In the matter involving a complaint brought by Julie Coleman against her former employer Manto Holdings Ltd.

This matter involves a complaint brought by Julie Coleman against her former employer Manto Holdings Ltd. (Pizza Delight), represented at this hearing by its owner and operator Barrie Salter. I was appointed as a Board of Inquiry to hear the complaint by letter dated October 5, 1998. The hearing was held in Greenwich, Kings County on March 8, 9, and 10, 1999. Witnesses for the Commission were Julie Coleman, Susan Cowie, Dianne Banks, and Richard Schofield. Witnesses for the Respondent were Barrie Salter, Terry Martin, and Irene Stevens. The complainant called no witnesses. There were no preliminary objections or concerns about my jurisdiction to hear the complaint.

The complaint alleges discrimination based on physical disability, contrary to section 5(1)(d) of the Nova Scotia **Human Rights Act**. The written complaint, dated June 29, 1996 states as follows:

"I was employed as a waitress at Pizza Delight (Manto Holdings Ltd.) from August 1990 to October 1995. My employers were Barrie and Sharon Salter.

In June 1994 I injured my leg at work by pulling out a heavy steel-based table. My leg bothered me but I did not take time off until almost a year later when it worsened and I had to see my doctor who put me off work from July 16, 1995 indefinitely.

During this time, I received treatment and kept in contact with my employers to ensure that my job was safe.

On October 1, 1995 I informed them that I was ready to return to work at which time they informed me that they did not want me back to work with an injury. They gave me no notice and laid me off.

The last day worked noted on my Record of Employment is June 11, 1995. I had to file for my severance pay with the Department of Labour. I continued to seek work and found employment with Lai-Ching Restaurant; however, the very night I was scheduled to begin work, the owner of Lai-Ching Restaurant informed me that Barrie Salter said that I was late all the time, was not a good waitress, told them about my injury and told them that he would not recommend me to anyone in the restaurant business; however, through my father's intervention with the owner of the Lai-Ching Restaurant, I succeeded in getting the job. I allege that I have been discriminated against because of an injury that occurred in the workplace which required medical attention, and that this is in violation of Section 5(1)(d)(o) of the Nova Scotia Human Rights Act."

Mr. Salter's position is that he did not discriminate against Ms. Coleman, and laid her off because of a downturn in the business in the fall of 1995, which resulted in having no place for her when she wished to return from sick leave. He did not dispute that her medical condition constituted a "physical disability" for the purposes of Section 5(1)(d)(o) of the **Human Rights Act**.

Ms. Coleman testified that she commenced work at Pizza Delight in New Minas in August 1990, although this date is disputed by the employer. It was her first job other than baby-sitting since she left school. Her work involved normal waitressing duties, and associated cleaning. She testified that when the waitresses were scheduled for the opening shift, they were required to perform a number of cleaning duties prior to the shift, and it was her practice to come at least an hour early to do these duties, for which time she was not paid. On June 12, 1994 she injured herself at work. She was required to vacuum under the tables, which required moving the tables.

In pushing a table back with her foot, she felt a lump emerge in her groin. Following her shift, she went to the outpatients department at the local hospital. She saw her family doctor, Dr. Verryn-Stuart the next day. She took no time off following this injury. While she saw her doctor throughout the next year, there is no evidence that there were any problems at work with her knee or leg until June 1995.

The staff at Pizza Delight had daily, weekly and monthly cleaning lists, which duties were to be completed when they were not busy. Ms. Coleman testified that she found the vacuum they had to use very heavy and large, and using it aggravated her pain. This vacuum was used prior to and after the business moved to the new location a short distance away. While vacuuming was usually done prior to the morning shift at both the old and the new locations, it was moved to the closing shift. She was asked to do the closing shift, with the cleaning duties, on June 10, 1995. She testified that she asked Mrs. Salter to excuse her from that shift because she felt she couldn't do the cleaning, but this request was denied. She testified that she asked Mr. Salter if she could bring in her own vacuum, and this request was also denied. She testified that she only worked a couple of night shifts, but her leg pain was so bad, she couldn't continue. She worked her last shift on June 11, 1995 and saw her doctor on June 12. Dr. Verryn-Stuart put her off work for two weeks (Exhibit 1-8). It should be noted that no medical witnesses were called at the hearing, and the medical reports and notes were entered as exhibits by consent.

