family and the respondent's duty to accommodate. The director referenced the *Trick*³¹ decision, specifically referring paragraph 77 in which Read J. stated:

I noted that while perception and comments do not constitute discrimination by themselves, the actions and comments must be considered as a whole.

The director argued that the previous interactions and prejudices formed towards the complainant and his plight negatively affected the respondent's duty to fully address the accommodation issue. Further, if the respondent doubted the medical information they had before them, then under the principles of fairness the complainant should have been afforded the opportunity to provide further medical evidence as referenced in paragraph 76 of the Trick decision:

The employer cannot avoid its obligation to accommodate by failing to follow up to obtain the information it believes to be necessary.

[284] The director submits the offer put forth by the respondent, namely the reclassification, was unilateral in nature. Ms. Anderson was directed by her superiors in terms of what could be offered when one could not perform the full scope of their duties and that this is wrong in law. Further, this accommodation was not individualized and other options were not explored either procedurally or substantively to the point of undue hardship.

³⁰ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970

³¹ *Alberta (Human Rights and Citizenship Commission) v. Federated Co-operatives Limited*, (Trick) 2005 ABQB 587.

Director's Responses to the Respondent's Case Law

[285] The director referred to the *Reynolds*³² grievance and asserted that the arbitrator in this matter distinguished the case from the test set forth in *Campbell River*. In fact, the arbitrator noted that the case on its facts was a far cry from *Campbell River*, and therefore no discrimination was found on the basis of family status. The grievor in that case, was the one who changed the condition of employment; he applied for a position which required him to re-locate. The arbitrator acknowledged that the grievor's sons would benefit from his regular presence, but they did not require any special care from him. The director contends that the facts in that case are not even in the same category as those of the Rawleighs.

[286] The director distinguished the *Evans*³³ case on the basis that no discrimination was found on the basis on family status, that the complainant in that case failed to ensure that child care services had been secured prior to returning for work from maternity leave. As well, it was a British Columbia case and would be bound by the *Campbell River* decision.

[287] The director notes that the *Watson v. Golder Associates Ltd.*³⁴ matter did not meet the *Campbell River* test on its facts, since no discrimination was found, nor did the respondent fail to accommodate him. In that case, the complainant requested a one-year leave of absence to assist with the immigration of his common-law wife and her child to Canada. The complainant's employer informed him that they could not guarantee him that his position with the company would be available upon his return if he chose to take a one-year leave of absence.

[288] The director remarked on the *British Columbia Public School Employers' Association*³⁵ matter, that this was a commonplace situation in terms of breast feeding. The employer did not discriminate against the complainant by denying her request to extend her maternity leave by returning in a part-time capacity for six months, in order for her to continue to breastfeed her child who was 11 months old at the time.

[289] In *Palik v. Lloydminster Public School Division*,³⁶ the director distinguished this case on the fact that the complainant's diabetic teenage son was involved in a discretionary recreational activity, a hockey tournament, which was not essential to his well-being, nor that the complainant's attendance was necessary when her employer denied her a full day off work.

[290] The director emphasized that the respondent's arguments on the *McGill University* decision relating to prima facie discrimination focused on the minority

³² *Canadian Staff Union v. Canadian Union of Public Employees (Reynolds Grievance)*, [2006] N.S.L.A.A. No. 15, 88 C.L.A.S. 212

³³ *Evans v. University of British Columbia*, [2007] B.C.H.R.T.D. No. 348, 2007 BCHRT 348

³⁴ *Watson v. Golder Associates Ltd.*, [2007] B.C.H.R.T.D. No. 229, 2007 BCHRT 229

³⁵ *British Columbia Public School Employers' Association and British Columbia Teachers' Federation (Sutherland Grievance)*, (2006) 155 L.A.C. (4th) 411

³⁶ *Palik v. Lloydminster Public School Division No. 99*, (2006) 58 C.H.R.R. D/49 (Sask. H.R.T.).

decision written by Abella J. which addressed stereotypical or arbitrary assumptions about persons with disabilities. As well, the Collective Agreement in *McGill University* contained an absence clause that was negotiated in terms of a three-year period before an individual had to return to work. The director argues that this is a case based on hard facts and that these facts are a marked departure from the fact situation at hand.

