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| **IN THE MATTER OF:** | The Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214 as am. 1991, c. 12; |
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| **IN THE MATTER OF:** | A Complaint between **TERRI REDDEN** and **NAVID SABERI** and **ATLANTIC CONSTRUCTION SERVICES MANAGEMENT LTD.** |
| **BEFORE:** | **PHILLIP GIRARD, BOARD OF INQUIRY** |
| **APPEARING:** | **TERRI REDDEN**, on her own behalf **DAVID ROBERTS**, counsel for the Nova Scotia Human Rights Commission **BARRY MASON**, counsel for Navid Saberi. No one appeared from the corporate respondent. |

**DATE OF DECISION:** November 22, 1999

## DECISION

In this matter Terri Redden complains that she was discriminated against by her former employer Navid Saberi. She alleges that her employment with Mr. Saberi was terminated after thirteen months as a result of her pregnancy, constituting discrimination on the basis of sex and/or family status contrary to s. 5(1)(d)(m) and (r) of the Nova Scotia *Human Rights Act*.

Much of the case turns on findings of fact and on the appropriate inferences to be drawn from those facts, but there are also a number of legal issues to be addressed. Counsel for the respondent argued that the Commission breached the rules of natural justice in the course of its investigation of the complaint, principally as a result of the three-year delay between the time the Commission was seized of the matter (August 1996) and the date of the hearing in September 1999. He also argued that his client's s. 7 rights under the *Canadian Charter of Rights and Freedoms* had been infringed, specifically his right to "security of the person," as a result of the stigma and embarrassment which these proceedings have caused to Mr. Saberi. On the basis of either or both of these arguments, Mr. Mason moved at the outset of the hearing that these proceedings should be stayed. In the alternative he argued that the Commission has not proved on a balance of probabilities that an act of discrimination occurred, and in the further alternative that if an act of discrimination is found to have occurred, the employer's action was justified as a bona fide occupational requirement. For reasons stated later in this decision, I dismiss the motion to stay and find that the complaint should be heard on its merits.

## FACTS

At the outset it should be stated that very little evidence was adduced as to the role of Atlantic Construction Services Management Ltd. in these matters. The company was properly joined as a party since Ms. Redden's cheques were issued by it and in its name. During the course of the hearing, however, it became clear that the company was acting only as an agent of Mr. Saberi, and that the real employment relationship was between Ms. Redden and Mr. Saberi. At the close of the hearing Mr. Mason moved to dismiss the claim against the company and I granted his motion. There were relatively few witnesses. The Commission called William Grant, the Commission investigator assigned to this case, Ms. Redden, Peter Nieforth and Jean Walsh, both licensed real estate agents who formerly worked for Mr. Saberi, and Suelyn Li Saberi, who replaced Ms. Redden in Mr. Saberi's office. Mr. Mason called Dr. Eugene Nurse, Robert Shannon and Nancy Skinner-Adjemian, both licensed real estate agents who worked for Mr. Saberi, and Navid Saberi himself. The statement of Bonnie Hutchins, also a real estate agent who worked for Mr. Saberi, was entered into evidence by agreement, but Ms. Hutchins herself did not appear.

The parties are in agreement about many of the facts. What follows is a brief narrative overview of the parties' employment relationship, which I take to be accepted by both parties. Following

this overview I will examine those areas where the facts are disputed, and state my findings of fact on those points. It is common ground that Ms. Redden had worked in the real estate industry for some five years at Royal LePage in Halifax, where she had progressed through a series of administrative positions, before she began working for Mr. Saberi. Believing that she had advanced as far as she could at Royal LePage, Ms. Redden answered a newspaper advertisement placed by Mr. Saberi in which he sought a real estate assistant. After an interview on the evening of April 4, 1995, and a visit to Mr. Saberi's office the next day, Ms. Redden accepted his offer of a position and after some negotiation both parties signed a contract of employment dated April 6 which had been drafted by Ms. Redden. The material clauses stated "salary to be $25,000 per year with a 50 hours maximum per week to be reviewed in 3 months. Over 50 hours per week overtime to be paid at $10.00 per hour," and "hours to be 9:00 am to 5:00 pm Monday to Friday."

At this point Mr. Saberi was a very successful real estate agent and his business expanded even more over the course of the following year as he became more active in property development. Ms. Redden proved to be a highly competent employee and met or exceeded the expectations of Mr. Saberi during at least her first twelve months of work according to his own testimony. Meeting the demands of her employer's expanding business required Ms. Redden to work overtime on a fairly frequent basis. She at times found this burdensome but always did what was required. On a number of occasions attempts were made to hire part-time staff to help ease Ms. Redden's workload, but these staff never lived up to Mr. Saberi's expectations and were let go after a week or two.

Towards the end of March 1996 Ms. Redden arranged to take a ten-day holiday in Florida, her first since going to work for Mr. Saberi. Just before leaving, she discovered she was pregnant. Ms. Redden went to the office on the Saturday before her departure to tell Mr. Saberi so that he would not hear from someone else. He appeared to be thrilled with the news. A person who was hired to replace Ms. Redden during her vacation did not work out, and was let go after her return. Ms. Redden returned to a backlog of work on Easter Monday, April 8, and found out that they would be moving to a new office at the end of the week, that is, on April 12 and 13, 1996. She was obliged to put in 12 or 13 hour days to keep up with these extra demands, and was feeling fatigued as a result of her pregnancy. During this second week in April, Ms. Redden also had her first appointment with her obstetrician, who told her to "take it easy."

In the week after the move to the new office, Ms. Redden had a confrontation with Bob Shannon, one of Navid Saberi's licensed sales assistants. Mr. Shannon was upset that some of his paperwork was not completed. He called the office, demanded that his work be done, and blew up at Ms. Redden, using strong language (the exact words are a matter of dispute) to express his displeasure. Ms. Redden was extremely upset and left the office, saying "I quit." Subsequently (the exact time frame is a matter of dispute) Mr. Saberi met with Ms. Redden and urged her to come back to work. Ms. Redden's workload was discussed and it was agreed that someone else would be hired to assist her. She told Mr. Saberi that she could not work such long hours as before. Mr. Saberi hired Ms. Suelyn Li towards the end of April 1996, and she quickly became a useful employee. She had not worked in real estate before, but with training by Ms. Redden she quickly learned all that was necessary. The backlog of work began to decrease and and there were discussions between Mr. Saberi and Ms. Redden about finding a new role for Ms. Redden in the office. However, on May 31, 1996, Mr. Saberi informed Ms. Redden that she was being let go because Ms. Li was capable of handling the work and there was not enough for two people to do. Mr. Saberi gave her two weeks' pay in lieu of notice.

Turning now to areas where the parties' testimony differ, I should say at the outset that I found Ms. Redden to be the more credible witness. She impressed me as someone who took her work very seriously and who was deeply upset at being let go by Mr. Saberi, whom she felt she had served "above and beyond the call of duty." While Ms. Redden is of course an interested party, which I bore in mind when assessing her credibility, I note that she had every reason to recall

matters accurately because very important matters were at stake for her. I note too that she began exploring her possible legal recourses soon after being let go, when her recollection was fresh.