Dr. Verryn-Stuart referred her to physiotherapy, and she saw a therapist on June 21, 1995. She received another note from Dr. Worthylake on June 26 (Exhibit 1-12), saying that she should remain off until July 17. She gave the note to Mr. Salter, who told her not to worry about her job. She testified that when she brought in the note, Mrs. Salter said that she hadn't injured herself on the job. A further note dated July 17, 1995 (Exhibit 1-13) from Dr. Verryn-Stuart stated that she "cannot return to work due to injury for which she is being treated. She is seeing me for treatment regularly." These are the only doctors' notes that were given to the employer. She had no other contact with Mr. Salter between June and late September 1995, although she was occasionally in the restaurant for lunch.

Ms. Coleman experienced pain in her knees, legs and hips, which was eventually diagnosed as patellofemural syndrome, with ilio-tibial band syndrome. She saw an orthopaedic specialist, Dr. A.B.T. Connolly on September 26, 1995. Dr. Connolly indicated in a letter to Ms. Coleman's lawyer dated September 29, 1995 (Exhibit 1-14) that

"1. Mrs. Coleman 'has' a strain of her right adductor muscles and also has bilateral patellofemoral syndrome and chronic back strain, which may be postural.

2. Mrs. Coleman has been temporarily, totally disabled since June 12th, 1995. She was put off work by her physician who apparently told her that once she had a course of physiotherapy it was likely she could return. This appears to be Mrs. Skaling's sentiment as well. Unfortunately she was unable to obtain therapy and was not referred to the hospital for treatment. After discussion of the situation with Mrs. Coleman today she is going to attempt to return to her former employment as a waitress as soon as she can make arrangements.

3. Her present hip and knee conditions arose in the course of her employment but I can find no direct relationship between her employment and this present pain, except for the fact that she was on her feet for many hours each day. I do not think there is any relationship between her present hip and knee condition and the specific incident which occurred at work on June 12th, 1994.

4. I recommend that she obtain orthotics to correct the pronation of her feet and possibly improve her patellofemoral syndrome. She needs a course of rehabilitation for her back and hips

and her knees at physiotherapy and I also recommend an arthritis work-up. I have ordered an arthritis screen of blood work today.

5. With the nature and extent of her symptoms and findings Vocational Rehabilitation and retraining would be appropriate to a job that was not so demanding in the physical sense. She reports that on some of her twelve-hour shifts, although they are supposed to get one twenty minute break, she has gone without any break at all and this sounds a little excessive.

6. Mrs. Coleman is very unlikely to suffer from a permanent, partial disability as a result of her specific injury of 12 June 1994. She is certainly going to require further treatment as far as her knees and hips are concerned. This is outlined above in #4."

(The reference by Dr. Connolly to physiotherapy refers to Ms. Coleman's appointment with Ms. Skaling, the physiotherapist, on June 21. She attended at three sessions, but discontinued in July because her Workers' Compensation claim had not been approved, which would have paid for the physiotherapy sessions.)

The Complainant's pain worsens when she is on her feet for long periods, and various doctors and therapists have noted that her condition is aggravated by having to work long hours on her feet. She felt that the pain was particularly aggravated by the cleaning duties, including vacuuming, and she testified that she was in constant pain, and that others in the workplace were aware of this. She categorized her pain in November 1998 as "ten out of ten" (Exhibit 1-21), despite the fact that she had surgery in October 1997.

She received sickness benefits during her absence from work and took the full fifteen weeks of claim from June until September 1995. Following her visit with Dr. Connolly on September 26, she decided to return to work, although she was still having pain. She contacted Mr. Salter in late September, telling him that she was ready to return to work. She testified that he told her "it wouldn't be fair to the other girls to have to share their hours with someone who was off on an injury". She testified that she was shocked and angry, and hung up, believing that she was laid off or fired. She took her uniforms and other things back to the restaurant, including Christmas presents she had received from the restaurant, because she was angry. She was told that Mr. Salter was not there, although she believed that he was and that he was avoiding her. She was given her Record of Employment (Exhibit 1-3), which indicated that she was laid off, with the expected date of return marked "unknown". After leaving her things at the restaurant, she never returned there. Shortly after, she complained to the Department of Labour regarding pay in lieu of notice, and they held that no money was owing.

She testified that after she had applied for a job at Lai-Ching restaurant, she understood that Mr. Salter had given her a bad reference, to her prospective employer, Ms. Banks. Ms. Banks told her that she would not get the job because of that. After Ms. Coleman's father intervened, Ms. Banks relented, and hired Ms. Coleman. Ms. Coleman also believed that Mr. Salter had given her a negative reference for a job at Cornwallis Veterinarians in 1997, and that was the reason she did not get that job.

