IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 636

["the Union']

AND:

POWER STREAM INC.

["the Employer"]

RE: HUMAN RIGHTS GRIEVANCES OF BENDER, BADDELEY, APPS AND THOMPSON

SOLE ARBITRATOR:

Norm Jesin

FOR THE UNION:

Craig Flood - Counsel

FOR THE EMPLOYER:

Mark Contini - Counsel

INTRODUCTION AND BACKGROUND

There are four grievances in this case. They allege that the Employer has discriminated against the grievors on the basis of their family and marital status, contrary to section 5(1) of the Ontario *Human Rights Code,* R.S.O. 1990, c. H-19 as amm (hereinafter the "HRC"). The facts giving rise to the grievances are as follows.

The Employer is an electricity distribution company. The grievors are employed as linemen in the lines department, servicing the City of Vaughan. The parties are subject to a collective effective from April 1, 2008 until March 31, 2011.

Under the previous collective agreement, employees in the lines department had the option of working five shifts per week consisting of eight hours each, or four shifts per week consisting of ten hours each. It seems that most employees preferred to work the four ten hour shifts. However the grievors all chose to work the five shift schedule. That schedule allowed them to more easily fulfill their familial responsibilities such as day care pick or attendance at their children's sporting activities. More detail on this will be provided below.

The parties commenced negotiations for the present collective agreement in or about March, 2008. At those negotiations the Employer introduced a proposal to standardize the hours of work for employees in the line department. The Employer did not insist that either the five shift per week schedule, or the four shift per week schedule be agreed to. It was content to let the Union and/or the employees choose which schedule would be implemented. However, the Employer no longer wished to allow employees to work on different shifts. There were a number of reasons cited in the evidence for the Employer's proposed change. The evidence

established that employees worked on small sub crews that were integrated into larger crews. Those larger crews meet every morning to discuss and plan the work of the day. According to the Employer it was inefficient and inconvenient to have different sub crews starting work at different hours as they would not be able to all attend the opening meeting together. It is important for everyone to attend those meeting as that is where the work of the day is planned and assigned. In addition to this problem there could also be difficulties in assigning sub forepersons to crews working different hours.

The Union initially resisted the Employer's proposal to standardize hours for the linemen. However, in order to reach an agreement, the Union ultimately accepted the proposal. The Union had met with its employees and determined that the vast majority of the linemen preferred the schedule consisting for four ten hour shifts per week and that was the schedule that ultimately was written into the collective agreement. The ten hour shift started at 6:30 am and went till 5 pm. The eight hour shift started one hour later (7:30 am) and ended one hour earlier (4 pm). Although the new agreement was effective on April 1, 2008 the Employer determined that it would delay implementation of the schedule until September of 2008 and the Union and employees were so informed. It should be noted that Lynn Baddely, the spouse of one of the grievors (they were separated at the time), is on the Union executive committee and was involved in the negotiations. At no time during the negotiations did anyone on the Union side of the negotiating table suggest that there would be a problem with the new schedule or that there might be a grievance over the schedule.

The grievors did not want to accept the new schedule because they were concerned about the impact of the schedule on their families – and particularly on the grievors' ability to carry out the child care responsibilities and to interact with their children. The grievors approached the Union with their concerns. As a result a meeting was held on June 4, 2008. The grievors were present along with representatives from both the Employer and the Union. At that meeting the grievors relayed information as to the personal and familial difficulties that the new schedule would cause them. The employer responded in writing that although it gave serious consideration to their personal situations, it was unable to accommodate their request to allow them to continue on the five eight hour shift schedule. The grievors responded in turn by filing their grievances.

PRELIMINARY MATTER AND FORM OF EVIDENCE

At the outset of the hearing the Union brought a motion to stay the implementation of the new shift schedule until after I could determine the grievances on their merit. In a written decision I determined that I did not have the jurisdiction to grant the interim relief requested. However, I indicated that I did have the jurisdiction to expedite the hearing by receiving evidence in writing and through other means. As a result the parties agreed that they would submit written witness statements and the witnesses would be subject to cross-examination. This did not result in as much expedition as was hoped. However, in light of the complexity of the issue I am convinced that much hearing time was saved and that there was a full and complete disclosure of all the pertinent facts. I commend the professional and cooperative efforts of both counsels in this regard.

Before describing the personal difficulties sustained by each grievor I would note that there was much evidence pertaining to how difficult it might be to accommodate the request of the grievors and on the necessity for the Employer to have standardized shifts. Ultimately, although this evidence provided me with important background information, I have not placed significant reliance on it at this time for two reasons. First, I accept that the change in schedules was made by the Employer with the Union's agreement. There is no evidence that either party acted in bad faith or that the Employer was motivated by anything other than legitimate business reasons. The second reason is that in argument, the parties agreed that the only issue before me is whether the Union has made out a prima facie case of discrimination contrary to s. 5(1) of the HRC. If such case was made out, the parties agreed that there was insufficient evidence to support a conclusion that accommodation should be avoided because of undue hardship. As a result I do not intend to deal with the evidence on this issue at this time, though it may become relevant if the grievance is sustained and it becomes necessary to determine precisely what accommodation must be offered.

THE GRIEVORS' PERSONAL CIRCUMSTANCES

Tom Baddely

Mr. Baddely has been employed by the Employer and/or its predecessor utility as an apprentice linesman since 1989 and as a journeyman linesman since 1993. He has been working in the Employer's Vaughan location since 2004.

