2012 NSHRC
51000-30-H10-2159

IN THE MATTER OF
THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

BOARD OF INQUIRY

BETWEEN:

DARLENE MUNRO - Complainant

and

I.M.P. AEROSPACE COMPONENTS - Respondent

Parties:

Darlene Munro, the Complainant
self represented

I.M.P. Aerospace Components, the Respondent
represented by Kate Hopfner

Nova Scotia Human Rights Commission
Represented by Lisa Teryl

Board of Inquiry: E.A. Nelson Blackburn, Q.C.

BACKGROUND:

On October 31, 2012, I was nominated by the Chief Judge of the Provincial Court for appointment by the Nova Scotia Human Rights Commission, to a one member board of inquiry, to inquire into the complaint of Darlene Munro, dated October 12, 2011, against I.M.P. Aerospace Components. By letter dated December 10, 2012, I was appointed as a Board of Inquiry into this matter pursuant to section 32 A(1) of the *Human Rights Act* by the Nova Scotia Human Rights Commission.

The Complainant alleges discrimination contrary to section 5(1)(m), sex (gender/pregnancy) of the *Human Rights Act*, RSNS 1989 c.214 as amended. The complaint dated October 12, 2011, was produced in this hearing as Exhibit C-1. The relevant sections of the Nova Scotia *Human Rights Act*, are as follows:

3(n) "sex" includes pregnancy, possibility of pregnancy and pregnancy-related illness:
5 (1) No person shall in respect of ... discriminate against an individual or class of individuals on account of ...

(m) sex.

The Board conducted two conference calls on June 28, 2013 and again October 27, 2013, and this hearing was heard over a period of four (4) days commencing December 17, 2013, and continuing on February 17, 18 and 28, 2014. I received final written closing arguments on April 22, 2014, and I received final written submissions from the parties on May 30, 2014, concerning the timeliness of the complaint.

The issue this Board has to decide is whether the Respondent contravened the Human Rights Act, supra., and in particular section 5(1)(m), by not accommodating the Complainant during her pregnancy from a time when she notified the Respondent on or about June 7, 2010, to when she left her employment prematurely on stress leave on or about October 28, 2010, when she ordinarily would have worked until the birth of her son in January 2011.

PRELIMINARY MOTION ON TIMELINESS OF COMPLAINT:

Following the written closing arguments of the parties, the timeliness of the complaint was raised in the closing written argument of the Respondent.

Section 29 of the *Nova Scotia Human Rights Act* states as follows:

29(1) The Commission shall inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this Act where

(a) the person aggrieved makes a complaint in writing on a form prescribed by the Director; or
(b) the Commission has reasonable grounds for believing that a complaint exists.

(2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

(3) Notwithstanding subsection (2) , the Director may, in exceptional circumstances, grant a Complainant an additional period of not more than twelve months to make a complaint if to do so would be in the public interest and, having regard to any prejudice to the Complainant or the respondent, would be equitable.

I was referred to WILLOW v. HALIFAX REGIONAL SCHOOL BOARD, DR. GORDON YOUNG and JOHN ORLANDO, 2006-NSHRC-2, CanLII, and also ISLAM v NOVA SCOTIA (HUMAN RIGHTS COMMISSION), 2012 NSSC 67 CanLII, and SHAW v. PHIPPS, 2012 ONCA 155, by Counsel for the Human Rights Commission.

Further, I was referred to the Nova Scotia Court of Appeal in IZAAK WALTON KILLAM HEALTH CENTRE v NOVA SCOTIA (HUMAN RIGHTS COMMISSION), 2014 NSCA 18, JUAN v LAKEHEAD UNIVERSITY [2014] O.H.R.T.D. No. 572, and WHITWELL v U.S. STEEL CANADA INC. - HAMILTON WORKS, [2011] O.H.R.T.D. No. 694 by the solicitor for the Respondent.

The Complainant argued in a written submission that she made a complaint to the Nova Scotia Human Rights Commission in October 2010 following receipt of a letter of August 31, 2010, (Exhibit C-5, tab 5, page 3) from the Respondent, whereby she was expected to notify her supervisor or charge hand when taking bathroom breaks and when returning from such breaks. She testified she had to leave work on stress leave on October 28, 2010, which was supported by a letter from her doctor and thus, she argues the conduct was ongoing.

Ms. Teryl argued on behalf of the Commission the Complainant must prove her suspension on October 14, 2010, was an incident of discrimination on the basis of pregnancy in order for the complaint to fall within the time limitation period provided in section 29(2) of the Nova Scotia Human Rights Act. She argued the Commission agrees with the Respondent that if that suspension is the only act of alleged discrimination and is not connected to the continuing discrimination, the Complainant's case may be dismissed for being outside the time limitation.

Ms. Teryl argued, however, there was evidence led of other incidents of discrimination during the one year time frame, and thus would bring the complaint within the time limitation as the discrimination continued to the date the Complainant left on stress leave on October 28, 2010. Ms. Teryl argued the ongoing requirement of the Complainant to advise her charge hand or supervisors of bathroom breaks constituted discrimination which caused the Complainant stress

and embarrassment each time she needed to go to the bathroom.

Ms. Teryl argued from the testimony of Tina Fleming, the Complainant's direct supervisor, the normal way to correct unjustified absence from work is to initiate a discipline process of verbal and written warnings and the bathroom breaks were fashioned in a corrective measure. However, Ms. Teryl argued, compelling a corrective measure with accommodation could lead a reasonable person in the position of the Complainant to think her pregnancy was a burden and, accordingly, was a discriminatory act on behalf of the Respondent.

Ms. Teryl also argued a letter from the Complainant's doctor of October 27, 2010, Exhibit C-5, tab 3, p. 1, stated she was not able to work for the duration of her pregnancy due to stress and she remained off work from October 28, 2010. She argued the accommodation regarding bathroom breaks was tied to corrective measures and thus, a discriminatory action, as it was based on the protective characteristic under the Human Rights Act of sex (pregnancy).

Further, Ms. Teryl argued the Complaint was filed on October 12, 2011, Exhibit C-1, and the allegations with respect to bathroom breaks are within the twelve month time frame under section 29(2) of the Human Rights Act as they continued up until she left work on October 31, 2010, and, accordingly, she argued the Board of Inquiry can consider the entire context surrounding the incidents alleged by the Complainant.

Accordingly, Ms. Teryl argued the entire incidents of discriminatory conduct can be taken into account as the conduct was ongoing since the Respondent's letter of August 31, 2010, respecting conditions regarding bathroom breaks, Exhibit C-5, tab 5, p. 3, and there was also evidence of other incidents of discrimination during the one year time frame which can be submitted.

Ms. Hopfner, counsel for the Respondent, argued section 29(2) of the Human Rights Act requires action or conduct to be ongoing and not simply the effects of the action or conduct. She argued the letter of October 7, 2010, Exhibit R-1, tab 32, with respect to absenteeism is not, in itself, an action or conduct; however, she argued the letter outlined a notification requirement, but the notification requirement is the effect of the letter, and it is not in itself the action or conduct on the part of the Respondent.

Ms. Hopfner said the argument of continued contravention was dealt with by the Ontario Human Rights Tribunal in WHITWELL v US STEEL CANADA INC., supra., where at paragraph 9, the

Tribunal found:

> To be a 'continuing contravention' there must be a successor or repetition of separate facts of discrimination of the same character. There must be present acts of discrimination, which could be considered a separate contravention of the Act, and not merely one act of discrimination which my have continuing effects or consequences.

Further, at paragraph 10, the Tribunal found, "the continuing effect does not extend the time limit for filing an application under the Code. If it did, then there would effectively be no time limit on filing an application, since most actions of any significance will have long term effects."

Further Ms. Hopfner argued in JUAN v LAKEHEAD UNIVERSITY, supra., at paragraph 25, as follows:

> In *Garrie v. Janus Joan Inc.,* 2013 HRTO 1955, the Tribunal set out three non-exhaustive principles to assist in identifying the distinction between an incident of discrimination and its continuing effects. The Tribunal stated at paras. 39-42:
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> > First, as the Divisional Court stated in Visic, supra., to establish that an occurrence is an incident of discrimination (as opposed to merely the continuing effects of an incident), a party must point to acts of alleged discrimination which could be considered as separate contraventions of the Code. At this stage of the inquiry, the focus is on whether the last conduct complained of could, on its own, support, a finding of discrimination.
> >
> > Second, the Tribunal looks to when the allegedly discriminatory decision or act occurred and considers whether this is distinct from the timing of its consequences. This appears to be the step at which many of the subtleties play out. At this stage, the focus of the inquiry should be on whether the incidents in question involve fresh steps taken by the parties, each step giving rise to a separate alleged breach of the Code ...
> >
> > Thus, allegations concerning a discrete, non-continuing violation

(such as the imposition of the discipline or the failure to promote or hire) may have ongoing consequences but, without more, do not amount to a series of incidents within the meaning of the Code because they do not involve any fresh steps taken past the initial alleged incident of discrimination. Similarly, without more, the fact that a respondent maintains a decision it has already taken does not involve a fresh step, nor does it give rise to a separate breach of the Code.

Third, the Tribunal has also considered when the consequences of the alleged discrimination are manifest for the applicant. For example, in cases where a respondent has terminated an applicant's employment, the Tribunal has generally applied Visic, supra, to mean that the limitation period runs from the date the employment relationship ends: Longtin, supra. This is because, while a failure to provide a particular payment or benefit may be ongoing beyond the end of the employment relationship, the consequences of severing it are generally manifest as of the date of termination. In such cases, the Tribunal has not interpreted the ongoing failure to provide a benefit or payment upon termination as a series of fresh events. The termination of the employment relationship is the act which is discriminatory rather than the ongoing payments.

Ms. Hopfner also referred to the decision of HOBLAK v ST. MARY'S CEMENT, 2010 HRTO 1799, where a decision was made by an employer about accommodation of an employee, and the employer refused to change that decision despite repeated attempts by the employee, that does not amount to an ongoing incident of discrimination.

Ms. Hopfner further argued in IZAAK WALTON KILLAM HEALTH CENTRE v NOVA SCOTIA (HUMAN RIGHTS COMMISSION) supra., the decision of our Appeal Court confirms contacting the Commission is not sufficient to keep the complaint within the limitation period and thus the argument of the Complainant that she contacted the Commission almost immediately following the Respondent's letter to her of August 31, 2010, supra., does not assist her in that regard.