For Mr. Saberi, the situation was much different. He had numerous employees and hired and fired people all the time. There was no particular reason why the details of Ms. Redden's situation would stand out in his mind. When he stated at the hearing that he could not recall particular events or their dates, I did not find this to be evasion but the genuine lack of recall of a busy employer with many things on his mind at any given time. However, in certain cases Mr. Saberi did appear to change his story between the time he first spoke to Mr. Grant in the course of the investigation of this complaint, and the time of the hearing. At least, certain statements which Mr. Grant recorded in his interview summaries are inconsistent with some of the testimony given by Mr. Saberi at the inquiry. Mr. Saberi never signed any of these statements, but never suggested that he believed them to be inaccurate when invited to review them, except on one occasion at the end of the investigation. At that point he did say to Mr. Grant by telephone that he had certain corrections to make, but I accept Mr. Grant's evidence that Mr. Saberi never communicated with the Commission again to clarify what those corrections might be. Mr. Mason tried to say that there was a misunderstanding between Mr. Saberi and Mr. Grant about how the corrections were to be made, but common sense dictates that Mr. Grant could not begin to make any corrections unless he had some specific directions from Mr. Saberi. I accept that Mr. Grant's summaries of the interviews with Mr. Saberi are substantially correct and I make adverse findings of credibility against Mr. Saberi on some points where his earlier statements and his later testimony at the inquiry are in conflict. I will be more specific about these at the appropriate points.

I turn now to specific points of conflict in the evidence. It is agreed that Ms. Redden phoned in sick to her employer Royal LePage on April 5, 1995 so that she could attend at Mr. Saberi's office, but the parties disagree about whether Mr. Saberi suggested this course of action. The finding is not important in itself, but counsel for the respondent urged upon me that it reflected poorly on Ms. Redden's credibility that she would lie to her previous employer. Even if Ms. Redden herself suggested that she would take the day off, I do not find that this action affects her credibility. It is well known that in certain workplaces employers tolerate the occasional use by employees of sick days for "mental health days" - i.e., the employee is allowed to take a day off at his or her discretion. Ms. Redden did not state that this was the case at Royal LePage, because her position was that Mr. Saberi had suggested she take the day off, which in her mind absolved her of any blame. I find that at most Ms. Redden's action amounted to a "white lie" which neither she herself nor, likely, her former employer would have treated as involving a serious ethical breach.

Another point of conflict emerges over whether Mr. Saberi did or did not ask Ms. Redden about children at this initial interview. Mr. Grant's summary of his April 14, 1997 interview records that Mr. Saberi stated that he usually asked prospective employees about whether they had children, but that he had probably not asked Ms. Redden because he already knew via another real estate agent that she was newly married. At the hearing he conceded that he might have asked her such a question but he could not recall. Mr. Saberi stated in 1997 that he asked potential employees not just about children but about their child care arrangements in order to determine how flexible they could be, given the irregular time demands of some types of positions in real estate. He stated at that time that he had no policy against having employees with children, but wanted to ensure that such employees had adequate child care arrangements. Ms. Redden stated that she was asked about children in the interview and told Mr. Saberi that she had no children but that she and her husband were planning to have a family. In the end I accept Ms. Redden's version but I do not think much turns on this specific finding of fact.

A related issue on which the evidence was contradictory is the more general question of whether Mr. Saberi made a practice of asking candidates if they had children. The Commission relied on

the summary of Mr. Saberi's 1997 interview and the evidence of Peter Nieforth and Ms. Redden to establish that Mr. Saberi usually wanted to know whether prospective employees had children in order to weed out those who might have trouble meeting his need for flexibility. Mr. Nieforth testified that he interviewed a number of candidates, more than three but less than a dozen, seeking employment with Mr. Saberi. Mr. Saberi never told him directly to ask about children but since Mr. Saberi usually asked him afterwards about whether the candidate had children or other demands on their time, Mr. Nieforth understood that he was supposed to elicit this information in the interview. Ms. Redden testified that she was involved in pre-screening applicants for interviews for regular positions and in interviewing for part-time positions and that Mr. Saberi had made it very clear that he wanted to know about whether applicants had children. The evidence of Peter Nieforth and Ms. Redden might be summed up in this statement by Ms. Redden: "Mr. Saberi wanted to hire one of two [types of ] people; he wanted to hire young people with no commitments or older people whose children had grown."

Mr. Saberi denied at the inquiry that he regularly asked about children, but agreed that he was always concerned about the flexibility of potential employees and that there were many reasons besides children that candidates might not be flexible. He also denied that he had made the statement to Mr. Grant recorded in the interview summary of April 14, 1997, regarding his usual practice of asking candidates about children. He states that this was one of the things that he asked Mr. Grant by telephone to correct in the interview summary. I do not accept his evidence at the inquiry, and find that Mr. Grant's summary of the interview was substantially correct on this point. Mr. Mason urged me to reject Mr. Nieforth's evidence as tainted by bias and Ms. Redden's as self-serving on this point. Mr. Nieforth admitted that his departure from Mr. Saberi's employ had involved a dispute over some commissions which he (Nieforth) was allegedly owed. Mr. Nieforth sued Mr. Saberi and lost. Naturally Mr. Nieforth's evidence should be scrutinized with some care under the circumstances, and I was deprived of the opportunity to observe him since he testified from Vancouver by telephone, by agreement of the parties. On balance, however, I accept the evidence of Mr. Nieforth and Ms. Redden on this point. I did not get the impression that Mr. Nieforth harboured such vindictiveness towards Mr. Saberi that he would lie or distort his evidence before this inquiry or earlier in his interview with Mr. Grant. Ultimately, however, whether Mr. Saberi generally asked candidates for employment whether they had children is of limited relevance in deciding whether his termination of Ms. Redden constituted an act of discrimination. It was perhaps more important during the investigative stage when Commission staff were trying to decide whether a *prima facie* case of discrimination was made out, but it recedes in importance when faced with the specific question facing this inquiry.

Other conflicts in the evidence emerged over the course of events dating from the Shannon incident onwards to the termination of Ms. Redden's employment. I have outlined the nature of this incident in general terms above. Ms. Redden's version is that Mr. Shannon called her a "bitch, a whore and a slut" over the telephone, and that she in turn left the office in the late morning, saying "I quit." Mr. Shannon, testifying by telephone from Calgary, conceded that he might have used such language but it was not his normal practice. I find that he used insulting and vulgar language with Ms. Redden, language which provoked the response described. Since I had no chance to observe Mr. Shannon's demeanour, I am reluctant to find that he used these specific words, but I find he used some such language. Ms. Redden states that she telephoned Mr. Saberi that afternoon to tell him what had happened, and that they agreed to talk over matters the next day, which they did. Mr. Saberi urged her to stay and she agreed to do so. Mr. Saberi has stated at various points that Ms. Redden was out of the office for two or three days as a result of this incident, but does admit that he asked her to return to work. I accept Ms. Redden's testimony about the chronology. It is inconceivable that Mr. Saberi would have let his busy office drift for two or three days with no staff. He had every reason to try and smooth over matters with Ms. Redden and get her back on the job. Part of the quid pro quo for Ms. Redden returning to work was that Mr. Saberi agreed to allow her to look for someone to work part-time in the evenings to assist her. She did bring in someone for a half-day trial, but this person did not work out. Mr. Saberi himself then took the initiative, and invited Ms. Suelyn Li to work with

Ms. Redden in the office. Ms. Li had been a client of Mr. Saberi and he knew that she was dissatisfied with her current employment situation. Ms. Li's testimony was that Mr. Saberi asked her to come to work and be trained by Ms. Redden so that she could replace her on her maternity leave. Ms. Li had not worked in real estate before, and so would need to be trained in the appropriate procedures. Although Mr. Saberi stated in one of his interviews with Mr. Grant that he had hired Ms. Li to replace Ms. Redden when she had "quit," he conceded at the inquiry that things may have unfolded as Ms. Li said. Ms. Redden testified that Ms. Li's start date was Friday, April 23, 1996, and Ms. Li testified that Ms. Redden was in the office when she began work. I accept this evidence and find that Mr. Saberi's earlier assertion that he hired Ms. Li when Ms. Redden quit cannot be correct. Both women testified that they got along well during the period they worked together.

