IN THE MATTER OF: The Nova Scotia *Human Rights Act* (the "Act")

- and -

IN THE MATTER OF: Board File No. 51000-30-H06-0266

BETWEEN:

Roger LeFrense
(Complainant)

- and -

IBM Canada Ltd.
(Respondents)

- and -

The Nova Scotia Human Rights Commission
(NSHRC)

Board of Inquiry: J. Walter Thompson, Q.C.

Heard: February 3, 4, 10, 2014
May 8, 2014
November 3 & 4, 2014
December 1, 2, 4, 2014

Counsel: Brian Johnston, Q.C. and Michelle Black,
for the Respondents

Lisa Teryl, for the NS Human Rights Commission

Decision of the Board of Inquiry

Introduction

On October 20, 2006, the complainant, Roger LeFrense, filed an allegation that his employer, IBM Canada Ltd., had discriminated against him as an employee because of his physical disability contrary to the *Human Rights Act*, Stats. N.S. 1989, c. 214 as amended. Mr. LeFrense is an IT maintenance specialist, or in the nomenclature of IBM, a Systems Services Representative (SSR). The IBM job description says that an SSR is "primarily responsible for the post sale maintenance of IBM hardware and software in customer accounts." Mr. LeFrense began work in the field in 1994, and through a series of mergers and acquisitions, came to be an employee of IBM in 2000. His work involved, on rotation as a part of a team of other specialists, some overtime, an on-call weekend every eight weeks and an on-call night every two weeks.

In April, 2004, Mr. LeFrense was diagnosed with sleep apnea. He sought relief from the on-call night and week end work. IBM said it could not accommodate him. He went on disability in July. In December and in February, 2005 he had unrelated back surgeries. He advised IBM in April, through his doctor, that he had recovered from his back surgeries and was ready to return to work on a limited basis. In September 2005, IBM offered Mr. LeFrense a return to work on regular hours together with two Saturdays per month, and some overtime as required to finish work in progress.

Mr. LeFrense, again through his doctor, made a counter proposal suggesting only one Saturday per month with no night driving. Further delay ensued through the fall of 2005 as IBM and its disability plan administrators at Manufacturers Life ("Manulife") considered the counter proposal. Then IBM decided it could not accommodate his needs and sought out another IBM position with him. Mr. LeFrense continued on paid leave all the while. In the early summer of 2006, IBM offered and Mr. LeFrense accepted, a return to work as a parts specialist, albeit at a reduced salary. IBM subsequently sold this part of its technical service business and so Mr. LeFrense is no longer employed by IBM.

The Complaint

Sleep apnea is a medical condition in which breathing stops and starts numerous times through the course of the night. The afflicted person may be sleepy through the following day. Mr. LeFrense's biggest concern was the job requirement that

he drive at night to customer locations and the risk he might fall asleep at the wheel. Mr. LeFrense says in his complaint:

> ...I refer to all of the above information and say that I believe I was discriminated against by IBM Canada Ltd. because of my physical disability. I believe that if I had not been diagnosed with sleep apnea, and had not required the restrictions to my employment, I would not have had to accept the lesser position nor the reduction in salary. I further believe that my overall medical condition was a factor in why I have not been accommodated sufficiently. I allege that these actions constitute discrimination and they are prohibited under Sections 5(1)(d)(o) of the Nova Scotia *Human Rights Act.*

In sum, Mr. LeFrense submits that IBM has discriminated against him by failing to accommodate his disability by not adapting his work schedule so that he could stay employed as an SSR. He seeks damages including compensation for lost salary.

The Issue

IBM completely accepted from the outset, and throughout, that Mr. LeFrense's sleep apnea is a "physical disability". The issue is whether, notwithstanding IBM's accommodations of Mr. LeFrense, it would have caused IBM "an undue hardship" to have maintained Mr. LeFrense in his position as an SSR.

Chronology

I accept the following as facts. I do not understand they are contested. There is a complete written record in evidence and the written record was in almost every respect confirmed by testimony.