Ms. Hopfner argued the disciplinary conduct in this case is the issuance of the letter of August

31, 2010, and not October 7, 2010, by the Respondent. She argued the effects of the letter may continue beyond the date of the letter, but they do not constitute action or conduct. She argued there were no fresh steps that would give rise to any claim of discrimination and the reporting requirement was the point of the issuance of the letter and there were no fresh steps taken that would make any single reporting incident.

Ms. Hopfner argued the jurisprudence is clear and not to follow those principles she referred to would suggest there would be no circumstance for a limitation period for the Complainant with respect to the letters of August 31 and October 14, 2010, supra., which she argued is not in keeping with the limitation period under the Human Rights Act. She argued the complaint should be dismissed because it is outside the limitation period, unless the Complainant can prove the October 14, 2010, discipline letter, Exhibit R-1, tab 36, supra., was discriminatory.

DECISION ON PRELIMINARY MOTION:

I have reviewed the written submissions from the parties, including the authorities cited.

Section 29(2) of the Nova Scotia Human Rights Act states as follows:

> (2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

I find a complaint was made with the Human Rights Commission on October 12, 2011, Exhibit C-1, alleging discrimination on account of sex (pregnancy) and I find following our Appeal Court in IZAAK WALTON KILLAM HEALTH CENTRE v NOVA SCOTIA (HUMAN RIGHTS COMMISSION) supra., that it is not sufficient that just a contact be made, as submitted by the Complainant in her brief, that she made contact with the Nova Scotia Human Rights Commission almost immediately following the August 31, 2010, letter that outlines her restrictions on being away from her work area, Exhibit C-5, tab 5, p. 3.

I agree with the argument of the parties that any acts of discrimination can be ongoing. However, I agree with the case law as submitted by Counsel for the Respondent that the letters of August 31, and October 7, 2010, supra., outlined the notification requirement by the Complainant when she is away from her work area and on absenteeism, respectively, and that the notification

requirement is an effect of the letter, but not the action itself by the Respondent.

I was referred to WHITWELL v US STEEL CANADA supra., and JUAN v LAKEHEAD UNIVERSITY supra, which I agree, that for there to be continued contravention, there must be successor or repetition or separate acts of discrimination of the same character and as stated in WHITWELL, supra., at paragraph 9, "there must be present acts of discrimination, which could be considered a separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences."

Further, in the same case at paragraph 10, the Tribunal stated the continuing effect does not extend the time limit for filing an application under the Code. If it did, then there would effectively be no time limit in filing an application since most actions of any significance have a long term effect.

Further, in JUAN v LAKEHEAD UNIVERSITY supra., a fairly recent decision of the Human Rights Tribunal, of April 22, 2014, the Tribunal at paragraphs 24, 25 and 26, stated as follows:

> The applicant appears to be arguing the application is timely because she is complaining about an ongoing series of events within the meaning of section 34(2) of the Code which only concluded on June 14, 2012 when the University advised her that it would not be taking any further action in response to her email of March 7, 2012. The respondent disputes this and argues that the Application relates to a single pivotal incident of deregistration and withdrawal from the program on October 26, 2010 and that while there may have been continuing effects of that incident, those continuing effects are not separate incidents of discrimination.
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> In *Garrie v. Janus Joan Inc.,* 2013 HRTO 1955, the Tribunal set out three non-exhaustive principles to assist in identifying the distinction between an incident of discrimination and its continuing effects. The Tribunal stated at paras. 39-42:
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> > First, as the Divisional Court stated in Visic, supra., to establish that an occurrence is an incident of discrimination (as opposed to merely the continuing effects of an incident), a party must point to acts of alleged discrimination which could be considered as

separate contraventions of the Code. At this stage of the inquiry, the focus is on whether the last conduct complained of could, on its own, support, a finding of discrimination.

Second, the Tribunal looks to when the allegedly discriminatory decision or act occurred and considers whether this is distinct from the timing of its consequences. This appears to be the step at which many of the subtleties play out. At this stage, the focus of the inquiry should be on whether the incidents in question involve fresh steps taken by the parties, each step giving rise to a separate alleged breach of the Code ...
Thus, allegations concerning a discrete, non-continuing violation (such as the imposition of the discipline or the failure to promote or hire) may have ongoing consequences but, without more, do not amount to a series of incidents within the meaning of the Code because they do not involve any fresh steps taken past the initial alleged incident of discrimination. Similarly, without more, the fact that a respondent maintains a decision it has already taken does not involve a fresh step, nor does it give rise to a separate breach of the Code.

Third, the Tribunal has also considered when the consequences of the alleged discrimination are manifest for the applicant. For example, in cases where a respondent has terminated an applicant's employment, the Tribunal has generally applied Visic, supra, to mean that the limitation period runs from the date the employment relationship ends: Longtin, supra. This is because, while a failure to provide a particular payment or benefit may be ongoing beyond the end of the employment relationship, the consequences of severing it are generally manifest as of the date of termination. In such cases, the Tribunal has not interpreted the ongoing failure to provide a benefit or payment upon termination as a series of fresh events. The termination of the employment relationship is the act which is discriminatory rather than the ongoing payments.

> Applying those principles, I find the last incident of alleged discrimination is the applicant's de-registration and withdrawal from the program on October 26, 2010. While it is apparent the applicant had ongoing contact with the University, I have difficulty viewing any of that contact as a fresh incident of discrimination on the basis of the particulars the applicant has set out about that contact.

I agree with the principles outlined in JUAN v LAKEHEAD UNIVERSITY, supra., and WHITWELL v USA STEEL CANADA supra., and I find the actions or the conduct in this case are the issuance of the letter of August 31, 2010, and October 7, 2010, supra., and I am satisfied that in interpreting section 29(2) of the Human Rights Act, the effects of the letters may continue beyond the date of the letter, but those effects do not constitute action or conduct and I find there are no fresh steps that would give rise to a new claim of discrimination.

The Ontario Human Rights Tribunal in WHITWELL v US STEEL CANADA supra., stated at paragraph 10, the "continuing effect does not extend the time limit for filing an application under the Code. If it did, then there would effectively be no time limit in filing an application since most actions of any significance have a long term effect."

Accordingly, from the arguments of Counsel and the Complainant and from the authorities cited, and applying the legal principles referred to herein, I find the Complainant must establish the October 14, 2010, disciplinary letter, supra., was discriminatory or there was continuation of discrimination since the Respondent's letter of August 31, 2010, supra., in order to make the complaint filed on October 12, 2011, within the time limit set out in section 29(2) of the Human Rights Act.

I will set forth a summary of the testimony and argument with respect to the matters raised at this hearing, as I find I have to consider all of the testimony and evidence filed to make a determination if there was discrimination as alleged and/or was it continuous, and if there was discrimination, pursuant to this motion, did it come within the time limit set out in section 29(2) of the *Human Rights* Act.

TESTIMONIAL EVIDENCE:

Darlene Munro testified she lives in Mapleton, Cumberland County, Nova Scotia, and her

employment with the Respondent started March 5, 2005, as a non-union, office employee, and in August 2007, she went on training in the assembly area of the Respondent's plant in Amherst, Nova Scotia, and she worked at various jobs; namely, on DeBurr, drawing control, fitting and other ancillary types of work on the floor. She testified she enjoys working for the Respondent and is still employed by them. However, she concedes she had a lot of absenteeism from work which she says, for the most part, was supported by doctors' notes or permission being granted.

Ms. Munro testified her main concern with respect to this complaint is that she notified her supervisor that she was pregnant in June 2010, and following that notification she had frequent periods of nausea, and complications from her pregnancy, which caused her to take frequent bathroom breaks resulting in her being away from her work station and she was subsequently written up for innocent absenteeism which she believed was a from of discipline for matters beyond her control.

Ms. Munro testified she did not have any major problems with her first pregnancy, however, she conceded she did miss time from work, but not as much as her second pregnancy, but she had no accommodation issues with the Respondent with respect to her first pregnancy.

Ms. Munro testified she was unable to do evening shifts due to her illness from her second pregnancy and her physician, Dr. Flynn, gave her a medical note that she should not work the 4:00 p.m. to midnight shift. She referred to Exhibit C-5, tab 3, p. 9, in support. Ms. Munro said, as a result, she was not able to work past 4:00 p.m. each day, and could not make up missed time for doctors appointments or other matters after 4:00 p.m. as she could not work more than eight hours a day and thus lost a source of income.

Ms. Munro testified the Respondent discriminated against her as they failed to accommodate her during her second pregnancy and in particular, they monitored her work, criticised her for missing time because of her complications during pregnancy and even kept a log of her bathroom breaks and accused her of fraud. She testified she was issued warnings in January and March 2010 for missing time and in particular, she testified in June 2010, when she won $1,000.00 in a lottery, she asked to leave work to get her winnings and she was granted time by her supervisor, but was later suspended for one day for leaving her work area. She testified she does not have respect for the Respondent's Human Resources Department as they have given her a difficult time over her absenteeism.

Ms. Munro testified the complications during her pregnancy forced her to take bathroom breaks and she said she had to inform her supervisor from August 31, 2010 on, following a meeting with her supervisors, when she went to the bathroom and when she returned and this was all very humiliating to her, and continued up until she went on early pregnancy leave in late October 2010, due to stress.

Ms. Munro testified there was an incident when her husband's uncle died in October 2010, and she asked for time off work to attend an internment which was conducted several hours away from her home and in her request form she referred to it as a funeral and the Respondent accused her of fraud because there was no funeral. She testified she was devastated by the Respondent accusing her of fraud and said the Human Resources Department harassed her on this matter. She testified as a result, she did not want to go to work because she was sick and if she called in sick, they accused her of missing time for no valid reason.

Ms. Munro testified her absenteeism from work was as a result of complications with her pregnancy and she believed her employment with the Respondent was in jeopardy. She testified she had various meetings with her supervisors which were followed up by correspondence to her.

Ms. Munro further testified she had to take early pregnancy leave in late October 2010, and at that time she believed there was a threat by the Respondent of termination due to absenteeism. She testified she was embarrassed in the August 31, 2010 meeting with her supervisors, which summary of this meeting was put in a letter, Exhibit C-5, tab 5, p. 13, when she was informed by her supervisors that she had to notify her male supervisor when she was going to the bathroom and when she came back. She testified the Respondent later modified that requirement so that she could leave a note on the desk of whichever supervisor was in charge that day. Ms. Munro conceded she roamed from time to time throughout the Respondent's premises, however, she said she was never away for any significant length of time and could always be reached. She also testified, she was sensitive of being around chemicals while she was pregnant and the Respondent was made aware of this and conceded they did accommodate her in that regard.