[291] The director pointed out some concerns she had with the *Baum*³⁷ decision, namely that this decision is under appeal and argues that this case mixes the duty to accommodate with prima facie discrimination, in that the latter was addressed and dealt with before the prima facie discrimination element was proven. As well, the director contends that there was an inappropriate insertion of the requirement to find a stereotypical position relating to the “normal worker” versus that of the employee who is now a “disabled worker.”

[292] The director distinguishes the *Hutchinson*³⁸ decision on its facts and specifically notes that the employer in this case provided eight accommodations in an attempt to accommodate the employee’s extreme environmental sensitivities.

[293] The director points out that in the *Callan*³⁹ case the Alberta Court of Appeal is determining whether the decision of the chief commissioner to dismiss the complaint was reasonable. The director also distinguishes this case on its facts. The employer undertook studies and assessments in an attempt to accommodate the needs of the complainant. The complainant then gave the employer three days to put into place further accommodations and quit when this was not accomplished during this short time frame.

[294] The director distinguishes the *Anderson*⁴⁰ case, since in this matter, the employer in accordance with the principles underlining the concept of the duty to accommodate did conduct a full search which differs from the case at hand.

[295] The director notes that in the *Ford Motor Company*⁴¹ case, there was a significant problem with respect to seniority rights since senior workers were being replaced with junior workers. The director argues that no evidence had been led in this case that there had been an incursion to seniority rights, and on this basis that case can be distinguished.

[296] The director’s final submission relating to the respondent’s case law focused on the *Canadian Forest Products*⁴² decision. The director indicates that this case was pre-*Meiorin* and submits that the standard used in this case was lower. As well, the evidence demonstrated that in order to accommodate the grievor in this way would create undue hardship to the employer, specifically relating to the other employees of the company.

³⁷ *Baum v. Calgary (City)*, 2008 ABQB 791

³⁸ *Hutchinson v. Canada (Minister of the Environment)*, 2003 FCA 133

³⁹ *Callan v. Suncor Inc.*, 2006 ABCA 15

⁴⁰ *Anderson v. Alberta*, 2004 ABQB 766

⁴¹ *Ontario (Human Rights Commission) v. Ford Motor Co. of Canada*, [2002] O.J. No. 3688

⁴² *Canadian Forest Products Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-424 (Cote Grievance)*, (1995) 50 L.A.C. (4th) 164

Respondent's Arguments Regarding Duty to Accommodate to the Point of Undue Hardship

[297] The respondent submits that they differ in their interpretation of the concept of the duty to accommodate and what their responsibilities were with respect to it, from that of the director. As well, they indicate that the case law which was referenced is heavily dependent on the facts. Likewise, the principles contained in those decisions are more valuable than the outcome of each particular case.

[298] The respondent argues that there was nothing on the complainant's file to indicate that he had an accommodation/exemption from working the night crew. Further, when the complainant was informed by Mr. Morrison that he would have to rotate onto the night crew, the complainant requested that he work a four-week rotation as opposed to eight-week. He was informed by Mr. Morrison that while they were sorting his claim of an exemption from night crew, he would be scheduled into this rotation later.

[299] The respondent indicates that until they received the letters from the complainant, Dr. Smith and Ms. Roski in January 2005, they had no supporting evidence that would have necessitated the granting of an accommodation. The receipt of this new information brought the complainant's concern into perspective since the respondent then understood that Ms. Rawleigh's brain surgery would not correct her vision issue and that the surgery was meant to assist with the symptoms of a wholly unrelated medical condition. The respondent contends that they were quick to respond to this new information and began to explore what type of accommodation could be made notwithstanding the fact they had no supporting documentation from Dr. Hamilton prior to the January 13, 2005 meeting.

[300] The respondent offered an accommodation, that of a cashier position, which would meet the needs of the complainant in terms of not having to work night crew.

[301] The respondent disagrees with the director's position that Safeway should have done more in terms of accommodating the complainant and notes that the Collective Agreement specifically outlines that general clerks are required to work their fair share of night shifts in the absence of a permanent night crew, through a rotation process.

[302] The respondent distinguished the *Oliphant*⁴³ grievance from the complainant's case on the fact that the complainant in this case could perform all of the duties required of a general clerk except working the night crew. The respondent argued that bundling, mixing his job with another job was not an option at that point.

[303] The respondent argued that in Safeway's view, the offer of a reclassification to a cashier position met the needs of the complainant since it fit within Safeway's operational capacities and the salary was in line with that of a general clerk.