She testified that, during the June 1994 - June 1995 period, she did not try to hide from her co-workers the fact that her work aggravated her pain, and felt that everyone knew about it. She could recall no specific conversations where she told anyone, including her supervisor Ms. Stevens, that there were things she couldn't or shouldn't do because they caused her pain. Her only specific recollection of telling Mrs. Salter (now deceased) was in June 1995 when she was asked to do the night shift with the associated cleaning duties, where she indicated to her that she did not want to do that shift. However, Ms. Coleman admitted that she did not mention to Mrs. Salter that the reason she did not want to do the night shift was because the cleaning caused her pain. She testified that she felt Mr. Salter knew that the cleaning duties aggravated

her knee pain. She never asked to be relieved from any of her duties, other than her alleged request of Mr. Salter to use her own vacuum rather than the "industrial" vacuum, in June 1995, just prior to going on sick leave.

Ms. Coleman testified that she and the other staff were evaluated every few months, and her evaluations were positive. There was only one negative comment, and that concerned the way her uniform was ironed on one occasion.

Susan Cowie testified in support of Ms. Coleman's complaint. She worked at Pizza Delight as a waitress from 1991 until May 1995. Toward the end of her employment she also had some supervisory duties, and was present during Ms. Coleman's evaluations. She confirmed that they were generally positive, and that Ms. Coleman was well liked in the restaurant. She was aware that Ms. Coleman had injured her leg and that she had pain, but Ms. Cowie said it didn't affect her performance. She testified that she recalled Ms. Coleman and Mr. Salter discussing the workers' compensation claim immediately following the June 1994 injury. It was her sense that Mr. Salter felt that Ms. Coleman was embellishing the complaint, although she could not be specific. Ms. Cowie felt badly treated at Pizza Delight during her pregnancy, and felt it was the employer's practice to treat people badly to try to force them to quit.

Terry Martin was employed as a supervisor at Pizza Delight in New Minas from September 1994 until March 1997. In testifying for the Respondent he denied that Ms. Coleman ever complained of pain during this time, or that he was ever aware that she asked for light duties because of it. He was not aware that she ever complained about using the 'heavy' vacuum, or that she asked to bring in her own vacuum to use. Irene Stevens, also a supervisor, testified for the Respondent. She worked at Pizza Delight from 1987 until the present. She supervised Ms. Coleman on many occasions. She supported Mr. Martin's evidence that Ms. Coleman never complained to her about pain at work, or asked for light duties as a result. She was never aware that Ms. Coleman had indicated a problem with the vacuum or cleaning duties, and had asked to bring in her own vacuum. In relation to her own knowledge of Ms. Coleman's knee problem, Ms. Stevens testified that Ms. Coleman told her, shortly before she went off work, that one hip was higher than the other.

Dianne Banks is co-owner and operator of the Lai-Ching restaurant in New Minas. Ms. Coleman applied for a position as a waitress in March 1996. It is Ms. Banks' practice to bring in potential servers for a try-out shift before hiring them. Prior to Ms. Coleman's try-out shift, Ms. Banks went to Pizza Delight for a meal with her family, not to check on Ms. Coleman. She recalled talking to three people — Mr. Salter, Sheila Parker, and another waitress whose name she did not recall. She did not recall the specifics of the conversation with Mr. Salter, but only that he told her that Ms. Coleman required a lot of time off. Her impression from talking informally to these three people was that she should not hire Ms. Coleman. She then advised Ms. Coleman that she would not be hiring her. After Ms. Coleman's father intervened, Ms. Banks reconsidered, and hired Ms. Coleman on a trial basis. She has been working there ever since. Ms. Banks was aware of Ms. Coleman's knee and leg problem when she hired her, and confirmed that Ms. Coleman is expected to do the same cleaning duties as the other staff, which include vacuuming. Ms. Coleman has not requested or received accommodation.

Barrie Salter testified on his own behalf. He denied ever being in contact with Cornwallis Veterinarians to give a reference or speak about Ms. Coleman. He did not specifically recall the June 1994 injury she suffered. Ms. Coleman did not request time off or other accommodation in relation to her knees, legs, or pulled muscles between June 1994 and June 1995. He denied that Ms. Coleman told him that she did not want to be scheduled for the close shift as she didn't want to have to do the cleaning, or any knowledge that she may have told this to his wife. He also denied that she ever asked to be permitted to bring in her own vacuum to use, instead of the one in the restaurant. He testified that the fact that the cleaning duties were moved to the close shift at the same time that Ms. Coleman was asked to do the close shift was coincidental. He felt

that, with the new drive-through operation which stayed open late, there would be more time on that shift to do the cleaning.