Ms. Munro acknowledged, prior to her notifying her employer in June 2010 of her pregnancy, she received a verbal warning for being absent and not calling in when she was late on January 25, 2010, which was referred to in Exhibit R-1, tab 9, and again on February 3, 2010, Exhibit R-1, tab 10, where she received a verbal warning for smoking outside of the break period and not being at her work station. She testified, however, she grieved this discipline by her employer, but

her grievance was not taken up by her union.

Ms. Munro testified on March 17, 2010, she acknowledged receiving a written warning for excessive absenteeism referred to in Exhibit R-1, tab 13, and she acknowledged all these issues were unrelated to her pregnancy. She testified after she gave notice in June 2010, of her pregnancy to her employer, she was disciplined on July 5, 2010, and given a one day suspension for leaving work to cash a lottery ticket, Exhibit R-1, tab 19, and she grieved that to her employer, but it was not pursued by her union. She testified her supervisor gave her a permission form to leave the premises and notwithstanding that, she later found out it would be a culpable absence under the attendance monitoring program (AMP) which resulted in a one day suspension, Exhibit R-1, tab 3, section 8.1.1.1. She testified she was very upset as she was given the pass by her supervisor and she was not aware of the AMP for culpable absence and also the one day's suspension was not justified. She conceded this suspension had nothing to do with her pregnancy.

Ms. Alyson Fromm, Human Resources Manager, testified on behalf of the Respondent that a pass out form from a supervisor permits a worker to leave the building but it did not indicate permission was granted, but is used mainly for payroll purposes to determine when the employee logged in and out.

Ms. Fromm testified the Complainant's supervisor had informed her he did not give her permission to leave to cash in the lottery ticket, but gave her the pass out form to leave the premises, and he believed the Complainant knew her absence was not authorized. Ms. Fromm further testified at the grievance meeting, the Complainant was concerned she was not aware she was in the AMP and if that was the case, she would not have left. Ms. Fromm testified the Complainant was fully aware her absence on that day was not excused but was just given a pass out form to leave the building. Ms. Fromm also testified at the grievance meeting the issue was never raised that the Complainant's pregnancy had anything to do with this one day suspension.

Ms. Munro testified she acknowledged posting on Facebook on July 20, 2010, Exhibit R-1, tab 21, the following excerpt: "Time to go to work, 4 days left the 6 work days off yay. Getting to be like Nazi Germany in there". … "Over at IMP stands for Idiot managers please" …"Supervisors are ok but upper management doesn't know thei ass from a hole in the ground" … "So sick of liars. If you make a mistake admit it; don't try to cover it up when someone else's' life is effected. I'm done with the fake smile and if she speaks my mouth may not be able

to shut."

Ms. Munro testified she was upset with what she felt was harassment by her supervisors about being absent from her work station and she was frustrated when she made those postings on Facebook. She testified she was sorry and she regretted it and it was done out of frustration and she apologized to Ms. Fromm when confronted.

This was contradicted by Mrs. Fromm who indicated the Complainant was very defensive and angry and did not apologize for those Facebook postings when confronted. Ms. Fromm testified she made notes of the meeting with the Complainant about the Facebook posting and referred to her notes in Exhibit R-3 which indicated the Complainant did not apologize and noted Ms. Munro told her that anything on Facebook is personal. Ms. Fromm testified the Complainant had a defiant attitude and she wanted to see the Facebook posting and to know who told her of the Facebook postings. Ms. Fromm testified the Complainant was not disciplined although she could have been for those Facebook postings.

Further, the Complainant acknowledged receiving a two day suspension on October 14, 2010, with regard to a bereavement leave claim, Exhibit R-1, tab 36. The Complainant testified she did not fraudulently claim a bereavement day, but was told by one of her supervisors, Ms. Gilfoy, a health and safety officer, she could leave for a private internment. Ms. Gilfoy in her testimony denied she indicated that to the Complainant, and further, she did not know what a private interment was all about.

The Complainant testified the accusation of fraud concerning the funeral of her husband's uncle, resulted in a heated meeting and when she was asked about the funeral being tomorrow, she responded "yes" and she believed the family getting together was classified as the same thing as a funeral. She acknowledged, however, due to the stress she was under due to her pregnancy and being harassed about her absenteeism, she stated the event was a funeral as she assumed it was the same thing, and she had no intention of defrauding or misrepresenting to the Respondent about the event. She testified she believes she was unfairly treated by the HR Department and they have singled her out.

The Complainant further denied not getting any further details of her medical condition from her family doctor, Dr. Flynn, who was her regular doctor during her pregnancy as he did provide a letter indicating she could not work night shifts after 4:30, Exhibit C-5, tab 3, p. 9, however, he

informed her he would not provide any further clarification for the Respondent. She referred to a document called Record of Events, Exhibit R-1, tab 42 page 131, a August 20, 2010 entry, that indicated she would not provide a letter from the doctor on her regularly scheduled prenatal visits, but would provide notice and appointment cards. She acknowledged there were different accommodations that she acquired at the time of her pregnancy, namely (1) not to be around the use of harmful chemicals; (2) need for frequent bathroom breaks and snacks - she agreed the Respondent through Tina Flemming, her supervisor, would accommodate her with respect to being around chemicals; however, she voiced her concern about having to tell the charge hand or her supervisor when she went to the bathroom and when she returned, especially as it was to a male charge hand and she felt embarrassed having to tell him every time she went to the bathroom. She conceded, however, she could leave a note and remove it when she returned. She testified time away from work for pregnancy related illness and medical appointments was met with resistance by the Respondent and she was still expected to work 8 hours a day for 5 days a week. She referred to notes of a meeting of October 7, 2010, Exhibit R-1, tab 33, page 110, as well as a letter from the Respondent, Exhibit R-1, tab 25, p. 99, in support.

The Complainant testified her doctor placed her on a high risk during her pregnancy because of the delay in delivering with her first child. She testified she did not believe any doctor could testify the determining factor had to do with her stress at work. She testified the doctor's letter of October 15, 2010, tab 3, page 3, Exhibit C-5, indicated she was off October 8, 2010, due to stress related to her work situation and the doctors note of October 27, 2010, Exhibit C-5, tab 3, page 1, indicated she would be off work for the duration of the pregnancy due to stress, establishes the Respondent caused her undue stress such that she had to leave earlier for her pregnancy than she normally would have done.

The Complainant testified when she was placed in culpable AMP, she did not have fear for losing her job, but she did when she received the letter of September 10, 2010, tab 25, Exhibit R-1, and she believed the medical appointments were out of her control due to her pregnancy and this appeared to be an issue for the Respondent and she believed her job could be in jeopardy.

Ms. Munro testified she went on pregnancy stress leave in late October 2010, which was an earlier leave than she had expected, which would have been in early January 2011.

Ms. Munro conceded she has missed a lot of time, but testified she had valid reasons due to complications due to her pregnancy, and feels she was punished by her employer for absenteeism. She testified she enjoys her work and continues to work for the Respondent, and she wants to do her job without being harassed or worried about being fired.

Ms. Munro testified she is seeking $14,500.00 in damages, less any deduction for Employment Insurance benefits received, which includes lost wages from the beginning of her maternity leave in late October 2010, which was earlier than planned, and for additional compensation for pain and stress and travel expenses. She is also requesting the Board Order the Respondent's managers and supervisors undergo sensitivity training dealing with staff.

Ms. Tina Flemming, the Complainant's supervisor, testified in relation to the Thanksgiving weekend of October 2010, she referred to Exhibit R-1, tab 26, where the Complainant requested in writing time off from work on September 14, 2010, for October 12 to 15, 2010, (Tuesday to Friday) following that long weekend, and the request was denied due to staffing reasons. She testified there were a number of employees who previously requested the time off for the long weekend and that was the reason the request was denied.

Ms. Flemming testified the Complainant also verbally requested time off work the Friday prior to the long weekend, namely October 8, 2010, after the September 14, 2010, request was denied. She testified with respect to Exhibit R-1, tab 29, the Complainant submitted a bereavement request on October 6, 2010, requesting to be off work the Friday before the long weekend. She testified the form indicated the date of the funeral was Friday, October 8, 2010.

Ms. Fromm testified under the Collective Agreement an employee could get payment for the day of the funeral only, but there was flexibility for exceptional circumstances. Ms. Flemming and Ms. Fromm testified the timing of the requested day was suspicious and they looked into it further and found the obituary for her husband's uncle, Exhibit R-1, tab 30, made no mention of a funeral on October 8, 2010, but a celebration of life on October 16, 2010, which was confirmed when she contacted the funeral home who indicated there was no funeral or celebration of life on October 8, 2010, with respect to the Complainant's husband's uncle.

Ms. Fromm and Ms. Flemming referred to notes of October 7, 2010, of their meeting with the Complainant, Exhibit R-1, tab 33, where the Complainant had indicated her husband's uncle was being laid out tomorrow (October 8, 2010) in his veteran's attire and was being sent to

Whitehead, Guysborough County. Ms. Fromm said the funeral home they contacted confirmed they were not releasing the remains. During the meeting Ms. Fromm testified the Complainant was present along with a union representative and Ms. Fromm told the Complainant they required some form of proof and the Complainant then cut her off and was defiant, and she referred to her notes of a meeting with the Complainant on October 7, 2010, Exhibit R-1, tab 33, pages 111 and 112, in support, being the responses from the Complainant. The notes also indicated the union representative for the Complainant supported the Respondent for the Complainant to cooperate and give them some proof, and they surmised the Complainant had been caught and that is why they were upset.

Ms. Fromm testified there was no mention made by the Complainant at the meeting of October 7, 2010, that Ann Gilfoy had indicated to the Complainant how she was to fill out the bereavement form. The discipline was initially grieved by the union, but it was not pursued. She testified she recalls three other suspicious bereavement leave forms from other employees where those employees got paid and they were also disciplined.

Ms. Ann Gilfoy testified she received Ms. Fromm's note, Exhibit R-1, tab 16, which stated "Darlene is unable to work the 4 p.m. to 12 a.m. shift and they are to be notified if there is any change in the decision", if she was able to work overtime past 4 p.m., she had to get a doctor's letter and permission which she did not do.