⁴³ Supra note 24

[304] The respondent acknowledges that other options such as variety clerk and bakery sales were discussed with the complainant, but none of these other positions would place the complainant in as optimum a position in terms of salary, as that of the cashier position. As well, the complainant was apprised of the fact that given his previous history, he would not be placed in a managerial position.

[305] The respondent contends that the complainant was adamant in his position not to accept the cashier position since he felt that he should be exempted from working the night crew while remaining in his general clerk position. If this did not occur, he felt he had no choice but to drop down to a restricted part-time status which would limit his availability to work.

[306] The respondent indicated that it is clear in the case law that both the employer and the employee have obligations in the accommodation process and referred to the majority portion in the *McGill University*⁴⁴ decision at paragraph 22 which stated:

Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street.

The Court went on to refer to the *Renaud* decision and stated:

...when an employer makes a proposal that is reasonable, it is incumbent upon the employee to facilitate its implementation. If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed.

And further:

The complainant cannot expect a perfect solution. The obligation of the employer, the union and the employee is to come to a reasonable compromise.

[307] The respondent disagrees with the director's submission that the cashier position which was offered was not appropriate and maintains that, although this position was not the same as a general clerk, it satisfied what the complainant was seeking, which was an accommodation from working the night crew.

[308] The respondent acknowledges that the offer of the cashier position was based largely on operational considerations, specifically in terms of scheduling and the morale of employees.

[309] The respondent argues that the night shift is viewed as the "scum shift.". Nobody wants to work it. This ultimately led to Safeway and the Union negotiating terms in the Collective Agreement that saw an equal sharing of the burden of working night shifts amongst all employees. It is for this reason that exempting somebody from the night shift

⁴⁴ Supra note 16

would cause serious problems operationally such as scheduling and staff morale. Likewise, it would clearly violate the fair rotation requirement of the Collective Agreement.

[310] The respondent alleges that the decision to offer the cashier position was the best accommodation it could offer, short of allowing the complainant to be exempted from having to work the night shift.

[311] The respondent again referred to the *Renaud* case and noted that this was one of the first accommodation cases to address the role that a Collective Agreement played in a unionized environment, specifically in relation to the Union's duty in dealing with accommodation issues. The respondent referred to the submission at page 25:

...a union cannot be required to adopt measures which conflict with the collective agreement until the employer has exhausted reasonable accommodations that do not affect the collective rights of employees.

The respondent interprets this to mean that employers should at all costs aim for accommodations that do not violate the Collective Agreement and that only in the most severe cases, where accommodations cannot be found should violating the Collective Agreement be contemplated.

[312] The respondent directed the Panel to the Court's decision in *Renaud*, pages 27-28, which reads in part:

The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense or disruption of the business of the union but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant.

And further:

The employer must take steps that are reasonable. If the proposed measure is one that is least expensive or disruptive to the employer but disruptive of the collective agreement or otherwise affects the rights of other employees, then this will usually result in a finding that the employer failed to take reasonable measure to accommodate and the union did not act unreasonably in refusing to consent.

[313] The respondent further submits that as cited in the *Hoyt* decision at paragraph 54, where an offer by the employer has been made that would fully accommodate the employee's needs or restrictions, the employer's duty is satisfied. It then becomes the duty of the employee and the Union to accept and facilitate the implementation of the offer.

[314] The respondent indicates that the sentiments set forth in *Hoyt* are echoed in *Callan v. Suncor*⁴⁵, an Alberta Court of Appeal decision, which stated at paragraph 21:

There is no duty of instant or perfect accommodation, only reasonable accommodation. The reasonableness of the employer's accommodation must be evaluated considering the knowledge of the employer, together with the cost, complexity and expense of any physical accommodation required, and other physical factors. The test is not subjective, and the employee is not entitled to dictate the accommodation he or she will accept.

[315] The respondent submits that the evidence is clear that the complainant, for his own reasons, did not want to be a cashier. One of the reasons given was that the complainant viewed the cashier position as a demotion, although no evidence was substantiated that a move from that of a general clerk to a cashier was an absolute demotion.

[316] The respondent further referred to the Alberta Court of Appeal decision, *Anderson v. Alberta*⁴⁶ in examining the obligations of an employer and employee when dealing with an accommodation and specifically alluded to paragraphs 34 and 43 which read in part:

A person is not entitled to a job of their own choice so long as the proffered job is one that is sufficiently inclusive to accommodate the complainant.

And further:

While the Applicant may not have liked the position, may have considered it demeaning or less worthwhile, and may have considered she was entitled to a different job entirely...