Mr. LeFrense began to suffer from the effects of his sleep apnea in the fall of 2004. He sought treatment. In late May, 2005, he advised his superior at IBM, Mark Gallant, that his condition was worse and asked that he be removed from the on-call schedule. He said:

> Mark,
>
> This msg is to advise that health condition is getting worst (sic). I am requesting that I be removed from the on-call schedule until my diagnosis is complete and treatment what ever form that takes

improves my condition.

> I also will not be able to do second shift on Thursday. I tried second shift last Thursday and found it too tiring. I am not sure if the 2 are related but after working last Thursday night I found myself sick for 3 days.
>
> If there are any medical forms required by IBM forward them to me and I will get my doctors to sign them.

The two later conversed by phone. Mr. LeFrense followed up with an email and Mr. Gallant replied saying that "...your job requires that you be available to take your fair share of standby, overtime shifts, etc. as required... but Roger the job is the job. I am unable to customize the job to suit your personal requirements - particularly when that would mean impacting the other members of the team."

IBM accepted that Mr. LeFrense was disabled and unable to work at his job. IBM had contracted out responsibility for the assessment and management of its disability claims to Manulife. Contracting out provides a greater degree of confidentiality protection for medical issues and independence in the decision making about the degree of disability and its effect on the person's ability to work. Mr. LeFrense went on disability through Manulife and remained on disability for over two years. IBM actually paid the benefits throughout this time. Manulife did not act as insurers, but rather as administrators of the plan.

Mr. LeFrense suffered a back injury which required two surgeries through the winter of 2004-5. By the spring of 2005, he was ready to consider some return to work. His physician, Dr. George Burden, wrote Manulife on April 26, 2005. Dr. Burden advised that Mr. LeFrense's back had been treated successfully, but his sleep apnea had been more difficult to manage. Dr. Burden concluded:

> Due to the sleep apnea and persistent headaches, I feel that Mr. Lefrense, although ready to return to work, should not work overtime nor any night shifts until his problem is further delineated. To date, he has not had any problems with falling asleep with activities such as driving; however, I feel that if he became exhausted or worked shifts that this could become problematic.

Delineation, according to Dr. Burden, would await further investigations at a sleep laboratory, but these could not be performed for another two years in March, 2007.

On September 14, 2005, Kristin Brothers of Manulife, but on behalf of IBM, responded to Dr. Burden. She quoted his phrase "...should not work overtime nor any night shifts until his problem is further delineated". She proposed a return over six weeks to a schedule of:

- Monday to Friday 8 hour days

- Occasional Saturday, 8 hour days - maximum two Saturdays per month.

- Occasionally working longer than 8 hour day (ie. 9 hour day to complete the job that he is working on)

Dr Burden replied crossing out the two Saturdays and replacing the two with one. On the lines left at the bottom for physician comments he said:

> Suggest maximum one Saturday per month
>
> no night driving.

The communication between Mr. LeFrense and Dr. Burden on the one hand, and between Manulife and IBM on the other, petered out thereafter. Dr. Burden testified that what he, or more properly speaking Mr. LeFrense proposed, was not to be taken as having been written in stone and he meant to leave the door open for further dialogue. Mr. LeFrense says he was open to options, including working the two Saturdays as had been proposed by IBM in September. Mr. LeFrense was disappointed that IBM or Manulife did not communicate with him about options for his return to work. Since what happened in the weeks after the September 14th letter proposing the return to work is crucial to Mr. LeFrense's argument, I will relate the sequence as it appeared from the evidence.

The crucible for IBM seems to have been a conference held on October 14, 2005 between Mr. Mark Gallant, Mr. LeFrense's immediate supervisor at IBM, Chuck Frost, a senior national human resources executive with IBM, Dr. Rick MacKenzie, consulting physician with Manulife, Becky Benedetto Lawrence and Kristin Brothers Daley also of Manulife. Ms. Daley said she does not have a personal recollection of the conference, but from her notes she could say that IBM told the meeting that Mr. LeFrense could not be accommodated in the job if he could not do weekends. Notes of the meeting itself say:

> Oct.14/05 Met with Dr. Rick MacKenzie, Mark Gallant, & Chuck Frost to review restrictions & RTW schedule advised by Manulife. Mark & Chuck advise accommodation "unreasonable" for Rogers role.