I should note that Ms. Li appeared under subpoena. At some point after the events under investigation here, she married Mr. Saberi's brother and her full name is now Suelyn Li Saberi. I refer to her as Ms. Li throughout this decision in order to avoid confusion and also because that was her name at all times relevant to this inquiry. Obviously these proceedings have put her in a difficult position, where she must testify about matters which may result in adverse findings being made about the actions of a man who is now her brother-in-law. (Mr. Saberi is no longer Ms. Li's employer, she having quit his employ some time ago.) I was impressed with Ms. Li's testimony. In spite of her awkward situation, I found her candid and honest. I accept her testimony in preference to Mr. Saberi's where there is any conflict.

Ms. Li had been working seven days a week at her previous job. In April 1996 she was single and had no dependents, and was prepared to be very flexible in her working hours. Soon after starting at Mr. Saberi's office, Ms. Li was working 12 and 13 hour days, according to Ms. Redden's uncontradicted testimony. The pattern that Ms. Li settled into after Ms. Redden's departure was that in addition to working a normal five-day week, she also worked two evenings a week on average, and Saturdays until 2:00 pm. Her demeanour, if not her exact words, conveyed the idea that she did not consider this an excessive or unusual workload, and in fact regarded it as a little on the light side. Given Ms. Li's willingness to work long hours, and her quickness at learning the required skills and routines, the backlog of work was cleared up wihtin a few weeks of her arrival.

Even before Ms. Li was hired, there had been discussions about Ms. Redden shifting away from administrative work and into public relations work, where she would deal directly with clients and assist the licensed real estate agents who worked with or for Mr. Saberi. Thus she was not worried when she saw Ms. Li essentially replacing her. Mr. Saberi discussed with Ms. Redden the possibility of doing some open houses but she stated that she did not wish to do this because it would involve working on evenings and weekends. Ms. Redden testified that as the month of May progressed, she felt a change in Mr. Saberi's attitude towards her. She tried to raise the issue of new duties for her but Mr. Saberi remained vague on the subject. In her view he became more distant, did not invite her to lunch as frequently as before, and seemed to avoid contact with her. Mr. Saberi denies that there was any such change in attitude, but his own testimony confirms that discussion of alternate duties for Ms. Redden remained vague, which suggests there was some basis for her perception that Mr. Saberi was becoming more detached.

As noted earlier, Ms. Redden's employment was terminated on May 31, 1996, to her great shock. She first contacted the Labour Standards office to inquire whether she had any recourse, and that office referred her to the Human Rights Commission. Her first contact with the Commission was on June 6, 1996 and she wrote a letter of complaint to the Commission in August. After discussion with Commission staff over the ensuing months Ms. Redden filed a formal complaint on February 12, 1997, alleging discrimination on the basis of sex and/or family status.

*Did Ms. Redden's termination constitute an act of discrimination on the basis of sex or family status?*

There is no direct evidence that Mr. Saberi discriminated against Ms. Redden in terminating her employment. The Commission's, and Ms. Redden's, position, is that an inference can be drawn on a balance of probabilities from the evidence that the act in question was discriminatory. That is clearly the test. It is not necessary to prove that the discrimination was intentional, in the sense that Mr. Saberi had an invidious motive for terminating Ms. Redden's employment: s. 4 of the Human Rights Act states that discrimination may occur "whether intentional or not." Even if Mr. Saberi honestly believed that he was entitled to act as he did, that is no defence. The Commission must prove that discrimination on a forbidden ground formed one of the reasons for the termination, not that it was the only reason: *Seivert v. Roycom Realty Ltd.* (1994), 22 C.H.R.R. D/391 (N.S. Bd. Inq.).

Mr. Saberi's defence was twofold. First, he stated that he let Ms. Redden go because she was less flexible than Ms. Li in her working hours, not because she was pregnant. His position was that she became less flexible not because of her pregnancy but because her overtime hours had become a source of conflict with her husband. Second, Mr. Mason tried to establish that a number of women who worked for Mr. Saberi or one of his companies had small children, in order to rebut the suggestion that Mr. Saberi was the type of man who would discriminate against pregnant women. I do not find that either of these defences is made out. On the first point, I reject the idea that any disagreements which Ms. Redden and her husband may have had over her hours can be dissociated from her pregnant state. I find that Ms. Redden discussed with Ms. Li the fact that the time demands of her job were causing some tensions with her husband at that time (April-May 1996). I also note the following exchange between Mr. Mason and Ms. Redden in cross-examination:

Q. Okay. Isn't it true that your husband was also telling you that you were to reduce your hours because of the marital problems you were having?

A. We were not having marital problems.

After an objection by Mr. Roberts, Ms. Redden elaborated:

A. I mean all couples fight and have arguments, but we weren't having marital problems. We were having a child together.

Later, in re-direct examination, she reiterated that "we had arguments, but we didn't have marital problems" and stated that her husband's view about her [long] hours was that he wasn't in favour of them after she became pregnant. I do not find any inconsistency between Ms. Redden's and Ms. Li's testimony on this point. Ms. Li stated at the inquiry that

A. I seem to remember something about her husband wasn't happy [with] how long she was working, and that they had had a few arguments and fights and that she was going to cut back on her hours.

There was an inconsistency, however, between Ms. Li's testimony at the inquiry and her statement to Mr. Grant on January 27, 1998. After responding as noted above, the following exchange occurred:

Q. Did [Ms. Redden] ever say it was because of her pregnancy that she was going to cut back her hours?

A. Not initially, no.

Q. Okay. Did she later say that?

A. Not that I recall.

In the record of her interview with Mr. Grant in January 1998, however, Ms. Li is recorded as saying that "Redden told her that she had cut back her overtime hours since she became pregnant." Admittedly the 1998 statement does not explicitly make a causal connection between the pregnancy and the reduced overtime, but it seems clear that a person hearing Ms. Redden's words as reported would make that connection. I accept Ms. Li's interview statement as accurately reflecting her memory at that time, even though at the inquiry she stated she could no longer recall Ms. Redden having raised the issue of pregnancy. Neither counsel asked her directly about her previous statement on this point, and I attribute the change in testimony to the fading of Ms. Li's memory between the date of the interview and the date of the hearing.

Both women describe a not unusual situation where Ms. Redden's long hours in April were giving her considerable stress and causing some tensions on the home front. I decline to elevate these tensions or disagreements to the level of "marital problems" in the sense that that phrase is often used, i.e., conflicts over fundamental issues or values which imperil the continuance of a marriage. The essential point is that this issue only surfaced after Ms. Redden discovered that she was pregnant. There was evidence that Ms. Redden asked for more regular hours before she was pregnant simply because she wanted a normal working day, not in order to ease any marital tensions. The evidence was that she was not enthusiastic about working overtime on an "as-needed" basis before her pregnancy, but she always did it when required. The logical inference is that any marital tensions over Ms. Redden's hours only became evident after both spouses came to realize that long hours were going to be particularly fatiguing for the complainant because of her state of pregnancy. These "marital tensions" cannot be dissociated from the pregnancy itself. Cutting back on her hours may have had the *effect* of avoiding the disagreements Ms. Redden had begun to have with her husband over this issue, but I find that the principal *reason* for her announcing her intention to do so was the fatigue induced by her pregnancy and her desire to avoid stress during the early months of her pregnancy.