The respondent equated the Court's position to Safeway's offer of the cashier position since it met the needs of the complainant and it was the best position they could offer. Further, it satisfied their obligation with respect to the complainant's abilities, skills, experience, training, and it met Safeway's operational capabilities. The respondent contends that had no such position been available, they would have been obligated to search further. Since Safeway had met its duty by offering the cashier position, the obligation fell to the complainant to accept the offer whether he liked it or not.

[317] The respondent disagrees with the director's position that there was an obligation to continue to look for another position aside from that of the cashier because the complainant did not want it and felt he was entitled to an exemption from night crew.

[318] The respondent argues that the transfer of the complainant to another store which had a permanent night crew was not a feasible option since night crews are variable and no guarantee exists as to how long the permanent night crew will be in place, which

⁴⁵ *Supra* note 39

⁴⁶ *Anderson v. Alberta*, 2004 ABCA 766

would have necessitated another transfer. It is for this reason that the respondent viewed the transfer to a store with a permanent night crew as an unrealistic accommodation.

[319] The respondent referred to the *Alberta Dairy Pool* decision in terms of what the Supreme Court of Canada viewed as factors to be considered when assessing undue hardship, namely financial cost, disruption of a Collective Agreement, problems of morale of other employees, and interchangeability of the work force and facilities. The respondent reiterated the concerns Safeway faced in relation to following through with the terms of the Collective Agreement and the reasonableness of the offer they made to the complainant. The respondent reiterated the positions taken in the *Callan v. Suncor* and *Renaud* decisions and further referred to the *Baum*⁴⁷ decision, that cited the *Riess*⁴⁸ grievance which held:

The Union's position that the Employer ought to have accommodated him by changing other employee's job duties to allow the Grievor not to fight fires or to find him a position for which he was not qualified and would, in fact for those positions suggested by the Union, have been a promotion and would be interfering with the agreements between the parties.

[320] The respondent submits that collective agreements have strong rules with respect to promotions, specifically entitlements of promotions and the role seniority plays. The respondent refers to the Saskatchewan Court of Appeal decision in *U.F.C.W., Local 1400 v. Westfair Foods Ltd.*,⁴⁹ where the Court held that the employer did not fail to properly accommodate a disabled cashier by placing them into a position in a different Union local, which would have impacted the seniority and accrued rights of other employees.

[321] The respondent referred to the *Melody Rennie v. Peaches and Cream Skin Care Ltd.*⁵⁰ and *Ford Motor Co. of Canada*⁵¹ decisions as examples of cases where the effect on other employees was considered when accommodating certain employees. The respondent specifically noted that in the *Ford Motor* decision, the board examined the disruption of the Collective Agreement, problems of morale, and the interchangeability of the work force and facilities. The board also looked at the size of the operation and safety considerations, including the magnitude of the risk and the identity of those who would bear them. The board ultimately found that the proposals put forth by the Union significantly interfered with the rights of other workers and/or entailed substantive departures from the normal operation of the terms of the Collective Agreement.

[322] The respondent submits that exempting the complainant from the night crew would have created problems with staff morale and animosity amongst the employees

⁴⁷ *Supra* note 37

⁴⁸ *British Columbia Public Service Agency v. British Columbia Government and Service Employees' Union (Riess Grievance)*, [2006] B.C.C.A.A.A. No.64

⁴⁹ *U.F.C.W., Local 1400 v. Westfair Foods Ltd.* (2007) SKCA 22

⁵⁰ *Melody Rennie v. Peaches and Cream Skin Care Ltd.* (2006), File No. N2005/07/0112

⁵¹ *Supra* note 41

and cited the *Canadian Forest Products*⁵² case as another example of where the Court considered the reaction of other employees to the accommodation of one individual due to his religious convictions.

[323] The respondent reiterates their position that the accommodation they offered the complainant, that of a reclassification to a cashier, met his needs, would not have required a breach to the Collective Agreement, and would not have negatively affected other employees.

Findings and Analysis

[324] The Panel finds that in the application of the three-part test set out in *Meiorin*, the respondent met the first two parts of the test.

[325] The Panel disagrees with the director's argument that the respondent did not meet the second part of the test, specifically the good faith/bona fida element. The Panel agrees that the respondent's actions, most notably the treatment and the attitudes directed towards the complainant by his employer in relationship to his LOA request, attending to the emergency room with his wife, and the lack of notice regarding scheduling on night shift constituted poor business practices and an obvious lack of empathy and compassion. However, it does not equate to an adopted business standard which is what this part of the test addresses. The Panel noted earlier in this decision that it was for the aforementioned reasons and others that the complainant was found to have been prima facie discriminated against.