> Rick advised if accommodation is unreasonable we will need to look for alternate jobs. Next steps: Chuck & Mark looking into alternate roles ...

Ms. Daley said she is not in a position to assess the business issues associated with a plan she might devise for a return to work. She said it looked like there had been conversations to see if accommodation was possible, but that IBM had decided it was not.

Mr. Frost testified that there had been discussions about how to accommodate the restrictions on Mr. LeFrense's ability to work. Mr. Frost said the restrictions were not manageable in the circumstances especially because Mr. LeFrense's condition would not be delineated for another year and a half. Mr. Frost said that IBM did not know if anything would change even then. Mr. Frost said that whether the accommodation was temporary or permanent was, in that light, a question of definition. The fact remained, he said, that even if IBM was able to accommodate, IBM still would be faced with the restrictions until his reassessment, and the restrictions might well continue thereafter. The work, he said, would fall to the rest of the team. This was manageable in the short term. There were not, however, many other members of the team who would want to be called out to cover Mr. LeFrense's shifts, and so quickly he said IBM would end up having significant difficulty in managing. The job is the job he said, and it involves taking one's fair share of call outs. He said that after a lot of back and forth, IBM concluded it could not accommodate Mr. LeFrense's restrictions. IBM then moved on to find another job for Mr. LeFrense.

IBM offered Mr. LeFrense the parts job in June 2006. Mr. LeFrense accepted that job. He did inquire whether the salary was negotiable, but otherwise gave no sign that he was dissatisfied with the accommodation offered him.

Mr. LeFrense continues to suffer the effects of on going sleep apnea even to this day. He seldom drives at night and is often afflicted with severe headaches.

The Law

Mr. LeFrense alleges that he has been discriminated against on the basis of disability, to wit sleep apnea. A disability is defined by the Nova Scotia *Human Rights Act* as follows:

> (1) "physical disability or mental disability" means an actual or perceived

(i) loss or abnormality of psychological, physiological or anatomical structure or function,

(ii) restriction or lack of ability to perform an activity,

(iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device,

(iv) learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(v) condition of being mentally impaired,

(vi) mental disorder, or

(vii) dependency on drugs or alcohol;

Discrimination is said to be:

> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. 1991, c. 12, s. 1.

The Act goes on to prohibit discrimination in respect for employment because of a physical disability:

> Prohibition of discrimination
>
> 5(1) No person shall in respect of

(d) employment; ...

discriminate against an individual or class of individuals on account of ...

(o) physical disability or mental disability;

There are exceptions which IBM may qualify for:

6 Subsection (1) of Section 5 does not apply ...

(c) in respect of employment, ...

(e) where the nature and extent of the physical disability or mental disability reasonably precludes performance of a particular employment or activity;

(f) where a denial, refusal or other form of alleged discrimination is

(i) based upon a bona fide qualification,

(ia) based upon a bona fide occupational requirement;

(ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society; ...

IBM submits that it is entitled to the exception stated in section 6, immediately above, based on a "bona fide occupational requirement" (BFOR). The application of a BFOR exception, as I understand it, involves a consideration of the three-step test stipulated by the Supreme Court of Canada in *British Columbia (Public Service Employment Relations Commission) v. BCGSEU,* [1999] 3 S.C.R 3 (aka "Meiorin") at paragraph 20:

1. that the employer adopted the standard for a purpose rationally connected to performance of the job

2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

> 3. that the standard is reasonably necessary to the accomplishment of the legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer. (emphasis added)

The parties agree that working on-call on occasional weekends and week nights was an integral part of an SSR's job. Customers' technical needs must be served off hours. One has to travel to customers' places of business, sometimes a distance out of Halifax, and sometimes at night. The parties agree that IBM requires this off hour work for a purpose rationally connected to the performance of the job, that IBM requires its SSR employees to work off hours to fulfill a legitimate purpose, and off hours work is reasonably necessary to the fulfilment of that legitimate purpose.