Mr. Baddely has two children. When this hearing began they were six and ten years old. Mr. Baddely's wife works for the Employer at its head office as a customer service

representative. He remains married but he has been separated from his wife since November, 2005. He negotiated a joint custody agreement with his wife under which they would each look after the children in alternate weeks. Initially, after his separation Mr. and Ms. Baddely would use the matrimonial home in Holland Landing in alternate weeks to coincide with their custody schedule – that is, the parent caring for the children would stay in the home. Later, the grievor acquired the entire interest in the home and his wife moved to Bradford

Prior to his separation, from April, 2005, Mr. Baddely chose to work four ten hour shifts per week. After his separation he found that this schedule was, in his words, "no longer feasible". He therefore sought and received permission from the Employer to change his schedule to five eight hour shifts per week. After that the custody sharing arrangement seemed to work well. When Mr. Baddely had custody he had to get the children up at 6:00 am, half hour earlier than previously, to get them to their daycare so that he could get to work on time. Although this was a bit of an adjustment for the children, it was manageable. On the way home, Mr. Baddely's schedule allowed him more than sufficient time to pick the children up from daycare between 4:30 and 5:00 pm. After his schedule changed he was no longer able to fulfill these child care responsibilities. In September, 2008, he and his wife transferred the children to a school in Bradford. In order to get to work on time he would have had to wake the children up at 4:50 am and find a daycare that would accept the children before 6:00 am. He and his wife were unable to do so. In addition, they were unable to find a daycare that would keep the children until he got home to pick them up. As a result, they changed their custody arrangements so that Ms. Baddely would have custody from Monday to Thursday and Mr. Baddely would have custody through the weekend. To accommodate this arrangement, they

moved the children to schools in Bradford one week before the school season started. According to the grievor and his wife, this arrangement was not satisfactory for a number of reasons, not the least of which that it seemed that Ms. Baddely had the children only during school and the grievor had them during their time off.

Ms. Baddely testified that this arrangement had negative impact on her oldest child who exhibited anger issues in school. However she acknowledged in cross-examination that those issues arose after the separation and before the change in the grievor's schedule. Both Mr. and Ms. Baddely testified that they made some effort to find alternate day care that would allow Mr. Baddely to have the children during the week. They were unsuccessful. They acknowledged that they did not seek home care for their children. Indeed Mr. Baddely testified that he could not afford a nanny. In addition he was unwilling to seek more expensive living accommodations, closer to his workplace, although the he conceded that he earns over one hundred thousand dollars per year and does not pay spousal support. He stated that in any event he did not want the children to experience the additional disruption of moving out of the matrimonial home and having to commute to school in Bradford from Vaughan.

Kirk Thompson

Kirk Thompson has been employed by the Employer and its predecessor since 1986. He became an apprentice lineman in 1988 and became a journeyman in 2002. Until September, 2008, he had always worked five eight hour shifts. He presently works at the Employer's Markham yard though he lives in Holland Landing.

Mr. Thompson is married and has two boys, ten and eight. At the time the hearing commenced his wife worked at Winners Canada as an assistant to the Vice-President. Her hours were from 9 am until 6 pm. She generally arrived home around 7 pm though she was frequently required to travel outside Ontario. At some point during the hearing I was informed that Ms. Thompson was no longer employed and was now able to assume additional child care responsibilities. Mr. Thompson's sons were aged eight and ten when these hearings began. They attend school in Aurora. The older son attends a private school. The younger son attends a public school. Mr. Thompson testified that when his wife was working he had been the one to pick up the boys from school after work because his wife was not able to get to the school on time at the end of her work day. This was not a problem for Mr. Thompson when he was working eight hour shifts. However it became problematic after the ten hour shift schedule was implemented. Mr. Thompson explained that the day care that looks after his younger son charges fines if the child is not picked up before 6 pm and if not picked up by 6:30 the day care would call Children's Aid. This did not seem to be a problem for the elder son as the private school he attended was also a boarding school and there was always someone there.

In cross examination Mr. Thompson was asked why he could not move the children – or at least his younger son - to a school in Holland Landing, so that he could be bussed home. (The Aurora school would not bus his child home because Holland Landing was out of its district.) Mr. Thompson explained that the child was originally enrolled in Aurora because his elder son went to school there and because the second child had special needs that the Aurora school had been able to accommodate. Indeed, the younger son had been diagnosed with ADHD and the Aurora school had developed an Individual Education Plan (IEP) which was operating

successfully. In cross-examination, it was put to Mr. Thompson that the school in Holland Landing could also administer the same or similar program to accommodate his son. Mr. Thompson did not dispute this. However, he explained that the program in Aurora was working well and his son was settled there and he did not want to disrupt his child by moving him to a new school in Holland Landing.

According to Mr. Thompson the change in his schedule had negatively impacted his family in other ways. Because the children arrive at home later they do their homework and they have less time for personal and extra-curricular activities. Indeed, one of the children had to decline an opportunity to play rep hockey. Mr. Thompson was asked about possibly hiring a nanny to assist. He did not consider this as he would have had to purchase an additional car for the nanny. Again, one would expect that these problems would be alleviated once Ms. Thompson was able to pick the children up at an earlier time.

Bruce Bender

Mr. Bender has been employed by the Employer and a predecessor utility since 1990. He became a journeyman lineman in 1995. He presently works out of the east yard at Highway 7 and Woodbine. He is married and has two sons, aged eight and four at the time the hearings commenced. His wife works as an accounts development specialist for an employer near their home in Pickering. She works long hours and must be available between 7 am and 6 pm to deal with matters in other parts of the country.

In 2005 Mr. Bender had been working ten hour shifts. He found, however, that this did not work well for his family so he was able to work eight hour shifts until September, 2008.