In relation to the termination of Ms. Coleman's employment, he testified that she called in late September indicating that she was ready to return to work. He indicated that he didn't have a position for her at that time. He suggested that she stay on benefits for a while, and he would contact her if and when a position because available. She had indicated that her sick leave ran out the next week. He indicated that he would call the Employment Insurance office to confirm her eligibility for benefits, and did so on her behalf. On the basis of what he was told by the Employment Insurance office, he told her that she could pick up her Record of Employment which would indicate she was being laid off due to shortage of work, in hopes that she could keep her EI claim open until he could hire her back. He testified that there was no mention of her injury in the conversation. Shortly thereafter Mr. Salter received a phone call from Ms. Coleman's husband, who told him Ms. Coleman was owed a week's pay. Mr. Salter explained what he had been told by the Employment Insurance office. Mr. Salter then received a letter from the Department of Labour in relation to Ms. Coleman's claim for pay in lieu of notice. After investigation, the claim was dismissed.

He confirmed that he had a conversation with Ms. Banks in the restaurant, when Ms. Banks was there with her family. He understood that Ms. Coleman had a job at Lai-Ching at the time, and indicated that to Ms. Banks. Ms. Banks asked him what Ms. Coleman was like. He recalled saying that they got along fine, but that she could be a bit "troublesome" but that he learned to live with it. He did not know that Ms. Banks had spoken to two others at Pizza Delight, or what they said. It was the Respondent's position that at the time Ms. Coleman asked to come back to work in late September, the business could not justify another employee. He produced financial statements for the years ending July 1994 and 1995 (Exhibit 4), which showed that the amount spent on wages had increased significantly between 1994 and 1995, and that the deficit had likewise increased. After he received the year end statements for 1995 in September, he knew he would have to cut staff so that the business could survive. The financial statements for the year ending July 1995 showed that staff was the largest expenditure; cutting staff was the only real way to reduce costs. Mr. Salter testified that the reduction in staff was done by attrition, and no one was fired or laid off. When Ms. Coleman left on June 11, 1995 there were eight staff, including her. On July 1, one staff left, and someone was hired to replace her on August 3. Two staff quit in August 1995, and one replacement was hired on September 26. As of that date there were six staff. That number was maintained until December 31, 1995, when another two staff left. In early January 1996, one of the staff who had left in August asked to return. Mr. Salter took her back. He did not contact Ms. Coleman at that time to ask if she wanted to fill that vacancy. He felt that her actions in September/October of returning her uniforms and leaving her Christmas presents and keys, as well as the fact that she had complained to the Department of Labour about her pay in lieu of notice, indicated that she was severing her relationship with Pizza Delight and did not want to return. He made no inquiries of the state of her injury or recovery during the time she was off work, or after their conversation in September.

The year end statements filed in July 1996 reflect a significant reduction in staff, and a small profit. The year end statement filed in July 1997 shows staff wages down even further. These statements indicate that the Respondent's worst financial year was 1995.

Argument

Counsel for the Human Rights Commission argued that the Complainant was discriminated against on the basis of her physical disability by the employer in relation to her requests not to work the closing shifts because of the cleaning duties, to bring in her own vacuum to use, and to return from sick leave. She argued that this constituted adverse effect discrimination (in relation to the night shift and vacuum) and direct discrimination in relation to the termination of

employment. The decision to lay off Ms. Coleman — a relatively senior employee — in the fall of 1995, rather than someone more junior, was based in part on her disability. She referred to **Morrison** v. **O'Leary Associates** (1990) 15 C.H.H.R. D/237 (N.S. Board of Inquiry), where the Board noted that "unintentional" discrimination may also constitute adverse impact discrimination. While Mr. Salter may not have had the intention to terminate Ms. Coleman's employment because of her disability, one should infer that that was a factor in the decision to lay off.

She referred also to a recent arbitration decision dealing with accommodation due to a physically disabled employee (**Re Newell and Department of Human Resources (Nova Scotia**) (Ashley, March 1998), wherein it was noted that while finding an appropriate accommodation for a disabled person is a multi-party inquiry involving the employer, employee and the Union, the employer must take the lead, in that it is the employer who would be most aware of the employment options available within the business. Mr. Salter was in a position to know what his staffing needs were throughout Ms. Coleman's sick leave. If he realized in September or October that his staffing needs had diminished, he had a responsibility to ensure that Ms. Coleman's position was taken into account. She argued that the Respondent had not met the "undue hardship" test. While the employer's position was that he could not afford another employee in the fall of 1995, he agreed that the schedule varied from week to week, that there was no financial cost to lay off, and that he would have avoided training costs by bringing back an experienced employee such as Ms. Coleman rather than hiring a new one. He could have brought her back in September, and laid off a more junior employee in her place. There is no evidence that the other staff were aware of the reason for Ms. Coleman's absence, or that she had to be accommodated.