Thus, the discussion moves along to and is focussed on "undue hardship". *Hydro-Quebec v. SCFP-FTQ* [2008] 2 S.C.R. elaborates on the meaning of the duty to accommodate to the point of "undue hardship" in such disability cases.

> [13] As these passages indicate, in the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship. L'Heureux-Dubé J. accurately described the objective of protecting handicapped persons in this context in Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville), [2000] 1 S.C.R. 665, 2000 SCC 27 (S.C.C.), at para. 36:
>
> > The purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms. With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job.
>
> [14] As L'Heureux-Dubé J. stated, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons

who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

[15] However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration....

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

[17] Because of the individual nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties – or even authorize staff transfers – to ensure that the employee can do his or her work, it must do so to accommodate the employee. Thus, in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôspital général de Montréal,* [2007] 1 S.C.R. 161, 2007 SCC 4, the employer had authorized absences that were not provided for in the collective agreement. Likewise, in the case at bar, Hydro-Québec tried for a number of years to adjust the complainant's working conditions: modification of her work-station, part-time work, assignment to a new position, etc. However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.

[18] Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or <u>if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.</u> (emphasis added) In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. I adopt the words of Thibault J.A. in the judgment quoted by the Court of Appeal, *Québec (Procureur général) v. Syndicat de professionnelles du gouvernement du Québec (SPGQ),* [2005] R.J.Q. 944, 2005 QCCA 311: [TRANSLATION] "[In such cases,] it is less the employee's handicap that forms the basis of the

dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship" (para. 76).

[19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

Analysis

I am satisfied that IBM accommodated Mr. LeFrense, and that imposing his terms of work on his team colleagues would have imposed an undue hardship on IBM. I dismiss the complaint. In the end, I am not satisfied that the complaint has much merit or that it should ever have been referred for a hearing at all. I mean this to be no reflection upon Mr. LeFrense personally. He is by all accounts a gentleman, competent and faithful in his work.

The parties agree that IBM's was a service business run to suit the immediate and pressing needs of its customers. Enterprises depend on technology. If the computer does not work, then one is often out of business and the computer has to be fixed quickly. If the computer needs to be upgraded, and this demands that the computer be taken out of service for the purpose, then the upgrade takes place when the enterprise is not operating. Those employed in the business of serving these customers must live that reality. The IBM jobs here, I accept, were not in their nature nine to five jobs, nor could they be.

Mr. LeFrense was a part of an eight or nine person team. Each was on-call one weekend in eight, and one night Monday to Thursday every two weeks. Working the nights and weekends, albeit with flexibility within the team, was the job. Customers, for reasons vital to their business, demanded night and weekend work. IBM's employees had to service these customers. If someone was unable to do the extra work, then his or her colleagues on the team would have to. The job required on-call weekend and overnight work. IBM's requirement of on-call weekend and overnight work was a bona fide occupational requirement within the Nova Scotia *Human Rights Act* and the standards set out in *Meiorin* above. IBM's requirement was rationally connected to the performance of the job. IBM adopted the requirement in the good faith belief that it was necessary to fulfill its clients requirements.

The parties agree that Mr. LeFrense had a loss of physiological function and a

restriction in his ability to perform certain activities within the definition of physical disability under s. 2 of the *Act*. The issue, again, is whether IBM's decision that it could not accommodate the restrictions posed by Mr. LeFrense was acceptable under the law. Whether it was acceptable turns on a determination of whether it would have caused IBM undue hardship to put him back on the SSR team with the restrictions on his work week that he proposed.

I am satisfied that as judged by the criteria set out in *Hydro-Quebec* supra, IBM did accommodate Mr. LeFrense to the point of significantly and indefinitely disrupting the team of SSRs serving its customers and thus IBM's management of that team. I accept that by the fall of 2006, it was evident that Mr. LeFrense was "no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future." *Quebec Hydro*, supra, par.19.