[326] When addressing the rationale as to why the employer adopted the protocol in consultation with the Union in this case, that general clerks should have a fair rotation which included working the night shift, the Panel believes this undertaking was adopted in an honest and good faith. The Panel believes that in fact, there was a legitimate work-related reason for doing so. Given the nature of the business Safeway conducts, the Panel cannot find any malicious reason that this particular work practice was adopted. This practice was instituted for legitimate reasons.

[327] The Panel acknowledges that both the director and respondent put forth legitimate and for the most part persuasive arguments and case law to support their positions regarding the third part of the *Meiorin* test, that of accommodating the complainant to the point of undue hardship. Unfortunately, there exists no hard and fast definition as to what 'undue hardship' means in the context of accommodation. Justice Sopinka, in the *Renaud* decision provided a starting point to gauge what amount of hardship is acceptable and stated:

The use of the term 'undue' infers some hardship is acceptable; it is only 'undue' hardship that satisfies this test.

⁵² *Canadian Forest Products Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-424 (Cote Grievance)*, (1995) 50 L.A.C. (4th) 164

The Panel has followed Justice Sopinka's reasoning in conjunction with the list of factors to consider when assessing undue hardship as outlined in the *Alberta Diary Pool* case, namely: financial cost, disruption of a collective agreement, problems of other employees, interchangeability of work force and facilities to assist me in making my decision.

[328] The Panel notes that specific facts in this case played an immeasurable role in guiding the decision. As well, the Panel's review of the case law reinforced the uniqueness of this case and solidified the reasons for the Panel's findings.

[329] The Panel finds that the director was successful in arguing and putting forth the case that Safeway did not accommodate the complainant to the point of undue hardship.

Reasons

[330] When examining the *Callan* decision, the Panel notes that the employer undertook a multitude of different steps on its own volition, for example, communicating with the complainant's physician to indicate that they would facilitate any reasonable accommodation necessary in order to allow the complainant to return to work, as well as conducting studies in a further attempt to find the best accommodation possible. The evidence was clear and the Court noted that the complainant in that matter was being wholly unreasonable in her expectations. The complainant's last return to work took place over or around the Christmas holidays and she only gave the employer three days to put into place another accommodation to meet her needs. There was no evidence presented to indicate that had the employer been able to institute the changes the complainant was demanding, they would have been sufficient. The Court indicated that the complainant was "unwilling to try and return to work because she didn't think the position was suitable or that she was well enough to do it..." The Panel believes that this was a clear case where the complainant was being unreasonable in her demands for accommodation and was not working with the employer to meet a mutual goal. The actions and behaviour of that complainant clearly created undue hardship towards the employer who was sincerely trying to accommodate her needs.

[331] The Panel notes that in the *Anderson* decision the Court reiterated the *Renaud* decision in relation to what the employee's role is in accepting 'a reasonable accommodation' put forth by the employer. The Panel agrees that the employer is in the best position, since they have specific knowledge to determine how the complainant can be accommodated without creating undue interference in the operation of the employer's business. Further, the complainant cannot expect a perfect solution, but the Panel believes that each case must be weighted on its own facts. To arbitrarily give the whole control of deciding what the accommodation must be to the employer fails in the face of the principles of natural justice.

The Court in *Renaud* was clear in their reasoning of the role the complainant is to play in the search for accommodation and stated:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is a duty on the complainant to assist in securing an appropriate accommodation... To facilitate the search for an accommodation, the complainant must do his or her part as well.

[332] The evidence is clear in this case that the complainant and the Union were more than prepared to assist in the search process. The complainant put forth several suggestions, one of which was a transfer to Store 285, to the position of third person, which was a management trainee position. The Panel accepts Safeway's reason for not considering this particular position, since it would have been a promotion, for which Safeway felt the complainant did not have the qualifications. Likewise, the Panel notes that other options were put forth, such as variety clerk and bakery sales, which were not viewed (by Safeway) as comparable options to the cashier position offered by Safeway. However, the search should not have stopped with the one formal offer and should have actively involved the other parties, namely the complainant and the Union.