During this period, Ms. Bender took the children to daycare and Mr. Bender picked them up after work. He is unable to pick up the children under the new schedule as he cannot arrive before six and the daycare will not keep them that long. As a result, Ms. Bender must both drop off and pick up the children. According to Mr. Bender, this has limited his wife's opportunity for advancement with her employer. He also stated that his wife was now responsible for cooking dinners on all four weeknights that he worked whereas previously that burden was shared. Mr. Bender stated that the burden of domestic duties now fell unevenly on his wife.

Mr. Bender testified that he and his wife did investigate other child care options and did not find any satisfactory alternatives that would allow his children to be picked up later in the day. However, they did not consider private day care or nanny care.

Glen Apps

Mr. Apps became employed by a predecessor utility of the Employer as an apprentice linesman in 1989. He was certified as a journeyman linesman in 1993 and has been employed by the Employer in that capacity since that time. Except for a brief period of two to three months, Mr. Apps was always employed on a five eight hour shift schedule. He did try working the four shift schedule once before 2008 but found that it conflicted with his family life, particularly with his duties as assistant coach of his son's hockey team. He was allowed therefore to revert to the five shift schedule.

Mr. Apps is divorced from his wife. He has three kids aged thirteen, sixteen and nineteen at the time this hearing commenced. He has custody over the two younger children whereas the elder child lives with his mother. Mr. Apps and the two children live in Barrie.

Mr. Apps stated in his evidence that when he was on eight hour shifts he was able to get home on time to watch his sons participate in their extra-curricular sporting activities. He is unable to get to those activities on time while working his new schedule. He does not have a problem getting his children to and from school as they take the bus.

Mr. Apps also explained that under the old schedule he barely had time for himself and his children as he was responsible for grocery shopping, making dinner and keeping the house clean. Under the new ten hour schedule he has even less time and he stated that by the end of the week he is exhausted. In cross-examination he stated that he could not afford to hire housekeeping help. He did concede that the extra day off on this schedule did allow him time to recuperate from his exhaustion.

SUBMISSIONS OF THE PARTIES

The Union's Submission

It is the Union's position that implementation of the new shift schedule by the Employer violates the grievors' right to equal treatment in employment without discrimination on the basis of family status, as provided for in s. 5(1) of the Ontario *Human Rights Code.* Union counsel advanced this position by asserting a number of principles on which the position is based. The principles themselves are drawn primarily from cases decided in the courts and in various tribunals and, in counsel's submission, logically result in a conclusion in favour of the grievances.

The first principle asserted is that the history of jurisprudence in the area of human rights supports a liberal and generous interpretation to be given to human rights legislation. The second principle, which flows from the first, is that the protection against discrimination based on the enumerated criteria in s. 5(1) may be breached notwithstanding that the impugned action is not intended to discriminate against any group. Rather, the action may be in breach of the protection if the adverse effect of the action is to limit opportunities in employment to members of that group. These two principles may be drawn from the Supreme Court of Canada decision in *O'Malley v. Simpson Sears Ltd.,* [1985] 2 S.C.R. 536. In that case an employer implemented a new shift schedule which employees who were Seventh Day Adventists could not work. This was found to violate s. 5(1) because of the adverse affects of the schedule on those employees.

The third principle asserted is that the family status protection entitles individuals to protection from discrimination which is not only based on the identity of the individual's group, but from discrimination which is based on particular identity of the relationships attached to the individual. Another way of putting this is that individuals are entitled to protection from discrimination which is based on the particular characteristics of the individual's family status. This principle is drawn primarily from the Supreme Court of Canada decision in *A v. B et al,* [2002] 3 S.C.R. 403, affirming the Ontario Court of Appeal decision 50 O.R. (3d) 737. In that case, A, the claimant worked for a firm which was owned by two brothers of his wife. A's daughter accused one of those brothers, B, of sexual assault. Shortly thereafter A refused to let B into his house. On the following Monday, A's employment was terminated by B on the basis of the allegations made by A's daughter. A had worked for the firm for twenty six years.

The Human Rights Commission upheld A's complaint that he was discriminated on the basis of his family status. The Commission found that A had compartmentalized the sexual abuse allegation and could have continued in the performance of his work. Instead, he was terminated solely because he was his daughter's father. The Divisional Court overturned the Commission's ruling but the ruling was restored in the Court of Appeal, whose judgment was upheld by the Supreme Court of Canada. In the Court of Appeal, Abella, J.A. noted that A was terminated because of the employer's animosity which was "based on the identity and conduct of the employee's spouse and daughter. Marital and family status are clearly engaged … in a way that resulted in discrimination to the father." Abella, J. A. also concluded that discrimination based on marital status "may be defined as practices or attitudes which have the effect of limiting the conditions of employment, or the employment opportunities available to, employees on the basis of characteristics relating to their marriage (or non-marriage) or their family" (See reference to quoted portions of Abella, J.A.'s judgment in the Supreme Court of Canada judgment at paragraphs 30-33.)

In the Supreme Court of Canada, the judgment for the majority was delivered by Iacobucci and Bastarache, JJ. In their judgment they accepted and approved of Abella, J.A.'s analysis and concluded that to find discrimination on the basis of family status under s. 5(1) of the Code, "it is sufficient that the individual experience differential treatment on the basis of an irrelevant personal characteristic that is enumerated on the grounds provided for in the Code. It is not necessary to embark on the artificial personal exercise of constructing a disadvantaged sub-group to which the complainant belongs in order to bring one's self within the ambit of marital or family status within the meaning of the Code." (at para. 57.)