Manulife strove to provide an acceptable solution, as was their job. Manulife brought IBM to offering something close to Mr. LeFrense's terms. Mr. LeFrense countered this offer. As Ms. Daley of Manulife said, it was for IBM to decide whether the proposal Manulife formulated was workable. IBM swung away from the Manulife proposal and, in the end, decided it was not workable and his terms could not be accommodated.

The team context of Mr. LeFrense's employ is important. There was a fair degree of work place control among the IT service personnel at IBM. The team of eight or nine chose a first among equals to organize the time of work. It was this leader who figured out and set the schedules and shuffled the overtime. If someone was keen to pick up a weekend or a week especially with the shift premiums in place, then he might make himself available for another's shift. Others would be content to work extra weekends on projects without being on call. Even some retirees were available to rally round as might be required. Vacations, illness, and so on would always have to be accommodated, but I understand there was flexibility within the team to adapt the team members to the work requirements. Mr. Lewis Smith's experience during the last years of his service to IBM, of which more will be said later, is an example of the flexibility within the team.

I accept the testimony of Mr. Frost and Mr. Gallant that this flexibility enabled the team and management to cope with people being off for some periods of time. I also accept, however, that there were limits. I accept that at some point a team member's absence became unmanageable without imposing an undue hardship primarily on the other members of the team, but also then on IBM. I accept that, as Mr. Frost and Mr. Gallant testified, accommodating Mr. LeFrense's indefinite absence became unmanageable. IBM had to find someone who could fulfill the regular time requirements of the job to replace him as member of the team and,

if possible, find him another job with IBM.

In the fall of 2005, when IBM decided that it must hire a permanent replacement for Mr. LeFrense and find him another job, Mr. LeFrense had been on disability for a year and a half. I accept that even after that year and a half, Mr. LeFrense's return to work was uncertain. Mr. LeFrense was not scheduled for further diagnostic work until March, 2007 when he could expect to present himself to the sleep laboratory for a delineation of his sleep apnea. I accept IBM's view that the further delineation of Mr. LeFrense's condition would not enable Mr. LeFrense's return to work as a member of the team performing the team's regular functions and that, as a result, his return was uncertain. I accept that for the purposes of managing the team, the disability was in effect permanent. Indeed, Mr. LeFrense, even now, almost ten years later, still suffers the effects of sleep apnea. He seldom drives at night and suffers from fairly severe headaches if he has not slept well.

In September, 2005, IBM through Manulife, had proposed that Mr. LeFrense gradually return to work and accept a schedule of:

> Monday to Friday 8 hour days
>
> Occasional Saturday, 8 hour days - maximum two Saturdays per month.
>
> Occasionally working longer than 8 hour day (ie. 9 hour day to complete the job that he is working on)

This was not acceptable to Mr. LeFrense who, after consultation, had his doctor cross out the two Saturdays for one and suggesting one Saturday per month and no night driving.

I found IBM's proposal, in the circumstances, to be reasonable when it first came into evidence and still find it so now. I note too that Dr. Burden initially had a positive reaction to the proposal.

At some point, it seems to me, we have to defer to an employer's good faith efforts to accommodate an employee and manage the work place. We do not, I think, want to put ourselves in a position where we are second guessing management's reasonable and good faith decisions on accommodation, nor do we want to put ourselves in a position where we are fiddling with a return to work plan, saying that one is acceptable, but another with a minor variation is not. I cannot, then, say that Manulife's mediated IBM proposal to Mr. LeFrense of September 14th, that he work occasional Saturdays to a maximum of two a month and overtime to complete a job as required, was a failure to accommodate, but his own counter

proposal through Dr. Burden saying one Saturday and no night driving, would have been.