I do not find that the evidence regarding other women with small children working for Mr. Saberi or his companies does anything to dissuade me from drawing an inference of discrimination from the evidence as a whole. The only witness who testified for Mr. Saberi at the inquiry on this point was Ms. Nancy Skinner-Adjemian, a licensed real estate agent who worked for one of Mr. Saberi's companies at the same time that Ms. Redden was employed. She had three small children at the time, but had adequate childcare arrangements to cover both her daytime hours and occasional periods outside the hours of 9 to 5. Ms. Skinner-Adjemian worked on commission, however, so that her position was not directly comparable to Ms. Redden's. If she chose to cut back on her hours or not to work evenings in a particular week there would be no direct loss to Mr. Saberi. The evidence of Bonnie or Bonita Hutchins, in the form of the summary of her interview with Mr. Grant, was admitted by consent. She testified that there were some women working for Mr. Saberi's companies who had small children, and she also stated that in her view Mr. Saberi did not discriminate against people with small children. This evidence was of a general nature and of little probative value. There was some hearsay evidence about other women with small children who worked for one or another of Mr. Saberi's companies, but none of them occupied a position similar to that of Ms. Redden. In fact, on cross-examination Mr. Saberi was obliged to admit that none of the people who reported directly to him had small children during the period when Ms. Redden was employed. Some had grown children or children in the mid to late teens, but none had small children. The evidence adduced by the defence on this point was of limited probative value and did not convince me that the act of discrimination alleged by Ms. Redden was so contrary to Mr. Saberi's normal practices as to be implausible.

Some evidence led by the Commission contained references to a possible motive for Mr. Saberi's actions. During his initial interview with Mr.Grant, Peter Nieforth opined that Mr. Saberi's Iranian culture shaped his attitudes towards women. According to Mr. Nieforth, Iranians in general and Mr. Saberi in particular prefer women to stay at home when their children are small and do not approve of such women participating in the workforce. I should say that the Commission relied on Mr. Nieforth's evidence primarily to try and establish that there was a general policy by Mr.

Saberi to avoid hiring employees, or at least women employees, with small children, and not to second-guess his motivation, which the Commission is not required to do. In the course of his interview with Mr. Grant, however, Mr. Nieforth elaborated on his interpretation of Mr. Saberi's behaviour, as I have noted, and was cross-examined on this point at the inquiry. Mr. Saberi seems to have thought that these remarks of Mr. Nieforth meant that his (Saberi's) culture and ethnicity were being put on trial, and that his actions were being judged according to an inappropriate cultural stereotype. For my part I place no reliance whatsoever on this aspect of Mr. Nieforth's observations. The evidence is clear that at least some women in the various companies associated with Mr. Saberi had small children. He had no ideological objection to women with small children working. His evidence was consistent that he needed and valued flexibility in working hours, whether in male or female employees, and I accept his evidence on this point. I do not think cultural factors entered into Mr. Saberi's decision to terminate Ms. Redden; rather, I accept his own evidence that the decision was made for purely business or economic reasons. The question is whether those reasons can constitute a valid defence to a complaint of discrimination on the basis of pregnancy. I do not think they can.

As an employer Mr. Saberi was entitled to set the conditions of employment that he chose, subject to any applicable legislation. Since Ms. Redden was not a unionized employee and had not worked for him for ten years so as to achieve security of employment under the *Labour Standards Act,* R.S.N.S. 1989, c. 246, Mr. Saberi was entitled to terminate her for any reason or no reason on the appropriate notice period in s. 72 of the Act, as long as his act of termination did not constitute an act of discrimination under the *Human Rights Act* or contravene one of the few positive obligations in the *Labour Standards Act*. Mr. Saberi was a demanding employer and was used to hiring and firing employees on a regular basis. He was aware of the minimum protections contained in the *Labour Standards Act* and observed them in this case: Ms. Redden's cheque for two weeks' pay was ready the day after her termination. It may come as a surprise to employers such as Mr. Saberi to learn that the very large discretion afforded them by provincial law is restricted in one particular respect, i.e., where rights protected by the *Human Rights Act* are invoked.

Mr. Saberi's view was that his termination of Ms. Redden did not constitute an act of discrimination on the basis of pregnancy or family status, but rather the replacement of one employee with another whom he deemed more capable of fulfilling his employment needs because she was more "flexible." As I have said, under most circumstances Mr. Saberi is legally entitled to make this choice even though it may be highly distressing to the employee who is let go. In this case, however, he was not entitled to make that choice. It is an irresistible inference from the evidence that in this case Mr. Saberi equated "more flexibility" with "not being pregnant," as Mr. Roberts put it on behalf of the Commission. Mr. Saberi was "disappointed" (his word) at the blowup between Mr. Shannon and Ms. Redden and was informed by the latter the day after that incident that she could not work such long hours any more. In her testimony Ms. Redden did not say that she specifically told Mr. Saberi that her pregnancy was the reason for this change, but I find that this was a natural conclusion for Mr. Saberi to draw and that he did draw it. The pregnancy had only been announced three weeks before and was fresh in the minds of both parties. I make the inference that from this point on, Ms. Redden's pregnancy was identified in Mr. Saberi's mind as a "problem" that would have to be "fixed." Had he accepted her resignation at that point, that would have been the end of the matter. But Ms. Redden was too important to the office for Mr. Saberi to let her disappear so abruptly. Mr. Saberi put a premium on his office and business running smoothly, and there would have been short-term chaos if he had accepted her decision to leave. Mr. Saberi implored her to return, and found Ms. Li, whom he soon determined would be able to replace Ms. Redden. Mr. Saberi could probably have avoided any charge of discrimination by offering Ms. Redden suitable alternative employment in one of his other companies. However, I find there was no real attempt to do so. I can only infer that Mr. Saberi felt that Ms. Redden's pregnancy would also be a problem in other capacities as well. It is possible that Mr. Saberi was also concerned about Ms. Redden's future "flexibility" or

possible lack thereof once her child was born, but I prefer to base my finding of discrimination on the basis of sex (pregnancy) alone, and not on the basis of family status.

It is possible to test this finding of discrimination by proposing an alternative scenario. Had Ms. Redden not been pregnant, what would have happened after the Shannon incident? Would Ms. Redden still have given her ultimatum that she would not work such long hours any more? If so, would Mr. Saberi have found Ms. Li and ultimately discharged Ms. Redden? Possibly, but it seems more likely that the matter would have blown over, perhaps with adequate part-time help being secured. Or, if Mr. Saberi was genuinely displeased with Ms. Redden's reaction to the Shannon incident, he might have shifted her out of the administrative work and into the public relations and client service field, which he admitted she was good at. Given Ms. Redden's record as a valued employee, it seems unlikely that matters would have taken the course they did if she had not been pregnant. Mr. Saberi has the onus of proof on this point, and I find he has not discharged it on a balance of probabilities.

It is important to emphasize what is at stake here. It is common knowledge that one of the biggest social changes of the past thirty years has been the rapidly increasing participation of married women and women with children in the paid workforce. Public policy has supported this trend and changes to labour law, employment law and human rights law have tried to remove barriers to the full participation of women in the labour market. Along with these changes have come new obligations for women; provincial family law now requires mothers to support their children, and married women and female cohabitees are subject to a support obligation owed to their husbands or male cohabitees. None of these obligations existed at common law. In effect, adult women are now required by law to be self-supporting regardless of marital status.