Ms. Gilfoy testified there was work available on weekends from time to time. The Complainant indicated one of the reasons she did not get any further reports from Dr. Flynn, was Dr. Flynn discharged her as a patient and he was very temperamental and did not want to get into any specifics about variations on night shift and accordingly, he refused to give any clarification.

Ms. Fromm and Ms. Gilfoy testified the Complainant was permitted to work before her shift started on weekends as long as there was work available. Both Ms. Fromm and Ms. Gilfoy testified they accommodated the Complainant with respect to Dr. Flynn's written note for her not to work the evening shift during her pregnancy, and they allowed the Complainant to work the day shift. Ms. Gilfoy testified there were a list of chemicals the Complainant would have to be cautious around as referred to in Exhibit R-1, tab 20, and this list was prepared by the Complainant and reviewed with both Ms. Gilfoy and Ms. Flemming who complied with her concerns and there was never any problem. They testified at the time the Complainant prepared the list, she was working as a trainee fitter assembly worker and she was not required to train on

50 percent of her position due to her restrictions on being around chemicals and the Respondent accommodated her in that regard.

Ms. Fromm and Ms. Flemming indicated a 45 day work evaluation was done on the Complainant while she was training as a fitter assembly worker, and referred to Exhibit C-4, and the reference in the evaluation indicated her attendance issues affected her training. There was a notation on her progress which stated it did not have any adverse affect and they believed she certainly would pass her evaluation notwithstanding she was not able to train on approximately 50 percent of the job. Ms. Flemming and Ms. Gilfoy indicated with respect to a letter of August 31, 2010, Exhibit R-1, tab 24, with respect to her pregnancy issues for frequency for bathroom breaks, and for the Complainant to take snacks in a cool area, they did not require any medical documentation to support this, and the number of bathroom breaks or time duration were not limited, and she was fully accommodated.

Ms. Flemming, Ms. Fromm and Ms. Gilfoy all testified the Complainant had a history of wandering or roaming and being away from her work station and the company rule #11, Exhibit R-1, tab 2, states as follows:

> "employees are to be at their appointed work stations, ready to work at their appointed starting time and shall, except in the performance of their duties, remain at such work station unless authorized to leave by their supervisor until quitting time."

They referred to Exhibit R-1, tab 5, where the supervisor had indicated the following:

> Darlene, you have been seen in the office talking to other staff members. This is not productive and has to stop now. Darlene must stay on task and understand she is working an 8 hour shift in the deburr and not the office.

They testified the Complainant was disciplined for being away from her work area and smoking outside her break time on February 3, 2010, Exhibit R-1, tab 42, and she was spoken to at that time about staying at her work station. Further, on August 20, 2010, Exhibit R-1, tab 42, she was spoken to about excessive time away from her work station. They testified these incidents had nothing to do with her pregnancy, but was because the Complainant was a roamer and others often had to locate her and this was a concern from a health and safety perspective as well as her not being at her work station.

Ms. Flemming, Ms. Fromm and Ms. Gilfoy all testified it was not that the Complainant was going to the bathroom for any length of time, but it was that she would leave her work station for the bathroom and would then go roaming or if she did not go to the bathroom, she still went roaming to such places as the smoke area, locker room or cafeteria, which would involve her supervisor having to look for her or the HR Department trying to find her.

Ms. Fromm testified almost every day they would spend time looking for the Complainant and she was spending any where from 30 to 45 minutes a day away from her work area and this was not for just going from the bathroom back to her work station. Ms. Fromm testified her supervisor was very frustrated as often times, he could not find her and she could be anywhere on the production facility.

The Complainant testified Ms. Gilfoy told her it would be better for her to be in the workplace, even if it was the bathroom, than to be absent from work. Ms. Gilfoy denied making any such comment to her.

Ms. Flemming testified she personally would look for the Complainant approximately once or twice a day and would often find her in the cafeteria or HR Department or the locker room, and all of which was discussed with her and she agreed to change her behaviour, however, she failed to do so. They all testified they believed the Complainant was using her pregnancy as an excuse to leave her work station and roam.

They testified all these activities came to a head at a meeting on August 30, 2010, and the results of the meeting are referred to in Exhibit R-1, tab 24, which was a letter of August 31, 2010, which outlined the agreement reached with the Complainant. In particular, they testified with respect to bathroom breaks, she was to notify her supervisor, Ms. Flemming or the charge hand, when she left and returned. With respect to her feeling nausea and hot, she was given access to the "war room" and to keep her snacks near by and she was to notify her charge hand when she left and returned.

The Complainant testified she complained about the air conditioning in the 'war room' as it was too cold; however, she conceded she could change the temperature which was not a problem.

With respect to notifying the charge hand, the witnesses for the Respondent testified the

requirement for her to notify the charge hand was changed following this meeting to allow her to put a note on her supervisor's desk, and all these unlimited breaks, they testified, were provided to her without requiring any medical documentation.

The Complainant testified she was not comfortable telling her charge hand when she was going to and from the bathroom, as he was a male. She testified when she raised the issue, they agreed she could leave a note for the charge hand or her supervisor. Ms. Flemming testified leaving the note was her idea, however, the Complainant said it was on her suggestion.

Ms. Flemming, Ms. Gilfoy and Ms. Fromm all indicated that following that meeting the Complainant seemed satisfied with regard to the note procedure notwithstanding the Complainant testified she was not comfortable with the process. The Complainant testified she did leave notes and did remove them on her return.

Ms. Gilfoy testified it was not just with regard to bathroom breaks that she had to leave a note, but also if she went on any break, due to her constant roaming and wandering for lengths of time.

Mr. Richard Gibson testified on behalf of the Respondent, he was also a supervisor of the Complainant. He testified other employees who would wander from their work stations from time to time were also given similar types of restrictions in that they had to notify their charge hand when they were leaving and coming back.

The Complainant testified she was embarrassed because the whole plant was talking about her having to leave notes; however, on cross examination, she never recalled making those comments, but there were jokes made, however, she did not complain to her supervisor.

Ms. Gilfoy, Ms. Fromm and Ms. Flemming testified the Complainant did not raise any concerns regarding the note process, after indicating to her she could leave a note for the charge hand.

Ms. Fromm testified the attendance management program (AMP), Exhibit R-1, tab 3, which was implemented June 1, 2010, dealt with procedures for employees with culpable and innocent absenteeism. She testified this was important because a delay in any one department can prevent a part from progressing to the next department and attendance was very important to be monitored. Ms. Fromm testified culpable absences are those absences within the control of the employee, such as not setting an alarm clock, where innocent absences are those that are beyond

the control of the employees, such as illness.

Ms. Fromm further testified the innocent absentee program is not discriminatory nor is it disciplinary and the AMP puts employees on the program once they reach an absence rate of 6 percent in any three month period. She testified the 6 percent threshold is not discretionary.

Ms. Fromm and Ms. Gilfoy testified the Complainant had absentee issues before and during her pregnancy and nothing changed in that regard, which was supported by a chart prepared by Ms. Fromm, tab 43, Exhibit R-1, which revealed the first medical note provided by the Complainant to forecast any absences was September 22, 2010, Exhibit R-1, tab 27, and prior to that, absent notes had been for specific absences only. She testified they often could not tell if they were all pregnancy related due to the lack of information provided.

Ms. Fromm indicated in a letter on September 10, 2010, Exhibit R-1, tab 25, the Complainant was placed in the program for innocent absenteeism and when her attendance did not improve, she was given an additional letter asking for further medical information on October 7, 2010, Exhibit R-1, tab 32, to see if anything could be done to improve her attendance. Ms. Fromm testified the Union had accepted the AMP and they were on the second Collective Agreement since the AMP had been implemented.

The Complainant testified she felt her job was in jeopardy and referred to a letter, Exhibit R-1, tab 25, "if, after an extended period you continue to have an excessive absenteeism record and there is no reasonable expectation that you are able to attend work on a regular, timely, basis, then the company may determine the employment relationship must come to an end and terminate the employment contract". The Complainant testified she had not raised her concerns to the Respondent and said in meetings this was usually gone over with her verbally. She referred to Exhibit R-1, tab 39, where the Complainant stated as follows:

> Please advise Alyson that this was very inconvenient, contains no more information that previously submitted. It was inconvenient for me, the doctor and other patients waiting in the lobby. It has also aggravated my condition due to the stress she has caused me. If there should be another pregnancy at IMP, I hope she could figure out a better way to satisfy her needs.

The Complainant testified she wrote that comment on October 20, 2010, a little over one month

after she was entered into the AMP for innocent absences on September 10, 2010. She testified she received a follow-up letter on October 7, 2010, Exhibit R-1, tab 32, that outlined attendance issues and requesting further medical information.

The Complainant testified she is aware of the Company's policy referred to in Exhibit R-1, tab 2, namely,

> "All employees are to be at their appointed work stations, ready to work at their appointed starting time and shall, except in the performance of their duties, remain at such work station unless authorized to leave by their Supervisor until appointed quitting time."

Ms. Fromm testified no employee had been terminated under the innocent absence program of the AMP and the program has improved attendance at their work site.

The Complainant testified she should have been permitted to work make-up time for lost overtime past 4 p.m. Ms. Fromm testified they needed medical documentation from her doctor permitting her to work past 4 p.m. and they referred to a letter of August 19, 2010, from the Complainant, Exhibit R-1, tab 22, where she had indicated she would no longer provide medical notes. Ms. Fromm referred to a letter of October 7, 2010, where they requested additional medical information from the Complainant, referred to in Exhibit R-1, tab 32, and she responded to that by indicating she was being inconvenienced, and which aggravated her mental condition to provide this information.

CLOSING ARGUMENT OF THE COMPLAINANT:

The Complainant argued she filed her complaint within time in October 2010, and thus the issue of timeliness has been complied with.

She further argued her pregnancy had nothing to do with her being disciplined for issues surrounding the lotto ticket, Facebook comments or accusations of fraud. She conceded with regard to the Facebook comments, she maybe went too far and she apologized for doing so. The Complainant argued with respect to the accusation of fraud dealing with her request to attend her husband's uncle funeral or bereavement ceremony, she admits she should not have answered that there was a 'funeral tomorrow' following a meeting over this request; however, she conceded she was irritated with respect to issues surrounding her absenteeism and the harassment

by the HR Department. She argued she had no intention of misleading or defrauding the Respondent. She conceded she has a difficult time dealing with the Human Relations Department and she becomes very agitated and emotional in dealing with them which was exasperated in this case by her complications during her pregnancy and having to deal with HR on her request for medical leave.