I do not understand, furthermore, why Mr. LeFrense did not at least try to work the schedule IBM proposed. Early night driving from time to time after some overtime hours required to finish a particular job for a customer does not seem to me to present much of a risk. If one had to have a nap at the side of the road on the way home, or grab a Tim's, or get out of the car and take some fresh air, then so be it. We all have to be careful not to drive if sleepy. If Mr. LeFrense faced a lot of overtime producing a lot of driving while fatigued, then that might have been addressed.

Nor do I think, as was a reason suggested for the counter offer of one Saturday per month, that IBM would ask Mr. LeFrense to work two Saturdays in row as a part of two his Saturdays per month, much less four in a row over consecutive months. Even if IBM did suggest such a thing, I expect that IBM or the team could have worked out some accommodation.

IBM, after due consideration and work through Manulife, made a reasonable proposal of what it could accommodate without undue hardship. I accept IBM's view. Accommodating beyond the September 14th proposal, I am satisfied, would result in undue hardship to IBM by imposing too great a burden on the rest of the team and on IBM's needs to manage its work force to service its clients' urgent and pressing needs.

Mr. LeFrense said he expected a response to the counter proposal made through Dr. Burden and made the point in argument that accommodation involves a dialogue. Mr. LeFrense's argument is that he expected IBM to continue the dialogue and that it represents a failure by IBM to accommodate not to have done so. Arguably, there was room for continuing dialogue, but Mr. LeFrense had set out the requirement of no on-call work at the outset in May-June, 2004. IBM rejected that proposal then. Mr. LeFrense retained that requirement through Dr. Burden's letters of April 26th and September, 2006. IBM decided in June 2005, and remain consistent in saying, that it could not, as then Mr. Gallant said, "customize the job to suit your personal requirements - particularly when that would mean impacting the other members of the team."

Mr. LeFrense's demands remained substantially the same through the fall of 2005 when, I am satisfied, IBM decided that it simply could not accommodate him. IBM had rejected Mr. LeFrense's proposed work schedule as being unmanageable at the outset. Manulife was able to get IBM to place a work schedule close to Mr. LeFrense's demands on the table, but once Mr. LeFrense effectively rejected that

proposed work schedule, reverted to its earlier position and found him another job altogether. There had been a significant dialogue and I find no fault in IBM's acceptance of Dr. Burden's statements as being definitive statements of what Mr. LeFrense could be expected to do, and more importantly, not do. Falling asleep at the wheel presents a mortal danger to the driver and to those in other cars. If the doctor says "no night driving" then IBM might be reckless to ignore the direction. IBM could not think that Dr. Burden's statements were mere negotiating ploys. IBM's decision to put its shoulder to the wheel and find Mr. LeFrense a new position is, in my view, both reasonable and commendable.

Communication is, by definition, a two way process. Mr. LeFrense would have it that IBM is liable because it failed to respond with further alternatives to the "one Saturday no night driving" proposal. He was the one off work. One would have hoped for a stream of proposals to be coming forward from him to get back on to the team. One is left with the impression that he felt entitled to tell IBM he could not work and then expected IBM to adapt itself and the rest of the team to suit his requirements even if this meant burdening his colleagues with his on-call shifts or adding personnel while holding his position open for him.

Mr. LeFrense made much of another employee, Mr. Lew Smith, arguing that since Mr. Smith did no on-call work for a number of years, then IBM should have allowed him to do no on-call work as well. From the evidence given about him by Mr. Ray Deschenes, Mr Patick Dobbin and Mr. Mark Gallant, however, Mr. Smith appears to have made his own arrangements within the team without involvement of IBM management. Mr. Smith would appear to have been a good team player. He was available to work extra hours and if he did not work the standard on-call shifts, then he made up for it with other shifts and other work beyond the nine to five Monday to Friday routine. The evidence is that he worked with the team in the fluid rather unstructured method of the team to see that the team's work was done. By agreement with his colleagues, Mr. Smith worked some hours, his colleagues worked others. IBM management, on the evidence, was not a significant player in Mr. Smith's schedule.