[333] The Panel acknowledges that accommodations are not and should not be one way streets and that a reasonable compromise should be the ultimate goal of the concerned parties. Further, if the complainant is being unreasonable and not co-operating with the accommodation process, this may be grounds upon which to dismiss the matter. However, this is not the way things played out in this case. As noted in *Meiorin* at paragraph 64:

The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible.

and that:

Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in a particular case.

Safeway was steadfast in offering the first position that they felt met their operational needs, that of a cashier. The cashier position was not in the same classification as that of a general clerk and was also of lesser pay. There was no evidence led that Mr. Rawleigh had any experience or training to successfully function in the position offered. The Panel acknowledges that the employer certainly could and most likely would have offered training for this position. However, there was no evidence led to support the notion that Mr. Rawleigh even had the aptitude to be successful in this position. The Panel believes that there is a significant difference in the skill set that is required to function successfully as a cashier versus that of a general clerk. The Panel does not believe that the complainant's decision to reject this position was unreasonable. The respondent argued that the complainant willingly chose to request a change in his status from a full-time employee to that of part-time, more specifically a restricted employee, and further set strict restrictions upon his work availability. The Panel believes that the complainant did this for no reason other than to attempt to mitigate his damages in terms of securing a

full-time position with another company that could accommodate his night shift restriction, thereby choosing to forego an unreasonable offer of an accommodation due to his family status. The Panel is aware that the position the complainant secured with Lattion/Rankin Prewire and Installations Inc. resulted in a reduction in pay. However, had the complainant chose to become an unrestricted part-time employee, this would likely have resulted in close to full-time hours and he would still have had to work night shifts and once again, the complainant would have been the one making the accommodation. The Panel does not view the complainant's refusal to accept the cashier position negatively, but views it as the only viable choice he had given the respondent's unwillingness to work with him and the Union to secure a reasonable accommodation. The facts in this case can be easily distinguished from the *Anderson* case, where the respondent was relied upon to demonstrate that the employee was being unreasonable in her denial of an accommodation offered by her employer.

[334] The respondent made it abundantly clear that the cashier position was the only position that operationally met its needs. The Courts have said that no one can expect a perfect solution, yet at the same time they acknowledged that the decision should not be one-sided, which the Panel believes was the case here. Safeway is not by any stretch of the imagination, a small operation as was the case in the *Rennie* decision. Safeway, in the Calgary region alone, employs thousands of people and has over a dozen locations. As L'Heureux-Dube J.: alluded to in the *Hydro-Quebec* decision, the employer has a duty to arrange the employee's workplace to enable the employee to work, and in doing so rigid rules must be avoided and creativity should be employed if undue hardship will not result, such as varying the work schedule or authorizing staff transfers. The respondent's behaviour prior to the complaint being filed and even during the hearing indicated that applying creative solutions which would work for both complainant and the employer was not a priority. The respondent's counsel argued that bundling or mixing up the complainant's job with another was not an option. Citing the *Oliphant* grievance, the respondent argued that since the complainant was not capable of fulfilling the night crew aspect of his general clerk position, that this in turn meant he was no longer capable of performing all the duties required of a general clerk.

[335] The Panel disagrees with the respondent's reasoning for not looking for any other viable alternatives for the complainant. In the *Oliphant* grievance, as well as in some of the other cases the respondent cited, the complainants suffered from physical disabilities, that required modifications to the actual hands-on or physical aspects of their jobs. There was no suggestion that this complainant could not perform the physical and mental aspects of his assigned job, he was just unable to work the night shift hours.

[336] Safeway argued that the Collective Agreement played a central role in their decision not to look beyond the cashier position and relied upon the *Renaud* case. The Union, in this case, was actively supportive of the complainant's matter. They filed grievances on his behalf relating to the exemption/accommodation issue, attempted to facilitate a meeting between the complainant and Safeway, and were present during the January 13, 2005 meeting. The Panel fully acknowledges the role collective agreements and unions play in the work setting. Collective agreements are designed to facilitate an

amicable work relationship that is fair and just for all. The Panel concedes that the wording of the Collective Agreement in this case is unclear on some points, specifically Section 10.11 (d) which denotes that:

*Night shift work shall be on a fair rotation of all staff working the area concerned **with the exception of the Assistant Manager and one other designated clerk.***

Exactly who is the other designated clerk? Evidence has been led that the ‘other designated clerk’ refers to the third person, the management trainee. This may be an accepted position internally within the organization but on its face it is open to interpretation. The Letter of Understanding # 11 also is unclear in the meaning behind its wording:

The foregoing rotation may not, at the employer’s option, include one designated full-time general clerk and those working in the Produce Department.