The Complainant argued often there are issues with HR that are overruled by Ms. Fromm's superiors with other employees. She argued she complied the best she could with respect to getting her doctor to give more information as requested; however, her doctor was frustrated and agreed to provide notice by way of appointment cards to HR when requested, which she argued she did.

The Complainant conceded the Respondent did accommodate her with respect avoiding any harmful chemicals in her job. With respect to accommodation for bathroom breaks and snacks, she argued the Respondent did accommodate her in permitting her to go to the "War Room" which is an air-conditioned conference room and there were no restrictions on how much time she could take to have bathroom breaks or snacks. However, her main concern was having to tell her charge person, who was initially a male person, when she was going to leave and come back from the bathroom. She argued she objected to that restriction set out in the letter of August 31, 2010, outlining the meeting that took place the day before. She argued the bathroom breaks were not unlimited but were to be a reasonable amount.

The Complainant argued, however, with respect to time away from work for her pregnancy and attending to various medical appointments, was resisted by the Respondent, and she was expected to attend work 8 hours a day for 5 days a week and the Respondent requested information from her doctor to get particulars as to what would prevent her from attending work on a regular and timely basis, and referenced Exhibit R-1, tab 33, page 110 and tab 25, page 99 in support. She argued it is difficult for doctors to be specific that the issues surrounding her pregnancy are related to the pregnancy itself or due to stress in the work place. She argued she had a letter dated October 15, 2010, tab 3 of page 3, Exhibit C-5, which indicated she was off work October 8 due to stress in her work situation; a doctors note of October 27, 2010, Exhibit C-5, tab 3, page 1, stating she will be off for the duration of her pregnancy due to stress, and this revealed it was a combination of both stress and pregnancy issues that caused her to take early pregnancy leave.

The Complainant argued there was only one occasion where she was accused of being in the smoke area; however, she argued that was part of her work area as she was working as a sweeper at the time. She argued Ms. Flemming in her testimony said they requested the aid of an HR person to look for her, yet she was in the HR department at the time and there would be no need for them to go around looking for her. She argued also Ms. Flemming and others were exaggerating that they had to spend 30 to 45 minutes looking for her, and if that was the case, she would have been written up and disciplined. She argued all the Respondent had were 2 entries of her roaming, from August 7, 2009 to October 28, 2010. She conceded she did roam initially, but when she was told not to do so, she stopped. She conceded there were times when she was going from point A to point B and stopped along the way and if this was a major concern, she argued over the 7 years that she worked there, it would have been more than casually mentioned.

The Complainant further argued it was unfair being placed on the culpable AMP because she felt she could control these occurrences. She argued she did fear for her job when she received a threatening letter of September 10, 2010, tab 25, Exhibit R-1, which referred to medical appointments and time missed related to her pregnancy and she could not control those absenteeisms, and may lead to termination.

She argued with respect to the innocent absenteeism, she conceded the Respondent has a right to manage their operations. She argued the main issue that bothered her was having to tell her supervisor or charge hand when she went to the bathroom as this humiliated her.

The Complainant argued she enjoys her work and now keeps detailed notes of everything, but the working environment needs improvement. She argued her claim for compensation is as outlined in Exhibit C-6 for lost wages due to having to take pregnancy leave prematurely due to the stress of the work place, which she argued was caused by the Respondent failing to accommodate her during her pregnancy together with expenses for travel and meals. She argued the general damages she is making a claim for are reasonable.

CLOSING ARGUMENT OF THE NOVA SCOTIA HUMAN RIGHTS COMMISSION:

Lisa Teryl argued on behalf of the Human Rights Commission that the Complainant must show she had a protective characteristic under the Human Rights Act, c. 214, R.S.N.S. 1989, as amended, and that she experienced a burden or disadvantage and that characteristics were connected to or a factor in the disadvantage. She argued if the Complainant shows these three

facts, the burden then shifts to the Respondent to show the Complainant did not suffer a burden connected to her pregnancy, and although if she suffered a burden related to her pregnancy, did the Respondent accommodate her to the point of undue hardship?

Ms. Teryl further argued the Respondent's argument is that they did accommodate the Complainant and she experienced no undue hardship.

Ms. Teryl argued the Complainant felt burdened because she was pregnant and her employment was at risk because she missed a lot of time due to her pregnancy and the witnesses for the Respondent did not contradict her belief in that regard. Ms. Teryl argued this is supported by the attendance management letter which the Complainant received after her pregnancy related absences and which indicated her employment could be terminated if non-culpable absences remain too high, notwithstanding she provided doctors' notes and the Respondent knew she was pregnant.

Ms. Teryl argued the testimony of the Complainant was she had to take early pregnancy leave because of the threat of termination and her feeling of being harassed around the lack of accommodations provided around her pregnancy. Further, Ms. Teryl referred to MCGILL UNIVERSITY HEALTH CENTRE (MONTREAL GENERAL HOSPITAL) v. SYNDICAT DES EMPLOYES DE L'HOPITAL GENERAL DE MONTREAL [2007] 1 R.C.S. , a decision of the Supreme Court of Canada which outlines factors for the frustration of a contract within the human rights context. She argued when a disabled employee has not worked for the employer for at least two years, and there is no likelihood of return, then frustration could be established. In this case, she argued if the Respondent experienced an undue hardship, with spotting, non-culpable absences, short of the two year period, the first step should be to ask the employee to take a leave until the disability has resolved rather than to terminate for frustration of the contract.

Ms. Teryl argued the Complainant's temporary condition, such as pregnancy, may be used by the Respondent to determine frustration of a contract, and thus, her employment could be at risk due to her pregnancy if she did not provide complete information with respect to her medical condition to support her absences.

Ms. Teryl further argued Tina Flemming, the Complainant's direct supervisor, agreed the normal way to correct unjustified absences from a work station is to initiate a discipline process through

verbal or written warnings and that accommodation for the Complainant's more frequent bathroom breaks was fashioned into a corrective measure, especially when it was tied to her bladder issues. She argued, however, to conflate a corrective measure with accommodation would led to a reasonable person, such as the Complainant, to think pregnancy was a burden and circumstances to be avoided.

Ms. Teryl argued once the burdens related to pregnancy are established on the balance of probabilities, the onus shifts to the Respondent employer to show a justification. She argued the Respondent says they allowed her to attend doctors appointments, provided her with snack breaks, they did not assign her to work with chemicals and they allowed her to use the washroom as she required. Further, she argued, they said the requirement to check in with her supervisor while using the washroom was needed for safety reasons.

Ms. Teryl argued there was no evidence with respect to the Complainant's health that there was a specific safety risk that was not shared by other non-pregnant employees. She argued there was no medical evidence tendered in evidence to support she was at a greater safety risk and required such a measure, other than issues related to sensitivity to chemicals while pregnant.

Ms. Teryl argued, although the intentions of the Respondent in offering accommodations were well intended, however, the manner of executing them left the Complainant to reasonably experience her pregnancy was a disadvantage when working for the Respondent during this time period.

CLOSING ARGUMENT OF THE RESPONDENT:

Kate Hopfner argued on behalf of the Respondent, the test for discrimination is laid out in a recent case of QUILTY-MACASKILL v COMMUNITY JUSTICE SOCIETY, [2013] NSHRBID no. 5, at para 3-4:

> 3. The initial onus is upon the Complainant to establish a *prima facie* case of discrimination, in the absence of any evidence offered by the Respondent. To meet this onus she has to establish that: a) she was pregnant; b) the Respondent's actions had an adverse effect upon her; and c) it is reasonable to infer a connection between the pregnancy and the adverse treatment.

> 4. If the Complainant meets this legal test, the onus shifts to the Respondent to demonstrate on a balance of probabilities that the adverse effect occurred due to non-discriminatory reasons. In this respect, the subjective intention of the Respondent is irrelevant.

Ms. Hopfner argued in order to prove discrimination, the Complainant must establish the following:

1. That she was pregnant;
2. Respondent's actions had an adverse effect on her;
3. It is reasonable to infer a connection between the pregnancy and the adverse effect.

Ms. Hopfner argued the Complainant has not established, based on this test, there was any discrimination, and any adverse effect was due to non-discriminatory reasons.

Ms. Hopfner argued there are issues of credibility as there are competing versions of the events. She argued the role of the Board of Inquiry is laid out in QUILTY-MACASKILL supra., at paragraph 26, as follows:

> 26. As conflicting versions of events exist, this Board's finding as to what occurred are very much dependent on an assessment of the credibility of the Complainant, Mr. MacIsaac, and Ms. Atwell. The Board's task is to determine which of the witnesses' versions of events is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize is reasonable in that place and in those conditions." See Faryna v. Chroney, [1952] 2 D.L.r. 354 (B.C.C.A). This can include assessing the following factors: "the witnesses' motives, their powers of observations, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence" See Hadzic v. Pizza Hut Canada (1999), 37 C.H.R.r. D/252 (B.C.H.R.T).

Ms. Hopfner argued with respect to discipline, the Complainant has been disciplined both before and during pregnancy, all on issues not related to her pregnancy. She argued the role of the Board of Inquiry is not to assess if the level of discipline was appropriate or even whether

discipline was appropriate at all. She argued the role of the Board of Inquiry in examining these disciplines is to determine whether any of them were due to the Complainant's pregnancy. She argued, the Board may think discipline is too high, or too low, or perhaps may not even agree the Complainant should have been disciplined at all; however, she argued none of this matters, unless the Board is satisfied the disciplines were due to the Complainant's pregnancy.

Ms. Hopfner argued the Complainant was issued three disciplines for issues that occurred leading up to her pregnancy, namely:

- January 25, 2010 - verbal warning for absenteeism and not calling in when late (tab 9, Exhibit R-1)
- February 3, 2010 - verbal warning for smoking outside of break period and not being at work station (tab 10, Exhibit R-1). The Complainant testified she "wasn't guilty" and that she grieved this discipline. The grievance was not pursued by union.
- March 17, 2010 - written warning for excessive absenteeism (tab 13, Exhibit R-1)

Ms. Hopfner alleges these were all prior to her pregnancy and weren't issues related to her pregnancy. Further, she argued the Complainant was also disciplined during her pregnancy for matters unrelated to her pregnancy; referred to in Exhibit R-1, tab 19, being a letter of July 5, 2010, suspension for one day for leaving work to cash a lottery ticket.