Mr. LeFrense, himself, seemed from his own evidence to be largely unaware of how Mr. Smith and the team arranged his work, but still alleged that Mr. Smith had been "accommodated" by having been relieved of all on-call work for years. There was, however, no need for IBM management to "accommodate" Mr. Smith, and throughout virtually all of the time Mr. LeFrense refers to Mr. Smith not taking on-call work IBM was not "accommodating" Mr. Smith at all. Indeed, IBM did not "accommodate" him until he had a heart attack on the job in December, 2004. He returned to work promptly after his heart attack, and continued to chip in with overtime until he retired a few months later in September, 2005.

Circumstances alter cases. I am not sure that Mr. Smith's work experience would be relevant even with a better analogy to Mr. LeFrense. Simply because something was worked out for one person does not set a precedent for everyone else, but in any event, I am satisfied that the circumstances of Mr. Smith's participation in the team, even after his heart attack, were different than Mr. LeFrense's needs. Mr. Smith worked extra time. Mr. LeFrense's needs demanded no on-call work, that he work nine to five and limited any extra hours to one or two Saturdays per month with little or no night driving. There is no evidence that he could have put in the extra hours at the times Mr. Smith apparently did, even if indeed they were not "on-call".

Hydro refers to the opinion of Justice Wilson in *Central Dairy Pool, supra* saying that relevant factors to be considered specifically may include the financial cost and "the prospect of substantial interference with the rights of other employees." In *Hydro,* itself, the court says that "....if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship."

Furthermore, a number of tribunals, as submitted by IBM's counsel, have determined that an employee cannot expect, as a matter of accommodation, to have a job of the same salary or working conditions as the former position and that an employee has a role to play in his own return to work. The circumstances of this case, in my opinion, fall well within these parameters.

Mr. LeFrense also argues, however, that in effect, to pay him less in his parts job was an act of discrimination, that he was being paid less somehow because of his disability. Mr. Frost explained how Mr. LeFrense's salary was calculated in his new position within the ranges IBM had established. His explanation was full and rational. Again, there was not the slightest hint of any "discrimination". Mr. LeFrense was paid as much or more than the incumbent, who then moved into an SSR position. Within a short time, Mr. LeFrense was given a significant raise. I accept that the skills and experience required for the SSR position were higher and so was the stress of the job with the urgent need to perform to clients' satisfaction sometimes at all hours. Mr. LeFrense no doubt was over-qualified for the parts position, but the demands upon him were significantly less. In the end, the new position, without any night, weekend and on-call work, accommodated his disability within the parameters he, himself, had established.

IBM argued that Mr. LeFrense did not make the threshold of establishing a *prima facie* case of discrimination. I wrestled with this argument, but in the end, decided that inevitably once a person submits a disability, it falls upon the employer to

establish it has accommodated the person to the point of undue hardship. Once a person establishes a disability, and as this case shows, most anything can be such, then it falls to an employer to accommodate even if there is no "discrimination" in the ordinary sense of the word, or even within the definition of discrimination in the *Act*. It is "discriminatory" in the legal sense not to accommodate to the point of undue hardship.

Justice L'Heureux-Dube reminds us, however, of the essential nature of disability discrimination claims. They are still human rights claims. The "...specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics." I do not see in the evidence much to substantiate an allegation that IBM arbitrarily refused Mr. LeFrense's accommodation, nor do I see anything to suggest that IBM had preconceived ideas about the effects of his condition on his ability to perform the job. I do not see, in the terms of section 4 of the *Act* that IBM made a distinction based on Mr. LeFrense's disability which had the effect of imposing a burden on Mr. LeFrense. His was a long term disability claim. IBM and Manulife treated it as such. Thus, I am left to wonder whether Mr. LeFrense's claim even qualifies as "discrimination" in the conventional sense and generally to worry about the trivialization of human rights complaints and their confusion with employer-employee disagreements. In any event, what we are talking about, in my view, is, in the end, not a case of "discrimination", but rather IBM working with an employee under the terms of a disability plan to deal with what is simply a fairly common health problem.