She argued that the duty to accommodate an employee on sick leave includes an obligation to bring them back when they are ready to return to work, referring to **Chamberlin** v. **599273 Ontario Ltd**. (1990) 11 C.H.R.R. D/110 (Ontario Board of Inquiry). The Board in that case found that so long as the disabled employee is able to perform the essential duties of the position, the employer was obliged to let him return to his regular duties at the end of the sick leave, and their refusal to do so constituted discrimination on the basis of handicap. The Board also noted that it was not relevant that at the time the decisions were made the employer was not aware of the details of the medical condition or the fact that it met the definition of 'handicap' under human rights legislation.

She referred also to **Clarke** v. **Lou's Rent-All Service Ltd**. (1994) 26 C.H.R.R. D/343 (British Columbia Council of Human Rights) where the Council dismissed a complaint by an employee who claimed he was terminated because of a leg injury, holding that the reason for the dismissal was that the business was in a period of decline, and was to be sold imminently. In the employee's absence, the employer found that he could do without the employee's services, and the employee was not replaced. She argued that this case could be distinguished here, where it was a high turnover industry, hiring was going on, and where the employer would have incurred additional training costs by hiring an inexperienced employee over the Complainant. Further, there was no discussion in **Clarke** of the duty to accommodate.

She argued that the status of an employee on sick leave must be considered in staffing decisions, and decisions that will jeopardize that disabled employee's position shouldn't be made without considering her position. If sick leave can be considered, of itself, an accommodation, it must include the return to work. Despite any economic difficulties that the employer may be suffering, he discriminated against her in that he decided to lay her off rather than a more junior employee. She argued that the Complainant was entitled to lost wages from October 1, 1995 to March 4, 1996 less money earned in mitigation of damages, an amount which counsel for the Commission calculated at $2809.00, plus tips; general damages to take into account the harmful effects of the discriminatory action against her and to ensure that the objectives of the **Human Rights Act** are met; and exemplary damages, which she felt were appropriate here, in that the

statements which Mr. Salter admitted making to Ms. Banks were contrary to those which he initially gave in his reply to the complaint, and could have cost Ms. Coleman her job at Lai-Ching. She also sought pre- and post-judgement interest, a reference letter, and that Mr. Salter be required to take anti-discrimination training, at his own expense. Counsel for the Respondent argued that the evidence has not established that the Complainant ever asked Mr. Salter for any of the accommodation that she claims, in relation to the night shift or the vacuum. Nor did the Commission's evidence support the allegation that Mr. Salter terminated her employment.

He argued that the Complainant's credibility and judgement has been put into question in her evidence. While she testified that she told everyone that she was in pain, the only supporting evidence was that of Ms. Cowie, whose demeanor and responses left a negative impression. There is no evidence to support the allegations by the Complainant that Mrs. Salter denigrated her by saying that she didn't injure herself on the job, that Mr. Salter failed to give her severance pay, that he gave her a bad reference to Cornwallis Veterinarians, that he was "hiding" when she returned to the workplace to leave her things, or that he moved the cleaning to the night shift in an attempt to treat her badly. She exaggerated her hours of work to her doctors and therapists, and told them she didn't have breaks, attempting to leave a negative impression of the employer with them and with the Board of Inquiry.

Nor does the evidence corroborate her allegations that she asked not to be put on night shift and was refused, that she asked to bring in her own vacuum and was refused, or that Mr. Salter terminated her when she asked to return to work. Regarding the termination, her evidence that Mr. Salter said he "did not want her back with an injury" is not corroborated by any other evidence. After that telephone call between Mr. Salter and Ms. Coleman, she angrily brought back her things, and went out seeking other employment.

He argued further that the Respondent's financial position created an "undue hardship" that would alleviate any obligation of reasonable accommodation. The business's financial position deteriorated significantly from 1994 to 1995, and Mr. Salter had just received the 1995 statements while Ms. Coleman was off on sick leave. As a result of the worsening financial situation and encouraged by his accountant and others, he decreased staff by attrition. He did not replace staff who left, except to replace one where two left at once. He had no prior notice that Ms. Coleman would call him on September 30, and when she did, he declined to take her back, encouraged her to wait it out on EI until a job opened up. She did not do so, and indicated by her actions that she quit. He argued that she was not treated differently from any other employee would have been, who was off work for another reason. There was no reason for Mr. Salter not to take Ms. Coleman back after her sick leave except the financial reason. Their relationship did not deteriorate until after the employment relationship ended.