The widespread entry of women into the paid labour market has revealed the extent to which the demand side of that market was shaped by the male breadwinner model. That model expected that a male employee could be highly flexible in the sphere of production because an assumed non-wage earning female would look after the sphere of reproduction; i.e., the raising of any children and the feeding and clothing of both spouses. With the entry of more women into the labour market public policy was faced with a choice. Either women could be forced to conform to the male breadwinner model pursuant to a formal equality model, or changes to the male breadwinner model itself could be demanded, thus moving society more in the direction of substantive equality. Over the years public policy has moved from a position where pregnant women could be treated disadvantageously without legal consequence, to a position where they were afforded formal equality, and finally in recent years to the point where substantive equality must be afforded. Disadvantageous distinctions on the basis of pregnancy were considered as not contravening the *Canadian Bill of Rights'* guarantee of equality before the law in *Bliss v. A-G Canada,* [1979] 1 S.C.R. 183, in which the Supreme Court of Canada upheld the provision of the *Unemployment Insurance Act,* 1971, S.C. 1970-71-72, c. 48 requiring pregnant women to have ten weeks of insurable employment to be eligible for maternity benefits, when all other claimants for unemployment benefits were eligible after eight weeks. It was only a decade ago that the Supreme Court of Canada overruled *Bliss in Brooks v. Canada Safeway,* [1989] 1 S.C.R. 1219 and stated that discrimination on the basis of pregnancy was discrimination on the basis of sex for the purpose of provincial human rights codes. In response to *Brooks,* the Nova Scotia *Human Rights Code* was amended in 1991 to state specifically that discrimination on the basis of sex "includes pregnancy, possibility of pregnancy and pregnancy-related illness" (s. 3(n)), and the *Labour Standards Code* was amended in the same year to guarantee unpaid maternity leave and the right to return to work for all women employed for over a year with the same employer. In *Brooks* the Supreme Court of Canada did not have to discuss the meaning of substantive equality for pregnant women because the impugned action there could be accommodated under the concept of formal equality. According to Dickson C.J. it was "beyond dispute that pregnant employees receive significantly less favourable treatment under the Safeway [benefit] plan than other employees" (at p. 1236). In other words, the complainants were simply asking to be treated in the same manner as other employees.

Unlike some other grounds of discrimination, where the prohibited conduct involves treating like individuals differently, discrimination on the basis of pregnancy may involve treating unlike individuals alike. As Dickson C.J. said in *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at 347, "the interests of true equality may well require differential treatment." In the Supreme Court's first equality case under s. 15 of the *Charter, Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, McIntyre J. stated the proposition negatively at p. 164: "identical treatment may frequently produce serious inequality." *Recently, in Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497, a unanimous Supreme Court made clear that in his discussion of equality under s. 15 McIntyre J. was speaking of substantive equality. Iacobucci J. elaborated on the concept in this way:

Formal distinctions in treatment will be necessary in some contexts in order to accommodate the differences between individuals and thus to produce equal treatment in a substantive sense . . . . [E]quality in s. 15 must be viewed as a substantive concept. Differential treatment, in a substantive sense, can be brought about either by a formal legislative distinction, or by a failure to take into account the underlying differences between individuals in society. (at pp. 517-18)

It is true that these discussions of equality all relate to s. 15 of the *Charter* and not to provincial human rights codes as such, but in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.),* [1999] S.C.J. No. 46, delivered on September 9, 1999, the Supreme Court has labelled as problematic the traditional dissonance between the analysis of discrimination under the *Charter* and under "human rights legislation which, while it may have a different legal orientation, is aimed at the same general wrong as s. 15(1) of the *Charter*" (at para. 47 of unpublished judgment). McLachlin J. for the Court disapproved of "[i]nterpreting human rights legislation primarily in terms of formal equality [, which] undermines its promise of substantive equality" (at para. 41).

I take from this case that both the *Charter* and human rights legislation should be interpreted in light of their goal of achieving substantive equality for all citizens. As an example of substantive equality in action, one need look no further than the *B.C.G.S.E.U.* case itself. There, the government of British Columbia set an aerobic standard which forest firefighters were required to meet to keep their jobs, a standard which was found to be more difficult for females to pass because of physiological differences between men and women. The claimant did not pass the test although she had always performed her work satisfactorily in the past. In restoring a labour arbitrator's decision that the claimant had been discriminated against, the Supreme Court found that the government could not justify the standard as reasonably necessary to the safe and efficient performance of the work in question. It is important to note that the Court found the standard itself unjustifiable, rather than leaving the standard in place and ordering the government to "accommodate" the claimant on an individual basis. The latter approach had been the traditional mode of analysis where "adverse effect" rather than "direct" discrimination was alleged, but the Supreme Court has now stated that this distinction is indefensible and has articulated a unified test. The effect of this decision is to give human rights legislation more "teeth" by obliging employers to ensure that workplace standards are drafted so as to reflect the capacities and situations of a diverse workforce. The employer may still rely on a bona fide occupational requirement, and will not be required to accommodate employees beyond the point of undue hardship, but the onus will be a heavy one to discharge.

In the case of pregnancy in particular, this new approach should help to create truly equal access to the labour market for women by requiring that employers think about the needs of pregnant women in drafting job requirements and making some accommodation for them where necessary, unless the employer can prove that not being pregnant is a bona fide occupational requirement. In this way the costs of raising the next generation are spread over all employers instead of being visited, through loss of employment, only on those individuals who choose to have children, in the same way that the costs of education are shared among all taxpayers, not

just those with children. Mr. Saberi's argument that he was not discriminating on the basis of pregnancy when he terminated Ms. Redden, but was rather preferring the enhanced flexibility of another employee, is an example of treating the unlike alike. Ms. Redden had displayed considerable flexibility in working overtime hours before she became pregnant but could no longer do so afterwards. In fact, her obstetrician told her to "take it easy," which I take to mean in this context to work a normal work week and to avoid stress if possible. Even though Dr. Nurse, a witness called by Mr. Mason, found this advice to be somewhat vague, he confirmed that fatigue is a common complaint of pregnant women and should be taken seriously. I did not read his evidence as saying that pregnant women could not work a normal work week, at least in most jobs not requiring extensive manual labour. Nor had Ms. Redden asked to work less than the 9:00 to 5:00 hours her contract specified. She was entitled to some form of accommodation from Mr. Saberi during her pregnancy. The exact form does not need to be determined because matters never reached that point. Mr. Saberi was not willing to relax his demands one iota and made no serious attempt to accommodate Ms. Redden.

Counsel for Mr. Saberi raised the defence of bona fide occupational requirement, but I find it has not been made out in this case. A mere assertion by an employer requiring employees to be flexible in their working hours cannot suffice to establish a bona fide occupational requirement. "Flexibility" was never adequately defined, and the requirement is so amorphous as to not amount to a standard at all. Even if it were accepted as a standard, it clearly contemplates an unattached individual who has no other demands on her time except work, and makes no attempt to address the situation of those who do not fit this model. In any case, no evidence was presented to satisfy any of the aspects of the three-part test adopted by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U., supra*. The new test adopted by the Supreme Court requires that the employer adopted the standard for a purpose rationally connected to the performance of the job, in the good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose, and that the standard was reasonably necessary to the accomplishment of that work-related purpose. To demonstrate the latter, it must be shown "that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer" (at para. 54 of unpublished judgment). There was no evidence of any serious attempt made to accommodate Ms. Redden after she became pregnant, or what sort of hardship such efforts would have entailed for Mr. Saberi.