As Justice L'Heureux-Dube says, discrimination is arbitrary and based on preconceived ideas concerning personal characteristics which do not really affect a person's ability to do a job. There is none of that in this case. Everything in this process is inconsistent with the arbitrary nature of discrimination. IBM, through Manulife, sincerely implemented the processes in place to accommodate disabled employees. IBM, I am satisfied, proceeded throughout in a systematic, measured and thoughtful way through the processes of this large and well established organization. IBM accepted that Mr. LeFrense had sleep apnea and that the sleep apnea disabled him in the way in which he and his physician said he was disabled. Then, I am satisfied, IBM accommodated him. IBM paid disability payments for two years, then hired him in a different job that required no overtime or on-call night and weekend work. I find no fault in this process.

IBM treated Mr. LeFrense respectfully throughout. There was no condescension, no paternalism, nothing that could be said to smack of bad faith. While Mr. Gallant personally wondered why Mr. LeFrense could or would play golf while drawing disability, and commented on Mr. LeFrense losing credibility within the team, there is in all of the pages of all of the volumes that I have seen or have been

pointed out to me, no suggestion that IBM was not acting in good faith. Mr. Gallant's comments may be regarded as a healthy scepticism about a disability claim, and in any event, the comment is balanced by Mr. LeFrense's remark upon transfer to the service of IBM that people had to be crazy to work those hours and he would be getting a doctor's note. I attach little weight to either statement. The point is that overall, I am more than satisfied that IBM and its cohort at Manulife treated Mr. LeFrense's case seriously and without "discrimination" over the period of a number of years.

In the ordinary sense of the word, there was no "discrimination" here. The *Act,* however, defines disability broadly. Almost anything may become a disability if raised and presented to an employer as such. Then the duty arises on the employer to adapt to the point of undue hardship, or so I conclude. The issue becomes not whether Mr. LeFrense was "discriminated" against, but rather whether he was accommodated to the point of undue hardship. The accommodation tail can wag the discrimination dog.

As IBM argued, this human rights complaint might indeed be regarded as a recast workplace dispute about working conditions and money. The issue, at bottom, as IBM argued, might not be that IBM failed to accommodate Mr. LeFrense, but rather that IBM did not implement his demands and in the end did not pay him as much in his accommodated full time, nine-to-five, parts position as it had been paying him in his technical service position. The failure to accommodate then becomes a failure to pay him as much as before. Someone does not get his own way in a work place dispute and so resorts to the hammer of the human rights complaint process. Certainly, I am discouraged that Mr. LeFrense, having already been in contact with the Human Rights Commission and having learned from the Human Rights Commission that he could still pursue a discrimination claim if he accepted the parts position, then without reservation, accepted the parts position and then sought compensation for his lost income through this discrimination complaint.

Conclusion

I am satisfied that IBM accommodated Mr. LeFrense by paying him disability for over two years, by actively and seriously considering his condition and how it might be accommodated within the requirements of the SSR position and then, when this proved unmanageable without undue hardship to Mr. LeFrense's colleagues and to IBM itself, IBM found him another position that did accommodate the effects of his condition as they had been repeatedly stated by his own physician. I dismiss the complaint.

IBM moved to have this complaint dismissed at a preliminary stage because of the Commission's delay in bringing the complaint forward for many years after it was first brought to IBM's attention. I had reason in dealing with that motion to review the correspondence at the early stages of the complaint, and in particular the responses to the complaint provided by IBM's corporate counsel. I was impressed then by these responses. In the event, I dismissed the application having satisfied myself that IBM was not prejudiced by any delay. The hearing itself bore that out, but I can still go back to the responses and see in them a complete answer. The responses were factual and complete. Without rhetoric, they persuasively established that IBM had worked Mr. LeFrense's disability seriously, concluded that it could not manage his demands, and found him another position. I regret that after so many years and the expenditure of so much, counsel's responses were not accepted by the Commission then and the complaint dismissed.

Dated at Halifax, Nova Scotia this 22nd day of January, 2015.

J. Walter Thompson, Q.C.
Board Chair