Decision

This complaint alleges that the employer Manto Holdings Ltd. operating as Pizza Delight in New Minas, Nova Scotia, discriminated against Julie Coleman in relation to her physical disability contrary to Section 5(1)(d) of the Nova Scotia **Human Rights Act**. The parties have agreed that Ms. Coleman's knee and leg condition constituted a physical disability for the purposes of the **Act**.

The complaint has three parts. Ms. Coleman alleges that some time in early June 1995, just prior to going off work on sick leave, she asked her employer Mr. or Mrs. Salter to be relieved of the night closing shift, because that shift required cleaning duties. She claims the request was refused. She further alleges that she asked Mr. Salter to be permitted to bring in her own vacuum to use for cleaning, because she found the business's vacuum to be heavy and awkward in light of her leg problems. Once again she says that Mr. Salter refused. Finally, she claims that when she indicated to him her availability to return to work in late September 1995, he refused,

and terminated her employment. She asserts that all of these incidents violate Section 5(1)(d) of the **Act**, the first two as adverse effect discrimination, and the third as direct discrimination.

Mr. Salter denies having been asked by Ms. Coleman in June 1995 to be relieved of the closing shift or having any knowledge that she may have asked that of his wife; and he denies that she asked him to bring in and use her own vacuum. Further, while he does not deny that he told her he could not take her back in September 1995, the context he described put quite a different "spin" on events than that presented by Ms. Coleman. He asserts further, that even if I were to find that the manner of the termination of her employment constituted discrimination, he was relieved from the duty to accommodate because to do so would have amounted to "undue hardship" to his business.

Ms. Coleman was firm in her evidence that her condition and the pain that it caused were well known in the workplace. She testified that everyone at work knew of it, although she could not recall ever telling Mr. Salter or his wife directly about it, or raising it at all with them, prior to June 1995 at the very least. Mr. Salter denies any knowledge of it. The Complainant's witness Ms. Cowie confirmed that she was aware that Ms. Coleman suffered pain while at work. However, two witnesses called by the Respondent, Mr. Martin and Ms. Stevens, testified that they were not aware that she suffered pain; nor were they aware that she had ever sought accommodation for her disability. Both Mr. Martin and Ms. Stevens were supervisors, and were employed there in the relevant time period. Ms. Cowie had ceased working at Pizza Delight in May 1995. It should be noted however, that the Complainant's claim that she suffered from pain at work, and that her pain was aggravated by having to perform cleaning duties is not in dispute.

The **Chamberlin** case (*supra*) considered the level of knowledge of the handicap required by the employer to support a finding of discrimination, as well as the disabled employee's right to return to work from sick leave, if they can fulfil the requirements of the job. While the case held that the employer does not need to know the full extent of the disability or the accurate medical diagnosis, they must have sufficient information to know that the employee had a medical problem. The evidence does not support such a finding in the case before me. The Complainant did suffer an injury in June 1994 when moving a table while vacuuming, but she took no time off at the time, and neither requested nor received time off in relation to that injury or her condition between June 1994 and June 1995. The employer was not told that she still suffered pain or any ongoing effects from the 1994 injury. On balance, I find that while Mr. Salter must have known of the injury in June 1994, he did not know prior to the Complainant going off work in June 1995 that she had a physical disability or that she suffered pain at work because of it.

The closing shift and vacuum incidents are related, and I will consider them together. At some point, the cleaning duties that were previously done prior to the store opening in the morning were changed to the close shift. These duties included vacuuming. Ms. Coleman did the close shift on June 10. She did not dispute that the only other close shift she worked was on January 8. The same vacuum was in use at all times in the relevant period. Mr. Salter testified that he felt that it made more sense to move the cleaning duties to the night shift because the new location had a drive-through service which stayed open later, and the cleaning could be done during the slow time.

Mr. Salter denies that Ms. Coleman ever asked to bring in and use her own vacuum to do the cleaning duties. She did these duties while they were done on the opening shift with the vacuum that was in the restaurant, and no request was made concerning the vacuum until June 1995. The vacuum in question was brought to the hearing, and it was observed to be moveable, and of fairly normal size. There are no witnesses to confirm either the evidence of Ms. Coleman or Mr. Salter in relation to the vacuum request, other than Mr. Martin and Ms. Stevens testifying to being unaware that any request was ever made.