Ms. Hopfner argued, Ms. Fromm testified on behalf of the Respondent that the Complainant was issued a pass-out from her supervisor which allowed a worker to leave the building, but this does not indicate she was given permission, the pass-out is used to determine what time the employee clocks out. Upon checking with her supervisor, Ms. Fromm was informed the supervisor did not give her permission and she knew her absence would be unexcused. Ms. Hopfner argued this is an issue of credibility as Ms. Fromm testified the Complainant did not argue at the grievance meeting that her pregnancy was related to this discipline and further, she argued it is not even mentioned in her complaint and Exhibit R-1, tab 21, the Facebook posts of July 20, 2010, speak for themselves and demonstrate her attitude towards the Respondent when she wrote:

- "...getting to be like Nazi Germany in there;"
- "... IMP stands for idiot managers please;"
- "...supervisors are ok but upper management doesn't know their ass from a hole in the ground."

Ms. Hopfner argued there were further issue of credibility, when the Complainant was confronted by Ms. Fromm and she did not apologize for Facebook posting and stated Facebook is personal, and Ms. Fromm indicated they could have disciplined her for those remarks; however, they chose not to do so.

Ms. Hopfner argued a two day suspension was given to the Complainant by letter on October 14, 2010, Exhibit R-1, tab 36, for filing a claim for bereavement, as she appears to have made a request for a leave for bereavement and said Ms. Gilfoy had told her that her submitted request for a private interment was acceptable, yet Ms. Gilfoy didn't even know what a private interment was and denied making such a comment to her. She argued the Respondent had to investigate this matter because they were suspicious of her reasons, namely, as the timing was around the Thanksgiving weekend in October and after finding out there was no funeral arrangements for the date she requested.

Further, Ms. Hopfner she argued with respect to disciplines for her actions prior to her pregnancy and even those during her pregnancy, she was not disciplined for any matters arising out of her pregnancy, but because of her actions. She argued that many times disciplinary matters came up, she was represented by her union throughout and her discipline matters were either not grieved or were grieved and not pursued. She further argued the evidence is clear she never provided or raised the issue of pregnancy until she filed her complaint with the Human Rights Commission. She argues the issue for the board of inquiry is to determine whether the disciplines were discriminatory. She argues there is no indication that any of the disciplines were in any way related to the Complainant's pregnancy and, therefore, there was no discrimination under the *Human Rights Act*, supra.

Ms. Hopfner argued the Respondent tried to accommodate the Complainant as they took all reasonable steps to accommodate the Complainant despite the Complainant providing very little documentation in support. She argued *Central Okanagan School District 23 v. Renaud*, [1992] 2 SCR 970 makes it clear the accommodation process does not require the employer to act in isolation. Employees have a duty to participate in the accommodation process, and referred to paragraph 43 and 44, in that regard, as follows:

> 43. The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate

accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in O'Malley, at page 555, McIntyre J. stated:

> Where such reasonable steps, however, do not fully reach the desired end, the Complainant, in the absence of some accommodating steps on this own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

To facilitate the search for accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complaint must be considered.

44. This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable [page 995] and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complainant will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

Further she argued the Okanagan School District case was referred to in the Human Rights Board of Inquiry in *Snow v. Cape Breton – Victoria Regional School Board*, 2006, NSHRC 6.

Ms. Hopfner argued there were several accommodations made and implemented by the Respondent for the Complainant's pregnancy, such as, the Complainant's doctor, namely, Dr. Flynn, gave a letter indicating she would be unable to work the 4:00pm to 12:00am shift, this letter is found in Exhibit R-1, tab 16; the doctor also indicated they would be notified if there was any change in the decision. The Complainant wanted to work the evening shift; however, she

was not permitted to do so by her doctor and if she believed she was able to do so, she would have to get a letter from the doctor. She argued the Complainant testified about conflicting reasons about why she couldn't obtain additional medical information and it is because Dr. Flynn discharged her as a patient and he did not want to get into any reasons for auditing purposes.

Ms. Hopfner further argued, notwithstanding the Complainant was not permitted to work overtime due to her doctor's instructions, she was permitted to do shift hours on weekends, if there was work available. After the meeting in which the Complainant announced her pregnancy, Ms. Gilfoy wrote an email of June 25, 2010, , Exhibit R-1, tab 18, that the Complainant took issue with because it went to all supervisors. She argued the reason the email was to inform any supervisor that may be there at any particular time on her work floor, as they needed to know all restrictions and her needs that may apply, and in this case, the restriction of working overtime as indicated in Dr. Flynn's letter of June 24, 2010, Exhibit R-1, tab 16. .

Ms. Hopfner argued the first accommodation was to allow her to work a fixed day shift which was complied with by the Respondent. Ms. Hopfner argued with respect to working with chemicals, the Complainant provided Ms. Gilfoy a list of things she has to be cautious about, referred to in Exhibit R-1, tab 20. She compiled the list for review in a binder during work hours and this was complied with as the Respondent agreed, though Ms. Flemming testified, she was not required to work with any chemicals at all, which was beyond the list that was provided by the Complainant. Further, when she was in training to work as a fitter assembly due to the restrictions and working with chemicals, she was not required to train on fifty percent of her new position. These accommodations were done for the Complainant at her request with no requirement for medical documentation; however, she was evaluated after 45 days, referred to in Exhibit C-4, and references were made that her attendance issues were impacting her ability to work on parts of her job, such as; she didn't progress to more complex parts; however, Ms. Hopfner argues this was simply a notation with respect to her progress, which was the purpose of the 45 day evaluation. They expected her to pass her evaluation.

Ms. Hopfner argued with respect to the cool areas, snacks and bathroom breaks, that the Complainant, during her pregnancy, was permitted access to a "cool area" as well as unlimited breaks to cool down, eat snacks and have bathroom breaks, all referred to in Exhibit R-1, tab 24. The bathroom breaks were not limited in number or duration, and this was done without requirement for medical documentation, but as a common sense understanding at what the Complainant may require as a pregnant woman. The Respondent gave her access to the "War

Room", which is an air conditioned conference room close to her work station so she could have snacks during her work hour without having to go to the cafeteria or the locker room, which the Complainant testified was a minute and a half away from her work area. She was not limited in the number of times she could go to the "War Room" or how long she could go for. She argued having the Complainant notify the charge hand or the supervisor when she left her work station and report back, was due to the numerous incidences of her roaming prior to and during her pregnancy, referred to in the Complainant's own testimony where she admitted to wandering or roaming away from her work station. Ms. Hopfner referred to Exhibit R-1, tab 5, tab 10, and tab 42 as follows:

- In the Complainant's 480 hour plan from 2007, where her supervisor notes: "Darlene… you have been seen in the office talking to other staff members. This is not productive and has to stop now… Darlene must stay on task and understand she is working an 8 hour shift in the deburr cell not the office."
- The Complainant's February 3, 2010 discipline for being away from her work area and smoking outside of break time.
- On the Complainant's Record of Events, June 14, 2010: "Darlene was standing outside drawing control for 21 minutes. I spoke to Darlene about staying at her work station and not to rome (*sic*) around the plant"
- On the Complainant's Record of Events, August 20, 2010: "Darlene was spoken to today about excessive time away from her work station…"

Ms. Hopfner further argued there were other occasions where she had been spoken to about roaming but those were the only documented ones that they had, and the company's Rule 11, Exhibit R-1, tab 2, indicates that "all employees are to be at their appointed work stations, ready to work at their appointed starting time and shall, except in the performance of their duties, remain at such work station unless authorized to leave by their Supervisor until appointed quitting time." She argued the Respondent's witnesses testified the facility has an interest in knowing where people are from a health and safety perspective as it is a production facility with heavy machinery.

Ms. Hopfner argued accommodations made by the Respondent, include:

1. Restriction to day shift at the request of the Complainant with documentation;
2. Restriction from working with chemicals, at the request of the Complainant with no requirement for documentation;

3. Training on only 50% of her new job as a Fitter Assembly worker, due to restrictions;
4. Bathroom breaks unlimited as to quantity and duration;
5. Snack breaks unlimited as to quantity and duration;
6. Use of a conference room to cool down, unlimited as to quantity and duration.

She argued, in general, with respect to the Complainant's allegation she was not accommodated during her pregnancy, this has not been substantiated, as there were many accommodations to the Complainant implemented by the Respondent, and that any discipline that was taken against Complainant was due to her actions and not on a prohibited ground under the *Human Rights Act*, supra.

In the alternative, Ms. Hopfner argued if the complaint is substantiated, her claim for damages is over stated. Her request for loss of pay for July 5, 2010, and for October 15, 2010, ... for discipline received were unrelated to her pregnancy. With respect to lost wages for October 28, 2010 to January 4, 2011, lost wages for going on early pregnancy leave, which would have been on January 5, 2011, she argued no evidence has been provided by the Complainant that her leave had anything to do with the Respondent. There was no medical evidence connecting the fact that when she went out early, it had to do with any actions of the Respondent.

Ms. Hopfner argued further the Complainant testified she went out early on her first pregnancy and provided no documentation to prove her early departure in October, 2010, was related to work, instead of due to anything natural as it was for her first pregnancy. She argues her claim would also assume perfect attendance during that time, which is not supported by corroborated evidence considering her less than perfect attendance in the past. Ms. Hopfner argued her claim for $2,000.00 in general damages for pain and suffering has not been supported by any medical or other evidence. Ms. Hopfner argued in that event, this is excessive considering decisions, such as *Saunders v. Kentville Town* [2004] N.S.H.R.B.I.D. No. 9 where the Complainant was awarded $2,000.00 for losing her job and in *MacLellan v. MacTara Ltd.* [2004] N.S.H.R.B.I.C. No. 6, the Complainant received $1,000.00 for lost job, and she argued losing a job attracts more liability then someone who underwent any issues the Complainant went through, even if she could prove they were related to a prohibited ground. She argued with respect to the Complainant's claim for expenses incurred for the hearing, as well as to be paid for the attendance at the hearing, she argued the Supreme Court of Canada in the *Canada (Canadian Human Rights Commission), and Canada (Attorney General)* 93 C.C.E.L. (3d) 1, stated the Complainants cannot recover legal costs other than as stated in the statute. She further argued

those principles apply with respect to human rights in Nova Scotia as stated in the Court of Appeal decision in Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission) [2005] N.S.J. No. 156, and accordingly, the Complainant's expenses aren't recoverable unless the act explicitly provides for recovery, which it doesn't in this case.