## DELAY

At the opening of the hearing on September 27, Mr. Mason moved that the inquiry be stayed on the basis that his client's ability to mount a full and effective defence had been prejudiced by the delay of three years which had elapsed between the filing of the complaint and the hearing. He argued further that Mr. Saberi's s. 7 rights under the *Charter* were infringed in these proceedings. Relying on the decision of the British Columbia Court of Appeal in *Blencoe v. British Columbia Human Rights Commission* (1998), 160 D.L.R. (4th) 303 and that of the Saskatchewan Court of Appeal in *Re Kodellas and the Saskatchewan Human Rights Commission* (1989), 60 D.L.R. (4th) 143, Mr. Mason argued that the substantial stigma attached to being the subject of a human rights complaint amounted to an interference with Mr. Saberi's security of the person, and that the delay in processing the complaint did not comply with the requirements of fundamental justice. I declined to stay the proceedings but stated that I would retain jurisdiction over the issue of delay and deal with it in these reasons.

Although there is some overlap in the arguments advanced by the respondent, I prefer to deal with them separately as they are analytically distinct. Even if I find that the respondent's s. 7 rights are not at issue, or that such rights arise but are not infringed, the respondent still has a right under administrative law to insist that the Commission's proceedings respect the requirements of natural justice. I will deal with this latter argument first.

*Did the delay or other aspects of the Commission's process result in a denial of natural justice?*

There is a modest jurisprudence on the issue of delay in human rights proceedings in Nova Scotia, though it has been addressed many times in other provinces. Since the matter was fully argued, it will perhaps be useful to state the applicable legal principles here, as I see them. First of all, it is clear that a board of inquiry has jurisdiction to decide whether the proceedings of the Human Rights Commission have been in accordance with the requirements of natural justice up to the date of the hearing. S. 34(7) of the *Human Rights Act* states in general terms that a board of inquiry "has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act." In *Volvo Canada Ltd. v. Mary Ritchie and the Nova Scotia Human Rights Commission* (1989), 10 C.H.R.R. D/6341, Glube C.J.T.D. as she then was, stated that "the Board of Inquiry has the power to deal with allegations of unfairness, denial of natural justice, or inability to respond due to delay" (at p. D/6343). She rejected an application to quash the appointment of a board of inquiry on the basis of alleged delay, stating that it was for the board to hear argument on the issue in the first instance, and that "the Board of Inquiry may choose to deal with the purported delay by the complainant in filing her complaint by declining to give her a remedy" (at p. D/6343). Justice Glube did not state positively that the board had the power to stay proceedings in a preliminary way, but it seems implicit in her reasoning that such a power exists. Certainly boards of inquiry in Ontario have often been requested to issue stays of proceedings and sometimes have granted them; see, e.g., *Lewis v. York Region Board of Education (No. 5)* (1996), 27 C.H.R.R. D/261 (Ont. Bd. Inq.); *Joe v. University of Toronto (No. 1)* (1995), 25 C.H.R.R. D/472; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1996), 27 C.H.R.R. D/230 (Ont. Bd. Inq.).

Having established that the board has jurisdiction to inquire into the issue of alleged breaches of natural justice by the Human Rights Commission, including those arising from delay, the next question that arises is whether proceedings should be stayed at the outset, or whether the issue should be dealt with as part of the decision. As a general rule I would suggest that a board should be very wary of staying proceedings before hearing a complaint on the merits. There may be unusual cases where the delay is so extreme and the prejudice to the respondent so palpable that the complaint may safely be stayed at the outset. But it must always be kept in mind that the human rights process is the only avenue open to a complainant, and that the Commission rather than the complainant has carriage of the complaint. In those cases where delay arises because the complainant has only come forward after an inordinate period of time, there is perhaps more justification for making a preliminary ruling adverse to the complainant. In most cases, however, it will be the Commission's action (or inaction) which is impugned, rather than that of the complainant. In such cases it would be highly inequitable to prevent the complainant from having his or her "day in court" unless the respondent can demonstrate very serious prejudice directly attributable to the Commission's delay.

What then is the test to be applied when examining the issue of delay? In Ontario there was for some time disagreement on the test, with some boards of inquiry stating that the delay must be such as to render it impossible for them to determine whether a human rights violation occurred, while others adopted a less stringent test. The Ontario Divisional Court has now stated in *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 79 O.A.C. 72 at p. 76 that the "impossibility" standard is wrong, and that the correct test is the one enunciated by the Manitoba Court of Appeal in *Nisbett v. Manitoba (Human Rights Commission)* (1993), 18 C.H.R.R. D/504 at D/510:

The question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the trial.

Human rights commissions are similar enough across the country that it would be useful to have a uniform test on this question. In my view the *Nisbett* test is appropriate for use in Nova Scotia, and it is the test I will use.

A similar test is used in civil litigation in Nova Scotia to decide whether an action should be dismissed for want of prosecution. Aside from cases of "extremely lengthy delay" where prejudice may be presumed, the Court of Appeal has stated that a defendant in a civil action must demonstrate serious prejudice as well as "inordinate and inexcusable delay" to succeed in having a plaintiff's claim dismissed for want of prosecution: *Martell v. Robert McAlpine Ltd*. (1978), 25 N.S.R. (2d) 540; *Moir v. Landry* (1991), 104 N.S.R. (2d) 281; *Hurley v. Co-operators General Insurance Co*. (1998), 169 N.S.R. (2d) 22. While there are certainly some differences between the civil litigation context and the investigative processes triggered by a human rights complaint, on the fundamental question of when a claim should be dismissed peremptorily on the basis of delay it seems to me that the legal tests in the two contexts should be similar, if not necessarily identical.

The chronology of this case is as follows, according to the testimony of William Grant and the documentary record produced before me. He began by describing the Commission's normal investigative procedure and then discussed the processing of Ms. Redden's complaint. Ms. Redden telephoned the Commission on June 6, 1996 and spoke to a staff member who said that he could provide information but could not take any action until Ms. Redden had filed a written complaint. She did so by letter addressed to Herb Desmond, a Human Rights Officer at the Commission, dated August 19, 1996, but Mr. Grant took over the file at that point. It typically takes some discussion between the complainant and Commission staff before a formal complaint can be filed, which is then sent to the respondent. In this case Ms. Redden's formal complaint was dated February 12, 1997 (in fact it is dated "1996" in Ms. Redden's handwriting, but it was agreed that this was in error). Mr. Saberi was sent a copy of the complaint with a covering letter dated February 18, 1997 asking a number of questions, describing the complaint process, and asking him to reply within a month. When Mr. Saberi did not reply Mr. Grant contacted him and arranged a meeting on April 14. Mr. Grant sent Mr. Saberi a copy of the summary of that interview by letter dated April 25, asking him to sign one copy or indicate where he thought corrections were required. Mr. Saberi did neither. After waiting for some period of time Mr. Grant sent the draft statement to Ms. Redden for rebuttal, and then sent a copy of her rebuttal to Mr. Saberi by letter dated June 30, 1997. At this point the complaint went before an assessment team at the Human Rights Commission who decided on July 25 that the complaint should be further investigated. When informing Mr. Saberi of this decision by letter of August 5, Mr. Grant noted that he had "a backlog of complaints" and that it would be some time before he could proceed.

Over the next eleven months Mr. Grant interviewed six witnesses in addition to Mr. Saberi and Ms. Redden, prepared written summaries of the interviews, and arranged for the summaries to be reviewed, corrected if necessary, and approved by those witnesses. Mr. Grant interviewed Mr. Saberi again on June 29, 1998 and sent him a summary of the investigation on July 30 which included the summaries of all interviews conducted to date. After numerous fruitless attempts over the next seven weeks to contact Mr. Saberi by letter, telephone and fax in order to ascertain if he had any comments or responses to the summary, Mr. Grant passed on the file to Commission counsel on September 25, 1998. On January 29, 1999 the Commission decided to refer the complaint to a board of inquiry.