Ms. Coleman suggests that Mr. Salter knew of her condition, knew that vacuuming and cleaning aggravated that condition, and that he moved the cleaning duties to the night shift and then assigned her to the night shift. He then denied her request that she be relieved from that shift, and that she use her own vacuum. I cannot find this to be so. Ms. Coleman described the relationship between herself and Mr. Salter in good terms, indicating that Mr. Salter was seen by the staff as "one of the girls". He thought she was a good employee. It appears that they both liked each other, until their relationship deteriorated in late September. Mr. Salter was not even aware of her condition in early June 1995. He did not receive the first doctor's note until June 12. The evidence, in my view, does not support the version of events put forward by the Complainant. Ms. Coleman testified that the request not to do the cleaning in the close shift was made to Mrs. Salter, who has since died. Mr. Salter denied any knowledge that such a request was made. Even if it was, Ms. Coleman testified that she did not tell Mrs. Salter at the time that the reason she was requesting the change was because of the pain caused by doing the cleaning. There was no evidence that Mrs. Salter was aware that Ms. Coleman had any kind of a medical problem which would require accommodation.

I cannot conclude either that Ms. Coleman asked to be relieved of the close shift, or that she be permitted to bring in her own vacuum. These allegations are specifically denied by the Respondent. There is no supporting evidence. I find that there was no discrimination, either direct or adverse effect, in relation to these two incidents, and no failure to accommodate.

The events of late September 1995 are also in dispute. The Complainant's evidence is that at that time she called Mr. Salter indicating that she was ready to return to work, and that he refused to take her back, indicating that it would be unfair to the other employees to have to share their hours with someone who was returning from sick leave.

At the time she called Mr. Salter, the employer had received three doctors' notes, one from Dr. Verryn-Stuart dated June 12, 1995 (Exhibit 1-8) indicating that Ms. Coleman would be off work for two weeks; one from Dr. Worthylake on June 26 (Exhibit 1-12) saying that she would be off until July 17; and another from Dr. Verryn-Stuart dated July 17 (Exhibit 1-13) stating that she "cannot return to work due to injury for which she is being treated. She is seeing me for treatment regularly." It did not indicate a return date. Ms. Coleman would be off indefinitely. None of the doctors' notes gave any detail of the condition being treated. Although her complaint form indicated that she kept in contact with her employer during her sick leave, Ms. Coleman's evidence confirmed that she had no contact with Mr. Salter from the time she went off work on June 12 until her phone call to him in late September, other than to bring in the doctors notes, although she was in the restaurant a few times. There is no evidence that when Mr. Salter hired the replacement on September 26 for the employee who had left, he had any knowledge that Ms. Coleman would soon want to return to work, or that he and Ms. Coleman had been in contact from receipt of the last doctor's note on July 17 to that time.

Mr. Salter denies telling Ms. Coleman that he could not take her back because of her injury. He does not deny telling her that he could not take her back, but says that he told her he could not do so **at that time**, because they did not need anyone then. According to his evidence, he advised her that she should try to extend her benefits claim until he had an opening. He then phoned the Employment Insurance office to confirm the status of her benefits. On that basis he told Ms. Coleman he would indicate that she was laid off due to shortage of work on the Record of Employment, to give her eligibility for regular benefits until a position opened. According to his evidence, and it is not disputed by Ms. Coleman, she hung up on him and shortly thereafter she brought in her uniforms, keys, and Christmas presents she had received at the restaurant. She was angry. Ms. Coleman testified that she understood from her conversation with Mr. Salter that she was being fired. Mr. Salter testified that he understood from Ms. Coleman's actions that she wanted nothing further to do with Pizza Delight and that she was quitting her employment at that time. It is clear that in late September Mr. Salter was aware of Ms. Coleman's physical condition.

The law is clear that it is not necessary that the impugned decision or action be made solely on the basis of a prohibited ground in order for a finding of discrimination to be made (see, for example **Holloway** v. **MacDonald and Clairco Foods Ltd**. (1983) 4 C.H.R.R. 1454 (B.C.) If a discriminatory factor formed part of the reason for a decision, a finding of discrimination can be made. Mr. Salter denies ever mentioning the disability in the conversation with Ms. Coleman in late September, and denies that it played any part in the reason why he did not take her back at that time. He claims that he did not do so because when she called him he had no opening for her. He testified that he did not fill in her Record of Employment indicating "shortage of work" as the reason for lay off until he was advised to do so by the Employment Insurance office, in order to allow her to get further benefits.

There is no other evidence to support either the Respondent's or the Complainant's version of the termination of the employment relationship, other than the Record of Employment dated September 30, 1995 (Exhibit 1-3) indicating that her return date was "unknown" rather than "not returning", and that the reason for the record being issued is shortage of work.