DECISION AND REASONS

The Complainant alleges discrimination by the Respondent contrary to Section 5 (1) (m) of the *Human Rights Act*, RSNS 1989 C. 214 as amended, the section states as follows:

Prohibition of discrimination

5 (1) No person shall in respect of

(a) The provision of or access to services or facilities;

(b) Accommodation;

(c) The purchase or sale of property;

(d) Employment;

(e) Volunteer public service;

(f) A publication, broadcast or advertisement;

(g) Membership in a professional association, business or trade association, employer's organization or employee's organization,

Discriminate against an individual or class of individuals on account of

(h) Age;

(i) Race;

(j) Colour;

(k) Religion;

(l) Creed;

(m) Sex;

(n) Sexual orientation;

(o) Physical disability or mental disability;

(p) An irrational fear of contracting an illness or disease;

(q) Ethnic, national or aboriginal origin;

(r) Family status;

(s) Marital status;

(t) Source of income;

(u) Political belief, affiliation or activity;

(v) That individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).

(2) No person shall sexually harass an individual.

(3) No personal shall harass an individual or group with respect to a prohibited ground of discrimination.

Further, Section 3 (m) defines "sex" as follows:

(m) "sex" includes pregnancy, possibility of pregnancy and pregnancy-related illness;

It is uncontested the Complainant notified the Respondent on or about June 7, 2010, of her pregnancy with her second child. Further, it is uncontested the Complainant did leave employment on or about October 28, 2010, and her son was born in early January, 2011. The Complainant claims she wasn't accommodated during her pregnancy from when she notified the Respondent on or about June 7, 2010, until when she left on leave on or about October 28, 2010.

I was referred to a recent decision of the Nova Scotia Board of Inquiry, in *Quilty-MacAskill v. Community Justice Society*, 2013 [NS HRBID] No. 5, Paragraph 3-4 which sets forth the tests, to which I agree, for discrimination due to pregnancy:

3. The initial onus is upon the Complainant to establish a *prima facie* case of discrimination, in the absence of any evidence offered by the Respondent. To meet this onus, she has to establish that: a) she was pregnant; b) the Respondent's actions had an adverse effect upon her; and c) it is reasonable to infer a connection between the pregnancy and the adverse treatment.

4. If the Complainant meets this legal test, the onus shifts to the Respondent to demonstrate on a balance of probabilities that the adverse effect occurred due to non-discriminatory reasons. In this respect, the subjective intention of the Respondent is irrelevant.

Further in the same decision, at paragraph 26, I agree with the test of the Board's role for dealing with credibility issues, as laid out in the *Quilty-MacAskill case* supra. Further, I agree as argued by Ms. Teryl, on behalf of the Human Rights Commission, the Complainant must show she has a protected characteristic under the *Human Rights Act* and that she experienced a burden or disadvantage and that characteristic was connected to a factor in the disadvantage. This is

consistent with the tests outlined in *Quilty-MacAskill.* The Board heard testimonial evidence from the Complainant as well as four employees of the Respondent, namely Alyson Fromm, Ann Gilfoy, Richard Conrad and Tina Flemming, as well as reviewed numerous exhibits tendered in evidence.

The Board finds, and the Complainant acknowledged, prior to her advising her employer in June of 2010, of her pregnancy with her second child, she had been issued three disciplinary warnings for absenteeism, namely, January 25, 2010, referred to in Exhibit R-1, tab 9, for calling in late. A further verbal warning for smoking outside of her break periods and not being at her work station, on February 3, 2010, referred to in Exhibit R-1, tab 10, and on March 17, 2010, a written warning for excessive absenteeism, referred to in Exhibit R-1, tab 13. The Complainant acknowledges, as well as the Board finds, those disciplines were prior to her notifying her employer of her pregnancy and were unrelated to her pregnancy.

Further, the Board finds, and the Complainant acknowledges on July 5, 2010, she was given a one day suspension for leaving work to cash a lottery ticket and that is referred to Exhibit R-1, tab 19, and she grieved that discipline, but it was not pursued by her union. The Board finds this was considered by the Respondent as a culpable absence under the attendance monitoring program (A.M.P.) when combined with her previous culpable absence disciplines, resulted in the one day suspension in accordance with the attendance monitoring program (A.M.P.) Section 8.1, referred to in Exhibit R-1, tab 3. The Board finds although the Complainant testified she was given a pass out form, giving her permission to leave the premises to cash her lottery ticket from her supervisor, and she stated she was not aware she was in the A.M.P. for culpable absence, as this was a new program created in June 2010 by the Respondent, the Board prefers the evidence of Ms. Fromm, who testified on behalf of the Respondent, the pass-out just allows a worker to leave the building, but does not necessarily give permission for the absence. The Board finds the form is used by an employee to give to the guard upon leaving and it is also used to determine, for payroll purposes, when the employee is clocked out.

The Board accepts the testimony of Ms. Fromm, that the Complainant supervisor did not give her permission, but just gave her the pass-out form, and the absence was not excused. The Board comes to this finding as it weighed the credibility of the Complainant's testimony with that of Ms. Fromm who had indicated at the grievance meeting, on this matter, the Complainant's main argument was that she was not aware that she was in the A.M.P. and if she had been aware, she would not have left the premises to cash the lottery ticket. This was not contradicted by the

testimony of the Complainant. The Board finds this is not consistent with the Complainant believing she had been given permission. Further, the Board accepts the evidence of Ms. Fromm, which was not contradicted by the testimony of the Complainant, that at the grievance meeting she didn't argue her pregnancy was related in any way to the discipline that was administered. The Board further finds it wasn't mentioned by her in her testimony at this hearing. The Board accordingly finds the Complainant was not credible with respect to her testimony that the pass-out form that was given to her by her supervisor excused her from her work station. Further, the Board finds on the issue of the discipline administered, this was not related to her pregnancy.

On the further issue of credibility, the Board further finds where the evidence of the Complainant differs on material facts and issues to that of the Respondent, it gives more credence and weight to the evidence of the Respondent's witnesses. The Board finds from the Facebook postings of July 20, 2010, referred to in Exhibit R-1, tab 21, that the Complainant had a hostile and disrespectful attitude toward the Respondent as she referred to the Respondent in her Facebook postings, namely,

- It's like Nazi, Germany in there;
- I.M.P. stands for idiot managers please; and,
- Supervisors are ok, but upper management don't know their ass from a hole in the Ground.

The Board finds these postings disrespectful and reveal an insubordinate attitude toward her employer. The Board accepts the evidence of Ms. Fromm that when she spoke to the Complainant about these Facebook postings, upon reviewing her notes, referred to in Exhibit R-3, of the meeting with the Complainant, the Complainant did not show any apology as she indicated anything on Facebook is personal and was defiant, notwithstanding the Complainant testified she did apologize. The Board finds the Complainant was defiant, non-apologetic and although she was not disciplined over these Facebook postings, the Board finds this does go to credibility with respect to her testimony that she was targeted because of her pregnancy and wasn't accommodated.

Further, on the issue of credibility, the Board finds the Complainant lacked credibility with respect to a paid bereavement leave referred to in Exhibit R-1, tab 36, on October 14, 2010, for which she was given a two day suspension. The Complainant requested the bereavement leave as her husband's uncle was to have a funeral, and they wanted to attend the funeral and she

subsequently found out it was a private interment and she testified Ms. Gilfoy, her immediate supervisor said a private interment was the same as a bereavement.

The Board finds Ms. Gilfoy testified she did not provide any guidance to the Complainant with respect to completing the bereavement form and also indicated she did not know what a private interment was all about. The Board finds the Complainant was not forthright and accepts the evidence of the Respondent's witnesses over that of the Complainant with respect to the reason for the two day suspension administered to the Complainant on October 14, 2010. The Board finds from the testimony of both Ms. Fromm and Ms. Flemming, the timing of the request was suspicious and after they looked into the matter, they found from the obituary online, referred to in Exhibit R-1, tab 30, it had no mention of a funeral on October 8, 2010, yet she submitted a request on October 6, 2010, requesting the Friday before the long weekend off, October 8, 2010, and this is found in Exhibit R-1, tab 29. The form indicated the funeral was on Friday, October 8, 2010. The Complainant's testimony was it wasn't a funeral, but was an interment. The notes from Ms. Fromm, referred to in Exhibit R-1, tab 33, indicated the Complainant said her husband's uncle was being laid out tomorrow in his veterans attire and he was being sent to Whitehead, Nova Scotia. The Board finds from the investigation by the Respondent, the funeral home was not releasing any remains and Ms. Fromm testified they were concerned, and the union representative for the Complainant showed concern, who attended at the meeting with the Complainant, Ms. Fromm and Ms. Flemming, as revealed in Ms. Fromm's notes in Exhibit R-1, tab 33, on page 111-112:

- "There is no mention of what is happening in Dartmouth in the obituary;"
- "The funeral home says there is no funeral tomorrow;"
- "Normally when you call the funeral home, they would state there is a private viewing;"
- "Atlantic Funeral Homes, Sackville home that was handling remains. I called them and they are handling arrangements. They said he is not being laid out and there is no viewing."

Ms. Fromm testified from her notes, that they need some kind of proof from the Complainant of a funeral or service and the Complainant's replies were:

- "You are full of shit;"
- "I'll be to fucking work then. She how much work I do;"
- "I will be here tomorrow, I will sit at my bench. I've had enough."

The Board finds the union's representative, as noted from Ms. Fromm's notes, requested the Complainant to provide the request to Ms. Fromm and to:

- "Look at it online;"
- "You have to calm down or you will get sent home for insubordination. They have to do this. This is not advertised. Bring something in;"
- "It's not going to help if you don't..."
- "... Call family members. You know what you have to do..."

The Board finds notwithstanding the Complainant was upset at this meeting where she was accused of committing a fraudulent misrepresentation on the form and also due to the concerns by the HR department about her absenteeism as she was having pregnancy difficulties, the Complainant mislead the Respondent on the bereavement form or request form, and the Board finds the Complainant's response to the Respondent's inquiries, were offensive, rude and insubordinate.