There is no evidence before me as to when the chief judge of the Provincial Court was approached for a nomination, but apparently on April 29 Mr. Patrick Duncan was appointed as a board of inquiry. It took some time to find hearing dates suitable to all parties, and the inquiry under Mr. Duncan did not commence until August 10, 1999. Unfortunately, after Ms. Redden had been testifying for an hour or so, she mentioned the name of one of the respondent's witnesses whose presence Mr. Duncan realized would give rise to a perception of conflict of interest on his

part. Mr. Duncan was obliged to withdraw from the inquiry and the chief judge was sought out for another nomination. I was named as a board of inquiry on August 25 and the hearing was rescheduled for September 27 and 28, when it proceeded without incident. Final arguments were heard orally on October 29 after an exchange of written submissions. I should add for the sake of completeness that the hearing before me began de novo; Ms. Redden's testimony from the earlier inquiry was not used.

Summarizing this course of events, it appears that there were three periods when the Commission's process moved more slowly than would have been desirable: a six-month period between the receipt of Ms. Redden's letter in August 1996 and the drafting of the formal complaint in February 1997; the period of eleven months between the assessment team's decision to require further investigation in July 1997 and the closure of that investigation in June 1998; and the period of four months between the referral of the file to Commission counsel and the decision of the Commission to appoint a board of inquiry. Assuming that the Commission promptly requested the chief judge of the Provincial Court to nominate a board of inquiry, I cannot attribute any of the delay between January 29, 1999 and the commencement of the first inquiry in August to the Commission. Finding dates convenient for all parties and their counsel is not an easy task and some delay is inevitable on this score. Essentially, then, we are dealing with a period of some 32 months to move the complaint from Ms. Redden's letter to the appointment of a board of inquiry.

On the face of it, this is a long time to process a relatively straightforward complaint. Mr. Saberi's failure to respond to any of Mr. Grant's letters contributed in a minor way to the delays, but I note that Mr. Grant was conscientious about moving the file forward when Mr. Saberi did not meet the deadlines for commenting on or signing the various documents sent to him. In particular, the fact that it took six months to generate a formal complaint and a year to interview a half-dozen witnesses is troubling. I hasten to add that I do not in any way fault Mr. Grant for this state of affairs. He is an experienced and competent human rights officer, but he freely admitted that at these two points he had a "backlog" of complaints to process. He testified that his caseload over this period was in the high 30s or low 40s. He was not asked about the complexity of the cases assigned to him, but I expect they would fall in a range from relatively straightforward complaints with few witnesses aside from the parties, to more complex cases with many parties to interview. Given this caseload it does not appear to me that he could have moved matters forward much more quickly than he did. I acknowledge too that potential witnesses may be reluctant to speak to officers of the Commission and may be difficult to track down, all of which takes up time. Insofar as I can attribute any responsibility for the relatively slow movement of this complaint, the problem appears to lie either in the overall level of resources which the Commission has at its disposal, or the effective management of those resources, or possibly both. I repeat that I do not find any fault with the actions of the individual officer, Mr. Grant, in this case. While I do not find the delay in this case to be cause for alarm, I hope that the Commission will review its procedures in an effort to be more expeditious in investigating complaints.

Making a finding that a complaint has been processed slowly presupposes that there was an ideal speed at which it should have progressed. In this case, and purely for the purpose of argument, it seems to me that ideally it should have taken about two months to generate a formal complaint, perhaps five months to interview the remaining witnesses, and two months for the Commission to appoint a board of inquiry once Commission counsel was seized of the matter. Following that hypothetical time-line, about a year would have been shaved off the period of 29 months. However, the respondent is not entitled to insist on perfection. Neither boards of inquiry nor, I venture to say, courts, should be quick to condemn human rights commissions for slow process by judging them according to some standard of perfection. The ideal is not the norm in any context. While I have found the delay in this case to be somewhat troubling from the perspective of both complainant and respondent, I do not find it to be unreasonable.

In any case, delay in and of itself cannot be equated with a breach of the rules of natural justice, except perhaps in extreme situations. The delay must give rise to some prejudice to the respondent before he can complain of it. It is useful to compare a recent Ontario case on delay with the matter under review. In *Ford Motor Co, . supra,* Board of Inquiry Constance Backhouse found that an eight-year delay between the time of filing the complaint and the appointment of a board of inquiry was directly attributable to the Ontario Human Rights Commission. Applying the *Nisbett* test, she declined to hear two complaints against the respondent because of demonstrated prejudice (one witness had died and key documents had been destroyed), but allowed the others to proceed. The Ontario Court (General Division) (1999), 34 C.H.R.R. D/405 upheld her decision in spite of labelling the Commission's delay "shameful and scandalous" (at p. D/407). It is clear that in the complaint under review the delays do not even approach those in *Ford,* where the long delay was found not to constitute prejudice in itself.

Applying the *Nisbett* test to the facts in this case, I cannot find any evidence of prejudice to the respondent. There is no evidence that witnesses have died, or cannot now be located, or that key documents have gone missing because of the delay. Counsel for the respondent was unable to point to a single witness who was now unavailable because of the delay between complaint and inquiry. Two witnesses, one for the Commission and one for the respondent, both testified by telephone because they now reside in Western Canada. The evidence suggests they moved away from Nova Scotia some time ago, however, so that even if the Commission had proceeded more quickly, those witnesses might not have been present to testify. Counsel for the respondent rightly pointed out that the delay was likely to have affected Mr. Saberi's ability to recall specific dates and times for key events. I accept that, but I have also found that Mr. Saberi was a very busy man with many people working for him in various capacities, which would also have affected his recall even if the inquiry had taken place sooner. It will be apparent that I do not find the delay to be so extreme that prejudice should be presumed, as it was in a civil litigation context in *Martell, supra,* after a failure to prosecute for ten years.

Two other aspects of the Commission's investigative process were alleged to have resulted in a breach of its duty of fairness to the respondent. It was alleged that Mr. Grant's investigation was flawed because he failed to interview key witnesses whose testimony would have shown that Mr. Saberi was responsible for the hiring of many women with children either personally or through companies he controlled, and thus that he was unlikely to discriminate on the basis of pregnancy. It was also alleged that "Mr. Grant's reluctance to question Mr. Nieforth on his racist views that Iranian men treat women differently shows potential bias." On the first point, Mr. Saberi never suggested a single witness that the Commission should interview during the entire investigative process. It was open to his counsel to bring any witnesses he wished to the inquiry to demonstrate the "family-friendly" nature of Mr. Saberi's employment practices. As it was, only one new witness, Ms. Skinner-Adjemian, was called on this point. The central point of Mr. Grant's investigation was to determine if there was a *prima facie* case that this particular complainant had been discriminated against on the basis of pregnancy or family status. Mr. Saberi's general employment practices with regard to the hiring of women with small children would have been of only modest relevance at the investigative stage, and also would have taken up more precious time. I do not find any fault with Mr. Grant's decision not to engage in a full-scale inquisition of Mr. Saberi's hiring practices.

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*Can the respondent invoke rights under s. 7 of the Charter and if so, were they infringed?*

As noted above, the respondent argued that the stigma and public embarrassment inherent in these proceedings amounted to an interference with his security of the person, of which he could only be deprived by a procedure which met the requirements of fundamental justice. The two cases relied on by his counsel, *Blencoe, supra,* and *Kodellas, supra,* both involved human rights commission inquiries into allegations of sexual harassment. The former case featured a British Columbia cabinet minister as respondent, and the latter a prominent physician. In both cases there were delays of approximately three years between the date of the complaint and the date of the appointment of a board of inquiry, and in both cases appellate courts stayed proceedings on the basis that the respondent's s. 7 right to security of the person had been infringed, and that the delays in question could not be in accordance with the requirements of fundamental justice. The theory here appears to be that a state proceeding, such as an investigation into a human rights complaint, which has the potential to cause serious psychological upset to the respondent and his or her family, can at some point trespass on the respondent's s. 7 right to security of the person. While a speedy and fair process will be in accordance with the requirements of fundamental justice, and thus "cure" the s. 7 violation, failure to process the complaint in this fashion should result in a stay of proceedings.