Once again, who is the excluded designated full-time clerk? The Panel does not believe that the respondent can shield itself behind the Collective Agreement as a justification for not accommodating the complainant. The respondent also cites the Collective Agreement as a reason for not looking at any further accommodations and claims that exempting the complainant from the night crew would have a detrimental effect on staff morale as addressed in the *Alberta Dairy pool* decision. What little evidence that was put forth regarding the ‘perceived’ negative effect such an accommodation would have on staff morale is inconsequential. Impressionistic evidence cannot be used to support the respondent’s claim that, if the complainant was given an accommodation from working the night shift this would have led to undue hardship, the fear of the opening of Pandora’s Box, and the floodgate of ‘future’ employees seeking accommodations; this cannot relieve the respondent of their obligation to accommodate the complainant to the point of undue hardship. As Justice Sopinka noted, the standard is undue hardship not mere hardship or inconvenience.

[337] Safeway didn’t even test the degree of hardship that they might have experienced had they attempted to accommodate the complainant outside of the offer of the cashier position. They chose to rely upon impressionistic evidence which closed the door to the exploration of any other accommodations. They chose the safe, convenient and operationally beneficial option: a reclassification and cut in pay without even entertaining any other potentially viable options. The Union and the complainant were prepared to work with Safeway to find a position that would accommodate everyone. Safeway had an opportunity through which to demonstrate progressive employee relations by working with their employee and Union in finding a creative solution. Instead, Safeway retreated into a regressive and hard-line approach, citing operational considerations for their lone offer of accommodation. While Safeway states that they offered the best accommodation possible, the Panel can easily distinguish many of the cases the respondent relied upon in their arguments concerning the *Callan*, *Anderson* and *Hutchinson* decisions. In all of

these cases, the employer demonstrated their desire to find and offer the best accommodation available. They did not limit themselves to one offer, in fact they offered multiple accommodations, and the Courts rightfully found that it was the employee who was being unreasonable in their request.

[338] The Panel, through an extensive re-examination of the material and arguments put forth, has been unable to find that the employer, Safeway, had accommodated the complainant to the point of undue hardship. The provision of unilateral offer, that of the reclassification and pay cut which fit within the employer's operational capacity, does not constitute such an accommodation especially when other more viable options were not explored. The arguments put forth regarding Union and staff morale concerns were largely based on impressionistic evidence. None of the other factors as suggested in *Alberta Dairy Pool* were addressed, namely, financial cost and the interchangeability of the work force and facilities so the Panel has not addressed them.

[339] The Panel believes that the Commission's information sheet entitled *Family status and marital status*⁵³ exemplifies what the employer's responsibilities are in the event an employee requests a change in shifts because of family issues and that the employer should accommodate the request if possible, barring lack of employees, having to hire more staff to meet this request, and financial considerations which would create an undue hardship on the employer. Based on the facts in this case, the respondent did not demonstrate that accommodating the needs of the complainant would cause undue hardship.

[340] It is for these reasons that the Panel has found in favour of the complainant.

Remedy

[341] The Panel is unable, with the information provided, to render an informed decision relating to the director's request that the complainant be reimbursed for lost wages, pension and benefits from March 1, 2005 until the end of 2007.

[342] The Panel is not requesting and will not entertain any further written submissions relating to the issue of general damages, as there was ample opportunity during the hearing to address the issue and the Panel is satisfied with what has been presented.

[343] The Panel requests that the director and respondent provide written submissions regarding compensation for lost wages, pension and benefits as well as the rationale for the length of time this compensation is being sought, March 1, 2005 until the end of 2007. 30 days will be provided from the date of the decision to submit the responses.

[344] The Panel acknowledges that T-4 slips have been provided by the complainant, but this has not assisted the Panel in determining the actual monetary amount the complainant is seeking, as T-4s for example, do not factor in salary increases, overtime

⁵³ *Family status and marital status: Information Sheet, Human Rights and Citizenship Commission*

and vacation payouts. The Panel is not prepared to guesstimate the amount the director is seeking on behalf of the complainant with so many unknown variables.

[345] Upon receipt of the submissions relating only to the complainant's salary, pension and benefits loss, a decision encompassing all of the categories of remedy sought will be rendered.

September 29, 2009

Brenda Chomey
Panel Chair