The fourth principle asserted by counsel flows from the combined effect of the first three. It may be described as follows: if an action of the employer adversely affects an individual's opportunity to employment because of the identity and characteristics of the individuals family relationship, that action violates the protection afforded in s. 5(1) of the Code, even though the action was not intended to limit the employee's opportunity to employment. This principle is reflected in the decision of the Canada Human Rights Tribunal in *Hoyt v. Canadian National Railway,* 2006 CarswellNat 4258 (C.H.R.T.). In that case the employer was found to be in violation of the *Canada Human Rights Act* when it refused to make modifications to the complainant's job after she became pregnant. As a result the employee was forced to take a leave of absence. The claimant had obtained a child care space in the hope she would be accommodated but later lost the spot when she was held out of work. Later, the employer did attempt to provide the grievor with an opportunity to work, but only for a Tuesday to Saturday schedule and not the Monday to Friday schedule that she had requested. On short notice she was able to obtain child care for all but three Saturdays of her new schedule. The employer allowed her to stay home for those three days but did not pay her for those days. The tribunal made a prima facie finding of discrimination both for the action of not offering the grievor modified work and later, for not paying the grievor for the three days in which she had to stay home to care for her child. At paragraphs 116 and 117 of the decision the Tribunal articulated the relevant principle as follows:

> 116. It is a discriminatory practice under the CHRA to "differentiate adversely in relation to any individual on a prohibited ground of discrimination (section 7(b))." Ms. Hoyt alleges that in addition to

> suffering discrimination on the basis of sex, she suffered discrimination on the basis of family status.
>
> 117. Discrimination on this ground has been judicially defined as "… practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic relating to their … family ." (*A v. B. …)*

Counsel submitted that in order to avoid an adverse discriminatory effect of its actions an employer must accommodate efforts of its employees to balance work with their parental obligations. For this point counsel relied on a number of cases, including *Hoyt v. Canadian National Railway*; *Woiden v. Lynn* (2002), 43 C.H.R.R. D/296 (C.H.R.T.); *OPSEU and Ontario Public Service Staff Union,* June 28, 2005, (unreported) (Shime) and *Johnstone v. Attorney General of Canada,* [2008] CLLC 230-030 (F. C.C.), appeal to F. C.A. dismissed at [2008] CLLC 230-031. In *Woiden v. Lynn* the tribunal determined that the employer was in breach of the family status protection in the *Canada Human Rights Code* by failing to accommodate a single mother whose parental obligations conflicted with her evening and weekend work schedule. In the *OPSEU* case an employee was denied payment of child care expenses incurred when an employee was required to attend work early for a training session. The arbitrator found that the Union in that case had established a prima facie case of discrimination based on family status. In *Johnstone v. Attorney General of Canada,* the claimant was a customs inspector required to work rotating shifts. After returning from a one year long maternity leave, she sought an assignment to a fixed shift schedule to accommodate her parental obligations. The employer responded by placing her on a fixed shift schedule, but with reduced hours. She chose to work even less – three 10 hour shifts per week, as the rest of the available schedule – four

hours – would not have justified the extra child care costs she would have had to expend. She complained that the employer limited her opportunity for employment by reducing her hours. The Human Rights Commission dismissed her complaint, but on review the Federal Court found that the Commission erred in determining that the employer's work schedule did not have discriminatory impact on the grievor and remitted the matter back to the Commission.

The last point made by counsel for the Union is that a review of the efforts of an employee to self accommodate is not necessary to determine whether an employer action is discriminatory. Rather the employee's effort to self accommodate is only relevant after a finding of discrimination to a determination of whether an employer could refuse accommodation because of undue hardship. Because the parties have agreed that accommodation in this case would not result in undue hardship, counsel asserted that it is not necessary to consider the adequacy of the efforts of the grievor's to self accommodate in this case.

In all these circumstances counsel urged me to find that the new shift schedule violated the grievors' entitlement to protection under s. 5(1) of the Code and to order the Employer to reinstate the former shift schedule.

The Employer's Submission

The Employer would not dispute the first two principles drawn from the cases as I have described them above. However, in applying these principles counsel would differ from the

Union in their application in two major ways. First, according to counsel, when an employee balances his/her workplace obligations with parental and familial obligations, efforts by the employee to self accommodate workplace requirements must be considered as part of the "characteristics" that make up family status. That means that an employee's efforts to self accommodate those workplace requirements must be reviewed together with other characteristics of family status in the determination of whether an employer's action is discriminatory. In addition, in considering efforts at self accommodation, counsel asserts that only when an employee is unable to accommodate a workplace obligation can it be said that the adverse affect of the employer's action results in discrimination. It is only when the employee is unable to reconcile the conflict between workplace obligation and familial obligation that it can be said that the employee's opportunity for employment is limited. In the words of counsel, there is a difference between a familial need and a familial choice. S. 5(1) of the Code requires the Employer to accommodate familial needs, but not familial preferences.

In support of these points counsel relied on a number of cases including: *Campbell River & North Island Transition Society v. H.S.A.B.,* [2004] B.C.W.L.D. 715 (B.C. C.A); *Jeffrey v. Dofasco,* [2004] O.H.R.T.D. No. 5; *Canadian National Railway v. United Transportation Union,* 151 L.A.C. (4th) 328 (M. Picher); *Wight v. Ontario,* [1998] O.H.R.B.I.D. No. 13; *Toronto Star,* [1990] O.L.A.A. No. 70 (G. Brent); *Coast Mountain School District No. 82, v. British Columbia Teachers' Federation,* 155 L.A.C. (4th) 411, (D. Munroe); *Evans v. University of British Columbia,* [2007] B.C.H.R.T.D. No. 348; and *Canadian Staff Union v. Canadian Union of Public Employees,* [2006] C.L.A.D. No 452 (I. Christie).