There is a clear division of opinion among appellate courts in Canada as to whether s. 7 rights can ever be infringed in the course of human rights investigations, even those involving sexual harassment investigations. In *Nisbett, supra,* also a case of a sexual harassment investigation, the Manitoba Court of Appeal disagreed with *Blencoe* and *Kodellas,* stating at p. D/509 (C.H.R.R.) that "[s]ecurity of the person is simply not affected in these proceedings." In the recent case of *New Brunswick (Minister of Health and Community Services) v. G.(J.),* decided on September 10, 1999, the Supreme Court of Canada decided that s. 7 rights to security of the person could extend beyond the penal sphere, and could be invoked where state action had "a serious and profound effect on a person's psychological integrity." Such an effect was found to exist where a single mother was not entitled to be assisted by counsel under existing provincial legal aid regulations in a case where provincial authorities were attempting to retain custody of her children. *Blencoe* and *Kodellas* were not referred to, but an appeal in *Blencoe* will be heard by the Supreme Court of Canada in the near future.

Fortunately I do not have to decide between the two opposing lines of authority. Putting the respondent's case at its highest, and accepting that *Blencoe* is correct in holding that s. 7 rights may be invoked in the context of a human rights investigation, I find no evidence that Mr. Saberi has suffered any stigma or prejudice in the course of this proceeding. Nor was there any "serious and profound effect on [his] psychological integrity" as required by the Supreme Court in *New Brunswick v. G.(J.)*. There was no evidence before me that there was any public interest in the case before the August 10 hearing by Mr. Duncan. At that point there was a brief item in the local news media recounting the substance of the complaint and some of Ms. Redden's testimony, and I accept that Mr. Saberi may have suffered some adverse publicity as a result. But human rights proceedings are public matters, and the possibility of adverse publicity for the parties must be accepted as a necessary result. In the *New Brunswick* case, Lamer C.J. was quick to point out that "the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a

result of government action" (at para. 59 of unpublished judgment). There was no evidence before me to suggest that anything other than such "ordinary stresses and anxieties" were at issue in this case.

## REMEDY

S. 34(8) of the *Human Rights Act* empowers a Board of Inquiry "to rectify any injury caused to any person or class of persons or to make compensation therefor." Other decisions involving discrimination on the basis of pregnancy have allowed claims for lost wages and for humiliation and loss of dignity, and I find the complainant is entitled under both heads here. With regard to lost wages, Ms. Redden's evidence was that she began looking for work again in the week after she was laid off. She contacted the law firm of Landry McGillivray to inquire about work there, and also an accounting firm called Black & Associates. Landry McGillivray said they would try to find her some part-time work, while Black & Associates was offering full-time work, but the position was only guaranteed from the end of June until the middle of September. When it seemed as if Black was going to make her an offer, Ms. Redden spoke to Landry McGillivray again and they offered her a part-time position which she began on June 26, 1996. Ms. Redden claimed that she was entitled to be paid as lost wages what she should have received from Mr. Saberi, minus what she received from working for Landry McGillivray for the period June 26 - October 31, 1996, and minus her employment insurance benefits. Her calculations were that she should have been paid $961.54 per pay period for 13 pay periods, had she stayed with Mr. Saberi until the end of November as planned, for a total of $12.500.02. From this she deducted $5283.20 received from Landry McGillivray and $1572.00 in employment insurance benefits, for a total claim of $5644.82.

I was initially disinclined to award this entire amount because I was not sure that Ms. Redden had properly discharged her duty to mitigate. It is clear that complainants must mitigate their loss in employment dismissal situations, and that employers can properly raise the issue as a defence: *E.C.S. Electrical Cable Supply Ltd. v. British Columbia Council of Human Rights and Rachwalski* (1996), 30 C.H.R.R. D/328 (B.C.S.C.). On cross-examination Mr. Mason elicited from Ms. Redden the admission that in her own estimation she had a very good chance at the full-time job with Black & Associates, but that she took the job with the law firm because she did not want to work downtown and because she was interested in becoming more familiar with legal work. It is possible to construe this action as taking part-time work for reasons of personal preference when full-time work was available. In such a situation a complainant is not normally entitled to charge the difference to her former employer as lost wages. In this particular case, assuming a rate of pay at Black & Associates equivalent to that earned by Ms. Redden with Mr. Saberi, Ms. Redden would have earned approximately $550 more over the period in question had she taken the full-time job rather than the part-time one. However, it is up to the employer to raise the issue of mitigation and no argument or evidence was presented on the point except for one or two questions on cross-examination mentioned above. There was no evidence as to the rate of pay at Black & Associates, and of course Ms. Redden might not have got the job in spite of her own optimistic assessment of her chances. In general, Ms. Redden acted promptly in seeking out alternate employment and did in fact mitigate her losses to a considerable extent. So in the end I accept her account of her lost wages with one exception. She has included in her calculations a pay period for the first two weeks in June following her dismissal. In my view she cannot keep the two weeks' pay in lieu of notice given her on June 1st and also claim lost wages for those same two weeks. The claim for lost wages is allowed at $5644.82 minus $961.54, for a total of $4683.28. I also order the respondent to pay back the employment insurance benefits received by Ms. Redden, in the amount of $1572.

In *Sievert v Roycom Realty Ltd.*, *supra,* Board of Inquiry Susan Ashley awarded the complainant $2500 for humiliation and loss of dignity where the complainant was involuntarily placed on disability leave as a result of her pregnancy, and then constructively dismissed when she

attempted to return to work after the birth of her child. That decision was in 1994. In December 1996 the British Columbia Council of Human Rights also awarded $2500 for injury to dignity in a case of discriminatory termination of employment on the basis of pregnancy (*Armstrong v. Crest Realty* (1996), 31 C.H.R.R. D/156). An Ontario Board awarded $5000 in January 1996 (Jodoin v. Ciro's Jewellers (Mayfair) Inc. (1996), 25 C.H.R.R. D/39), although there appear to have been extenuating circumstances there. The test to be applied is that the award should be "high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable to our society" (*Willis v. David Anthony Phillips Properties* (1987), 8 C.H.R.R. D/3847 at D/3855 (Ont. Bd. Inq.), quoted with approval by Nova Scotia Board of Inquiry Evelyne Meltzer in *Miller v Sam's Pizza House* (1995), 23 C.H.R.R. D/433 at D/454). I acknowledge that there has been an upward trend in these kinds of damage awards in recent years and I award the complainant $4000 under this head of damages. All of these amounts, with the exception of the employment insurance repayment, are to carry simple interest at the rate of 5% from June 1st 1996.

It is common knowledge that many women of child-bearing age work in the real estate business across Canada in various capacities. It is apparent that while the number of complaints of discrimination on the basis of pregnancy brought against employers in this business is not large in absolute numbers, there is a significant cluster of reported board of inquiry decisions across the country involving this particular sector of the economy. This pattern leads me to suggest that the Nova Scotia Human Rights Commission inquire of the Halifax Real Estate Board and any local boards elsewhere in the province whether they undertake to educate their members about their responsibilities as employers under the *Human Rights Act,* and to work with them in developing appropriate materials or programs as needed.

I thank counsel for their assistance throughout the inquiry.

PHILLIP GIRARD

BOARD OF INQUIRY