The employer's evidence about the hiring situation was not disputed. He had no notice prior to the late September telephone call that Ms. Coleman would be asking to return to work at that time. He had just hired someone, and had no openings. Up to that time, he had thought that Ms. Coleman was a good employee, and it appears that he would have taken her back if a position were available. I cannot find that the decision not to take her back was due even in part to her disability. The only way that the disability can be thought to be a factor is if one considers that the reason why Ms. Coleman was away from the workplace in the first place was because of her disability. I accept Mr. Salter's evidence that he explained the situation to her, advising her to continue on benefits until a position opened up. I accept his conclusion that when she brought in her uniform, keys and Christmas gifts, she intended never to return, as a reasonable conclusion to reach in the circumstances. Believing that she had ended the employment relationship, he had no further duty to accommodate her disability.

In resolving the conflicts in the evidence, I have considered the credibility of both parties. While not concluding that Ms. Coleman was untruthful in her evidence, I find that she was inclined to exaggerate and jump to conclusions adverse to her employer. For example, there are several reports from doctors and therapists in evidence which indicate that her weekly hours of work and her shift length were far longer than they were. There were indications that she was not given breaks. (see Dr. Verryn-Stuart's notes (Exhibit 1-8); Dr. Verryn-Stuart's reports to the Workers Compensation Board (Exhibit 1-9); Dr. Verryn-Stuart's reports to Ms. Coleman's lawyer (Exhibit 1-16), and to the Human Rights Commission's lawyer (Exhibit 1-22); Dr. Howatt's report (Exhibit 1-17); Dr. Connolly's report (Exhibit 1-14). While Ms. Coleman cannot be held responsible for what these professionals put in their reports, they received their information from her. Her explanations for these discrepancies at the hearing were not persuasive. There is nothing to support her evidence that the employer ever gave her a bad reference for Cornwallis Veterinarians. Her evidence that she and others were required to work an extra hour or more prior to the opening shift to do the cleaning, without pay, was challenged. Further, there is nothing to support the inference made that the employer owed her severance pay pursuant to the **Labour Standards Code**, or that she was promised her job was safe while she was off on sick leave. (While Mr. Salter told her "not to worry" about her job when she brought in the June 26 doctor's note, this was at a time when she was expected to return to work on July 17, before she was determined to be off indefinitely by Dr. Verryn-Stuart's note of the same date.) Her witness Ms. Cowie likewise had a tendency to exaggerate, and her evidence and demeanor left an unfavourable impression.

Mr. Salter's evidence was straightforward and internally consistent. He did not deny that his response filed with the Commission contained an untruth. In that document (Exhibit 1-3), he denied speaking with the owner of Lai-Ching about Ms. Coleman, describing the allegations as a "total fabrication". He clarified that he did not know Ms. Banks was owner of the restaurant at

the time, that it was a casual conversation, that he did not consider it to be a "reference" and that he had not been asked for a reference; and that he understood that Ms. Coleman was working at Lai-Ching at the time. While the discrepancy between the written reply to the original complaint and the evidence under oath is a concern, I find that overall, the evidence of Mr. Salter is to be preferred over that of Ms. Coleman.

The cases cited by the Commission can be distinguished. In **Chamberlin** (*supra*) the employer knew that the employee had a mental problem. The employee was told before he took sick leave (which was to be between two and four weeks) that his job may not be held for him. The day after he left on leave, his job was advertised. On his return, he was "offered" an alternate position, which he declined. The conclusion of the Board of Inquiry that he was discriminated against because of his mental disability is not surprising, but the facts are quite different from the ones before me. Likewise in **Newell** (*supra*), the employer was aware of the employee's disability, and the significant issue in that case was the failure of the employer to accommodate the disability in the workplace. The facts in the case before me disclose no such failure. The evidence does not support the conclusion that the employer knew of the disability, that requests were made to accommodate the disability, or that such requests were denied.

An employer has an obligation to accommodate a disabled employee to the point of undue hardship. The issue of what constitutes "undue hardship" has been considered on several occasions by the Supreme Court of Canada (see **Ontario Human Rights Commission and O'Malley** v. **Simpsons-Sears Ltd**. (1985) 7 C.H.R.R. D/3102; **Central Alberta Dairy Pool** v. **Alberta** (1990) 12 C.H.R.R. D/781; **Central Okanagan School District No. 23** v. **Renaud** (1992) 16 C.H.R.R. D/425). Even if I had found that discrimination existed, the evidence is clear that the financial situation of the business was such in the relevant time period that to hire back the Complainant would amount to an "undue hardship" on the business.

For these reasons, I dismiss the complaint.

Dated this day of May 1999

Susan M. Ashley

Board of Inquiry