According to counsel these cases fall into two factual categories. One category deals with situation where an employee has a particular family obligation which the employee must attend to which conflicts which a workplace obligation. An example of such a case is found in *Campbell River & North Island Transition Society v. H.S.A.B* (the *Campbell River* case). In that case the claimant was married with four children. The claimant initially worked an 8:00 am to 3:00 pm shift. The employer changed her shift so that it now ended at 6:00 pm. The claimant's third child had severe behavioral problems. Medical evidence was presented to establish that the claimant was required to attend to the child's needs after school. The grievor therefore requested and was denied an accommodation to the new hours so she could attend to her child's needs. The arbitrator initially concluded that the employer had the right to shift the claimant's hours of work and found no discrimination based on family status. That decision was overturned by the B. C. Court of Appeal. At paragraph 39 of its decision, the Court stated that "a prima facie case of discrimination [based on family status] is made out where a change in a term of condition of employment imposed by the employer results in a serious interference with a substantial parental or other family duty or obligation of the employee". In referring to this case, counsel noted that the claimant had no choice in this case but to attend to her familial obligations on her own and that need had to be accommodated.

The second kind of case cited by counsel deals with circumstances in which alternate family care arrangements would be acceptable if available. If they are not available, then there would be a familial need that would have to be accommodated. If such alternate arrangements are available, that the employee cannot claim that his/her opportunity for employment is limited by a workplace rule if the employee refuses to choose the alternate care arrangement.

Counsel referred to the arbitrator Christie's decision in *Canadian Union of Public Employees* as the most persuasive decision in support of the Employer's position in this case. In *Canadian Union of Public Employees,* the grievor applied for a research representative position in the employer's regional office in Halifax. The grievor was initially awarded the position. However, the grievor, who was a single parent living in Newfoundland, sought an accommodation allowing him to work in St. John's. The employer refused and the grievor alleged that he was discriminated against on the ground of family status. In finding that the employer requirement that the job be performed in Halifax was not discriminatory the arbitrator expressed a concern with an overly broad interpretation of the family status protection. At paragraph 132 the arbitrator stated:

> Is every requirement in a job posting or advertisement to be considered prima facie discriminatory because it adversely affects, or negatively disadvantages, in some way an employee because of his or her family situation? Many people, both men and women, have very complex child care and other family commitments, and the opportunities to arrange work in unconventional ways have been vastly increased by electronic and communication and speedy, if not cheap, travel. Are these competing considerations for employers and employees to be litigated at the drop of a complaint? If so, lawyers, arbitrators, human rights commissions and courts will be very busy.

The arbitrator followed the Court decision in the *Campbell River* case and found that the employer requirement was not a change in the term of employment resulting in a serious interference with a familial obligation. Indeed, at paragraph 139, the arbitrator noted that it was not the employer what sought a change in the terms of employment. Rather, "The grievor

sought a change in his employment, as was his right to do, but it was not imposed on him by the Employer".

Counsel for the Employer concluded his argument by demonstrating that each of the grievors is seeking to accommodate choices and not needs. In the case of Mr. Baddely, counsel pointed to four choices that Mr. Baddely made that put his family obligations in conflict with the new schedule. First, he has chosen to live in Holland Landing, which is a significant distance from his workplace. This choice makes it more difficult for Mr. Baddely to accommodate both his workplace and familial obligations. Second, Mr. Baddely refuses to drop his children off with his wife in the morning that he conceded in his evidence that he could do so. Third, Mr. Baddely does not wish to alter his custody arrangement to have his wife have the children on the days he is working, though he has done that out of necessity during the course of this litigation. Finally, Mr. Baddely chooses not to engage private nanny care to assist in carrying out his child care responsibilities so he can work the new schedule. According to counsel by exercising any of these choices Mr. Baddely could accommodate both his familial and workplace obligations and the Employer is not avoid to accommodate Mr. Baddely's choices in this regard.

In the case of Mr. Thompson, counsel submitted that he had chosen to send his son to a school in Aurora which is one of the most expensive private schools in the country. In doing so, he has chosen an arrangement in which neither the schools his children attend, nor his home, is close to his workplace. Furthermore, Mr. Thompson has not hired any additional private child care to assist with these responsibilities. Counsel concludes that the Employer should not be under any obligation to accommodate these choices. In any event, counsel notes that because

Ms. Thompson is no longer working and is now able to assume all the child care responsibilities, there can be no ongoing claim by the Mr. Thompson of discrimination.

With regard to Mr. Bender, counsel submitted that his wife is able to take the children to and from day care as needed. He also submits that if his wife did not wish to carry out this responsibility Mr. Bender could engage private care but chooses not to do so. Again, counsel submitted that the Employer should not be obliged to accommodate this choice.

Finally in the case of Mr. Apps, counsel noted that his children are older and are able to get to and from school on their own. Counsel pointed out that Mr. Apps wants more time to view his children's rugby games and other sporting events. Counsel submitted that this desire does not represent a need that the Employer should be required to accommodate.

Union Reply

The Union made a number of important points in reply. First, counsel submitted that the *Campbell River* decision was rejected in both the *Hoyt* case and by the Federal Court in the *Johnstone* case as placing too restrictive an interpretation on the family status protection. Counsel submitted that in any event, the shift schedule was discrimination even in the test articulated in *Campbell River* as it constituted serious interference the substantial parental obligations of the grievors. Counsel further submitted that the *Canadian Union of Public Employees* case was wrongly decided and does not follow the direction of the prevalent authority in providing a liberal interpretation of the family status protection.

Counsel repeated his submission that the extent of an employee's efforts to self accommodate is irrelevant to whether a claim of discrimination is made out. He strenuously asserted that an employee does not have to exhaust all possible self accommodation options before the Employer is required to accommodate the employee in response to an established claim of discrimination.

DECISION

Section 5 of the HRC provides as follows:

> Every person has a right to equal treatment with respect to employment without discrimination because of … marital status, family status …

Section 10(1) defines family status to mean "the status of being in a parent and child relationship".

The Union asks me to conclude that that an employer violates s. 5 of the HRC when its actions have any adverse effect on an employee because of the peculiar aspects if his/her parent – child relationships. The Union asserts that it is not for the Employer, or me for that matter, to intrude on or to evaluate the various choices made by the employees in creating those characteristics. On this analysis, the new schedule violates s. 5 of the HRC whether it interferes with a parent's need to provide necessary medical attention to a child, or whether it interferes with a parent's desire to spend additional of time with his/her child on a daily basis. If the schedule interferes with any parental obligation, such that the obligation conflicts with the employee's ability to work the schedule, then the schedule violates s. 5, according to counsel.

The Supreme Court of Canada decisions in *O' Malley v. Simpson* and *A v. B* do not by themselves lead to the result advocated by the Union in this case. In *O' Malley v. Simpson* the adverse affect of the employer's action (the requirement to work Saturday's) was felt by an entire protected group – Seventh Day Adventists. That adverse effect was found to be discriminatory. In *A v. B.* the employer's action was discriminatory even though it did not target the employee because of his membership in a protected group, but rather because of the characteristics of his membership in the group. However, it was not the adverse effect of the employer's action that was discriminatory. The employer's action was intended to discriminate against the grievor because of the characteristics of his family relationship. Neither of those cases are cases in which an employer's action had an unintended adverse effect against the individual because of the characteristics of his family relationships.

Subsequent cases, however, including *Campbell River, Hoyt v. Canadian National Railway* and *Johnstone v. Attorney General of Canada,* all support the notion that a finding of discrimination may be made where an action has adverse impact on an employee because of the characteristics of his/her family obligations. That begs the question as to whether there is some threshold of adverse impact that must be met before a finding of discrimination must be made. The B. C. Court of Appeal decision in Campbell River certainly suggests that not all adverse impacts are discriminatory. Indeed, the Court clearly stated that only a change in an employer rule which seriously interferes with a substantial family obligation is discriminatory.

The decisions in *Hoyt v. Canadian National Railway* and *Johnstone v. Attorney General of Canada* do not, on their face, restrict the degree of adverse impact which

may be found to be discriminatory. Indeed, the tribunal in *Hoyt* and the Federal Court, in *Johnstone,* both expressly rejected the restriction espoused in *Campbell River.* At paragraph 120 in *Hoyt,* the tribunal stated:

> 120 With respect, I do not agree with the Court's analysis [in *Campbell River*]. 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

In Johnstone, the Barnes J. quoted this criticism of *Campbell River* at paragraph 29 of his judgment and then stated the following:

> In my view the above concerns are valid. While family status cases can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status: see *ONA v. Orillia Soldiers Memorial Hospital* (1999), 169 D.L.R. (4th) 489 (Ont C. A.) … I would also add that to limit family status protection to situations where the employer had changed a term or condition of employment is unduly restrictive because the operative change typically arises within the family and not in the workplace (eg. the birth of a child, a family illness, etc.). The suggestion in *Campbell River,* above, 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.

In rejecting the test set out in *Campbell River,* neither the *Hoyt* case nor the *Johnstone* decision suggests an alternate test to limit the type of adverse impact on family obligation that would result in a finding of discrimination. In *Hoyt* although the requested accommodation was only for three days, it was clear that no form of self accommodation would have allowed the

Claimant to perform the work. That is not necessarily the case in *Johnstone* where the claimant did not wish to assume additional child care costs which would have allowed her to work additional hours. These cases along with Mr. Shime's decision in *OPSEU* suggest that any employer action which negatively disadvantages an employee because of his/her family obligations is prima facie discriminatory.

In *Canadian Union of Public Employees,* arbitrator Christie expressed the view that the *Hoyt, Johnstone* and *Opseu* decisions go too far. Indeed, at paragraph 121 of his decision he expressly disagreed with the proposition that any employer action that negatively disadvantages an employee because of his or her family situation is prima facie discriminatory. Instead he adopted the approach of the B.C. Court of Appeal as espoused in *Campbell River.* In dismissing the grievor's claim in the case before him, Christie stated the following at paragraph 139:

> The Employer did not change a term or condition of employment. The Grievor sought a change in his employment, as it was his right to do, but it was not imposed on him by the Employer. The interferences that would have resulted in the Grievor's marital and family obligations from a move to Halifax, while difficult for all concerned, were not comparable to the difficulties faced by Ms. Howard in *Campbell River.*

In reviewing these cases I do find it problematic that cases such as *Hoyt, Johnstone and OPSEU* suggest that an employer action which has any negative impact on a family or parental obligation is prima facie discriminatory. It is particularly problematic as these cases do not attempt to define what a parental or family obligation worthy of protection may be. Clearly, a

parent has an obligation to maintain the health, safety and security of his/her children. A parent must ensure that children receive necessary medical attention, that they are safely transported to and from school and/or daycare, that they are provided with food, shelter and clothing. Parents also have an obligation to spend time with their children, to guide them, and to teach them skills. Parents provide for the enhancement of their children's social and moral development and try to ensure that their children have a normal and happy childhood.

But most parents must also work. They work not only to provide for their own financial and emotional well-being, but also to ensure that they have the financial resources to fulfill all of their parental obligations. A parent cannot ensure the ongoing health of a child without having the financial ability to purchase necessary food, shelter and clothing. Opportunities to develop social and athletic skills also require the expenditure of financial resources. It is only natural that these obligations – the obligation to ensure a safe, healthy and happy child and the obligation to work will sometimes be difficult to reconcile. And parents may have to make difficult choices to reconcile their conflicting obligation. Parents may have to pay the cost of child care to care for their children while they are at work. They may have to choose more expensive accommodation to be close to work or they may have to find lesser paying work to accommodate their child care obligations.

In my view the jurisprudence over family status shifts some of the burden to employers to assist parents with some of the more difficult choices they may be required to make. It does so by recognizing that it is often easier for an employer to facilitate a needed accommodation that will allow an employee to continue as a productive employee while at the same time

allowing that employee to fulfill important and valuable parental obligations. But I do not think that every conflict between a work obligation and a parental obligation must be accommodated by the employer. More importantly, I do not think that every such conflict should give rise to a finding of discrimination such that an inquiry should be conducted over whether the employer should accommodate the conflict. As a simple illustration, where a collective agreement provides for mandatory overtime, I would not find an employer to violate s. 5 by requiring an employee to perform such overtime on an evening in which the employee was scheduled to attend some activity with his/her child, although the activity may have been scheduled well in advance. To find discrimination in every such circumstance of adverse effect would freeze the employer's ability to act to meet its economic needs as virtually every action could have some negative effect on the parental duties of one employee or another. On the other hand the requirement to perform such mandatory overtime would clearly have to give way if the employee were required to attend to some medical need of the child's or if the employee's caregiver was unexpectedly unable to attend to the child.

There are many examples of conflict that fall between these extremes. For example, again citing the mandatory overtime scenario, what if such overtime were required on an evening when the parent is scheduled to attend an important event in the child's life such as a graduation, a championship game, or a school play. Should the conflict between such events and work requirements result in a finding of discrimination requiring the employer accommodate them subject to undue hardship.

In considering the facts of this case, the change from an eight hour schedule to a ten hour schedule would clearly have a discriminatory adverse impact if the grievors were thereby prevented from attending to protect the health and safety of their children. In this case, however, the parental conflicts brought forward in the evidence are somewhat diverse. Mr. Baddely is unable to take his children to and from their day care under his new schedule. As a result he has been required to alter his custody arrangement with his wife in a way that he and his wife do not find satisfactory or in their family's best interest, although this course of action was clearly preferable to Mr. Baddely finding private nanny care or in moving to a different location closer to work. He has also transferred his children to a school closer to his wife. Both Mr. Thompson and Mr. Bender also have young children that need to be taken to and picked up from school and/or day care. Both are unable to perform these duties under the new schedule though both have spouses who have been able to perform these duties. They both complain that the new schedule has impeded their desire to attend the extra-curricular activities of their children and that it has further disrupted their daily routine and put more of the parental burden on their spouses. Mr. Apps, who is divorced, does not have an issue over picking his children up from school as they are older. However, he also is unable to attend his children's extra-curricular activities and finds himself more tired at the end of the longer work day after performing domestic and parental duties and exhausted by the end of the week.

In the cases of Messrs. Thompson, Bender and Apps, I would agree that the schedule has not seriously interfered with substantial parental obligations as contemplated by the *Campbell River* case. But, although I have expressed my reservations with the line of cases reflected by *Hoyt* and *Johnstone*, I am not entirely in agreement with the approach taken in

Campbell River either. For instance I agree with the criticism expressed in *Johnstone* regarding the requirement in *Campbell River* that a finding of discrimination can only be found from a change in an employer rule, though I agree that whether the subject of the case concerns a change in an employer rule or an existing rule is a relevant factor to be considered. I am in agreement with the point made in *Johnstone* that it is often a change in the characteristics of family status that will precipitate a conflict between work and parental obligations and an existing rule that does not accommodate such change may be found to be discriminatory. Indeed that is no different than an existing rule that fails to accommodate a newly acquired disability.

I am not however in agreement with the criticism expressed over the restrictive nature of the test set out in *Campbell River.* That criticism essentially holds that the family status protection should not be interpreted in a more restrictive manner than the other protections contained in s. 5. But an employer cannot be expected to establish terms of work that do not create conflict which each and every characteristic of family status. Nor should employees expect their employer to accommodate every such characteristic. Employees can and do make accommodations to meet the needs of their employer so that they can work for themselves and their families. Those accommodations include their choice of accommodation, choice and degree of child care, and choice of what kind of jobs to accept.

Nevertheless, the fact that the conflict arises from a change in the workplace rule is an important factor to consider. That is because employees who do accommodate themselves to existing rules may find it especially difficult to accommodate themselves and their families to

new employer initiatives that impede their ability to fulfill their parental obligations. In that regard Counsel for the Employer, in my view, takes too restrictive an approach in determining whether a change in an Employer rule constitutes a serious interference with a substantial parental duty. He asserts that in answering that question I should consider the employees efforts at self accommodation as part of the characteristics of that employees family status. He then submits that there can be no finding of discrimination unless the employee is unable to perform both the workplace and the parental duty. I accept his point that an employee's effort at self accommodation should be taken into account in determining whether a finding of discrimination may be made. Indeed, such efforts appear to have been taken into account in *Hoyt.* At paragraph 129 of that decision the tribunal noted that the claimant, upon learning that the employer was finally willing to attempt to accommodate her, made efforts on short notice to obtain child care and was able to find child care for all but three days.

I accept that it is appropriate for employees to make some efforts at self accommodation before making a claim of discrimination. But employees should not be asked to make choices which are unreasonable in all the circumstances before a finding of discrimination can be made. As an example, counsel suggested that the some of the grievors could have sold their homes and moved closer to the workplace so that they could then find the time to fulfill their obligations. The problem with that is that under the prior schedule there was no problem with where any of the grievors lived. They adjusted themselves to the prior schedule by finding affordable homes close enough to the workplace to allow them to fulfill both their work and parental obligations. It is in, in my view, unreasonable to expect that they should relocate at considerable expense and disruption to their families *before* the presence of discrimination can

even be considered. On the other hand, it would indeed be reasonable to expect an employee faced with the grievors' new schedule to at least consider and investigate alternate day care options if existing day care will not accommodate the grievors' schedule.

Having regard to the above, in determining whether the new schedule has interfered with the grievors' parental duties and therefore, violated the grievors protection set out in s. 5, I have considered the following questions.

1. What are the relevant characteristics establishing the grievors' family status?

2. What are the adverse effects complained of and is it reasonable to expect that the Code offers protection against the particular adverse effect of the Employer's action on each grievor?

3. What prompted the adverse effect on the grievor – a change in the Employer's rule or a change in the characteristics of the grievors' family status?

4. What efforts have the grievors made to self accommodate their conflict. Have they rejected options at self-accommodation that they should reasonably be expected to have made?

5. In light of the answers to all these questions taken together, is it reasonable to make finding of discrimination necessitating an inquiry into whether the Employer is able to accommodate the adverse effects of the discrimination.

In considering these questions I have determined that a finding of discrimination cannot reasonably be made for the benefit of Messrs. Bender and Apps. Mr. Bender, as previously indicated, has been able to fulfill their parental obligations by rearranging duties with their spouses. That is what families do every day. I do not think it is reasonable to expect that workplace obligations would not require one spouse to work together with the other to split their parental duties so as to be able to accommodate their workplace duties.

Furthermore, I do not think it is reasonable to make a finding of discrimination because Mr. Apps is unable to attend all his children's extra-curricular activities. That is not to say that an employer would not be required to accommodate a parent's need to attend a child's major event. But it is a fact of life that parents work schedules may conflict with their ability to view or attend some extra-curricular activities. Finally, the fact that the new schedule is more tiring from Monday to Thursday is not, in my view, a reasonable basis for a finding that the schedule violates s. 5.

I am also not prepared to make a finding of discrimination in favour of Mr. Thompson. It is not clear how Mr. Thompson was able to accommodate his child care responsibilities with his wife's work, but in any event, she is no longer working and is able to take the children to and from daycare. I also do not accept that the inability of Mr. Thompson to attend some of his children's sporting activities should give rise to a finding of discrimination.

The case of Mr. Baddely is more complex. Mr. Baddely's children are still relatively young and are unable to get to and from school on their own. Mr. Baddely is separated from his wife and shares custody with her. This places particular difficulty and pressure on Mr. Baddely's

family. Despite these pressures, Mr. and Mrs. Baddely were able to reach an amicable custody sharing agreement that was negotiated within the constraints of the five eight hour shift schedule. This agreement was in the best interest of not only Mr. and Mrs. Baddely, but their children as well. Mr. and Mrs. Baddely had agreed first that Mr. Baddely would keep the matrimonial home. They had also agreed that they would alternate custody each week. In that way, the children would be able to spend half their time in the matrimonial home and would be able to attend their regular school.

The new schedule materially disrupted this carefully crafted arrangement. First, the children were moved to a school in Bradford, closer to Mrs. Baddely's residence as she was the one that would now have to take the children to and from school. In addition, a material change had to be made to the carefully constructed custody arrangement in that now the children were with their mother for four school days and with their father for the extended weekend.

The crafting of a custody sharing agreement is a delicate matter which is to be encouraged. Such agreements are reached in circumstances in which children are subject to extra sensitivity and vulnerability. It is reasonable to conclude that a change in a workplace rule which forces parents to alter a carefully constructed custody agreement to their detriment in order to accommodate that workplace rule may be found to be discriminatory under s. 5. I do not think it is an answer to the allegation of discrimination in these circumstances to suggest that the grievor should have moved to Vaughan or hired private nanny care. He arranged his life to accommodate the previous schedule and he should not have been required to

accommodate the new schedule in the manner suggested to deal with his substantial parental obligations without an inquiry as to whether the Employer could accommodate him. I therefore find and declare that by imposing the new four shift schedule on Mr. Baddley, the Employer violated s. 5 of the HRC. I would note that the Employer is still protected from such a finding as it is not required to accommodate the grievor if that accommodation would result in undue hardship to the Employer. In this case undue hardship is not being claimed.

On the question of remedy, I would note that Mr. Baddely's children are now attending school in Bradford, close to their mother's home. Mrs. Baddely candidly stated in her evidence that if Mr. Baddely was successful in this grievance, the children would remain in school in Bradford and would not go back to their previous school in Holland Landing. In light of that evidence, it is not clear to me whether a reversion to the eight hour schedule is still necessary for Mr. Baddely, though I am not discounting that it may be. I am therefore remitting this matter back to the parties for discussion as to what accommodation is now necessary. I remain seized on the question of remedy if the parties are not able to reach agreement.

DATED in Toronto, Ontario on this 11th day of June, 2009.

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Norm Jesin