The Board finds the evidence of the Complainant is not credible with respect to the events surrounding the leave request and the Board finds the discipline administered by the Respondent was not discriminatory and was not in any way related to the Complainant's pregnancy for the reasons stated.

The Board was referred by Ms. Hopfner, Counsel for the Respondent to the decision in the Supreme Court of Canada in *Central Okanagan School District 23 v. Renaud*, [1992] 2 SCR 970 for factors to consider involving the duty to accommodate. This decision of the Supreme Court of Canada was also referred to by the *Nova Scotia Human Rights Board of Inquiry* in *Snow v. Cape Breton – Victoria Regional School Board* [2006] N.S.H.R.B.I.D. No. 5, supra. The Board agrees with the findings of the Supreme Court of Canada as well as it being supported by the Board of Inquiry in Snow supra., that part of the factors in determining if the duty to accommodate has been met is as follows: ".. an employment standard or policy be rationally connected to the performance of the job, and be held in good faith. In order to qualify as a bona fide occupational requirement (the third element of the test), the employer has to demonstrate that it was unable to accommodate the employee to the point of undue hardship".

The Complainant acknowledges she provided a doctor's note indicating she was unable to work night shifts which were from 4:00pm to 12:00am as referred to in Exhibit R-1, tab 16, which letter stated as follows:

"This letter is to state that Darlene is unable to work the 4pm-12am shift. You will be notified if there is any change in this decision."

The Complainant acknowledged she was accommodated with respect to the shift restriction and she acknowledged in her testimony she didn't provide any changes to that decision by her doctor, and she requested Dr. Flynn to indicate she was able to work past 4pm, but she said he was temperamental and did not want to provide any further elaboration, and that Dr. Flynn discharged her as a patient and he further indicated to her he would not provide further clarification, due to auditing purposes. The Board finds the Complainant conceded she was permitted to work before her shift started, as well as on weekends and she testified she did do so from time to time. The Board finds and accepts the practice of the Respondent as testified by Ms. Gilfoy and Ms. Fromm and was supported by an inter-office memorandum, Exhibit R-1, tab 15, that documentation is to be provided by employees for any shift restrictions and often employees had different shift restrictions from time to time.

The Complainant, however, was concerned other supervisors in the Human Resource Department were notified of these restrictions and in her testimony, she stated this was a privacy issue and this notification should not have gone to other people, and this was a result of Ms. Gilfoy writing an email which is referred to in Exhibit R-1, tab 18, sending it to all supervisors in Human Resources and Payroll. The Board finds the explanation by Ms. Gilfoy, Ms. Flemming and Mr. Gibson, all who testified, was reasonable, in that there could be any supervisor on a particular shift that would be supervising employees and would need to know any restrictions and needs, and the payroll office and Human Resources would have to know as well. This would be documented in the record of events, referred to in Exhibit R-1, tab 40-42, as this information that must be made available to supervisors and Human Resources who will be covering a shift. The Board accepts the explanation by Ms. Gilfoy, Ms. Flemming and Mr. Gibson in that regard that those departments and supervisors affected would need to know restrictions on employees. In any event, the Board finds with respect to the requirement for day shift for the Complainant, this was complied with by the Respondent immediately, and this was not contradicted by the Complainant.

The Board finds the Complainant provided a list of chemicals she could not be around, which was identified in Exhibit R-1, tab 20, and the Complainant acknowledged this request was complied with and was accommodated by the Respondent. The Board further accepts the

evidence of Ms. Flemming that not only was she not required to work with any chemicals on the list, but with any chemicals at all. Further, the Board finds she was being trained to work as a Fitter Assembly worker and due to these conditions and restrictions, she was not required to train on 50% of this new position and further, she did not have to file any medical documentation in support. The Board finds the Complainant was concerned that her 45 day evaluation on this training job, which is referred to in Exhibit C-4, being comments that she had not progressed to parts of her job and her attendance issues were impacting her ability to work on parts of her job that she was trained on. The Board finds the evaluation note, Exhibit C-4, was a progress evaluation and there was no impact to the Complainant and the Board accepts the testimony of Ms. Flemming that they expected her to complete and pass her evaluation.

The Board finds with respect to the Complainant requesting a cool area and to be able to take frequent snack breaks due to her nausea from her pregnancy, that the Respondent permitted her to use an air conditioned conference room which was the Respondent's "War Room", close to the Complainant's work station which the Complainant testified was approximately a minute and a half away from her work area. The Respondent also permitted her to control the air conditioning temperature in the room as she saw fit. The Board finds there was a letter issued, referred to in Exhibit R-1, tab 24, dated August 31, 2010, from Tina Flemming, Production Supervisor, which was a follow up to their meeting of August 30, 2010, regarding her current medical condition, her pregnancy and her expectations. This was a meeting with Mike Clark, the Shop Steward, Ann Gilfoy, the Health & Safety Officer, and Alyson Fromm, HR Manager. The letter of August 31, 2010, is reproduced as follows:

> "This letter is in follow up to the conversation of August 30, 2010, between you, me, Mike Clark, Shop Steward, Ann Gilfoy, Health & Safety Officer, and Alyson Fromm, HR Manager. The purpose of this letter is to clarify the expectations as outlined in the conversation.
>
> In light of your current medical condition (pregnancy), the following expectations apply:
>
> 1. Bathroom Breaks – it is understood that you may require more frequent bathroom breaks. The expectation is that you will:
>   - Notify me (your Supervisor), or if I am unavailable, a Charge Hand in the area when you are leaving for the bathroom.
>   - Notify me, or the Charge Hand again when you return

2. Nausea – it is understood that you may feel nauseous from time to time, and you may wish to take a rest in a cool area or have something to eat in order to settle your stomach. The expectation is that you will:
   - Use the "War Room" (not the Cafeteria or Locker Room) for these rest periods, or to have your snack
   - Keep snacks close-by, so that trips to the Cafeteria or Locker room won't be necessary
   - Notify me, or if I am unavailable, a Charge Hand in the area where you are going and why
   - Notify me, or if I am unavailable, a Charge Hand in the area upon your return.

During the conversation, you noted a concern regarding letting the Charge Hand know when you must leave the work area, as you felt comments might be made by the Charge Hand. The Charge Hands understand they are not to make comments or pass judgment; they are simply to provide the information if requested.

You also noted a concern over the air condition in the War Room being too strong. As mentioned, you may turn off the air conditioning while you are in the room if it is too cold, and turn it back on again before you leave the room.

I trust this helps to clarify; however, if you have any questions, please let me know."

The Complainant testified she was more concerned with having to notify the Charge Hand and not her supervisor, that she was going to and from bathroom for frequent breaks. She testified she felt that this was a form of harassment and was embarrassed, as the Charge Hand was a male person and she would have to do this throughout her pregnancy. The Board finds the Respondent permitted the Complainant to leave a note for either the Charge Hand or supervisor and to remove it on her return, which she did.

The Board finds from the work history of the Complainant, by her own admission, she was a "roamer" by often leaving her work station to go to the bathroom and then wandering down to the HR Department or the Cafeteria or other places throughout the facility, thus being away from her work station, and as the Complainant testified, she initially did a lot of roaming when she was working in the office, and when confronted, she ceased; however, the Board finds again, it accepts the testimony of Ms. Flemming, Ms. Gilfoy and Ms. Fromm to the contrary, that

notwithstanding, she was repeatedly told not to wander or roam around from her work station, she repeatedly did so, as documented in Exhibit R-1, tab 5, tab 10 and tab 42,:

- In the Complainant's 480 hour plan from 2007, where her supervisor notes: "Darlene… you have been seen in the office talking to other staff members. This is not productive and has to stop now… Darlene must stay on task and understand she is working an 8 hour shift in the deburr cell not the office."
- The Complainant's February 3, 2010 discipline for being away from her work area and smoking outside of break time.
- On the Complainant's Record of Events, June 14, 2010: "Darlene was standing outside drawing control for 21 minutes. I spoke to Darlene about staying at her work station and not to rome (*sic*) around the plant"
- On the Complainant's Record of Events, August 20, 2010: "Darlene was spoken to today about excessive time away from her work station…"

The Board finds the Complainant acknowledged the Company Rules referred to in Exhibit R-1, tab 2, and was aware of the following:

> "All employees are to be at their appointed work stations, ready to work at their appointed starting time and shall, except in the performance of their duties, remain at such work station unless authorized to leave by their Supervisor until appointed quitting time."

The Board accepts the testimony of Ms. Flemming and Ms. Gilfoy in that it is important that they know where employees are, not only for health and safety reasons, as it is a production facility with heavy equipment, but also to ensure work is produced in a timely and efficient manner and not having to, as Ms. Flemming and Ms. Gilfoy testified being frustrated in having to go and look for her on numerous occasions, and find her in areas such as the Cafeteria, the Locker Room, Human Resources, the washroom, spending 30 to 45 minutes a day away from her work area. The Board accordingly finds the meeting and follow up letter referred to in Exhibit R-1, tab 24, outlining the requirement of her advising a supervisor or charge hand when she leaves her work station was reasonable. The Board finds this didn't have anything to do with pregnancy related issues, it had to do with her behaviour in roaming the floors after she leaves her work area, whether it is for bathroom breaks or otherwise. In regards to the issue raised of being nauseous and heat issues, the Board finds she was accommodated by the Respondent, by allowing her access to the "War Room" which was an air-conditioned meeting room that she

could control the temperature and the Board finds that room was only a minute or minute and a half away from her work station.

The Board further finds her main concern regarding notification to her Charge Hand, who was a male, when she left the work station, was changed immediately after the meeting of August 30, 2010, in that she could put a note on the Supervisor's or Charge Hand's desk when she was leaving and then she could remove it upon her return. The Board accepts the evidence of the Respondent's witnesses, Ms. Gilfoy, Ms. Flemming and Ms. Fromm in that regard, that it was due to concerns of her roaming behaviour that they had to address the issue as it was not just her going to the washroom.

The Board finds the Complainant acknowledged following this notification on August 31, 2010, there wasn't any further complaint in regards to this process by the Complainant. The Board further accepts the evidence of the three witnesses for the Respondent following that meeting, the Complainant had no further issue with the notification process. The Board further accepts the testimony of the Respondent's witnesses that the note that she had to provide when she was leaving her work station was not just for bathroom breaks but was for all breaks, as they were concerned with her roaming. The Board also accepts the evidence of the Respondent's witnesses, especially with Ms. Flemming, where she indicated there is no log made of the Complainant's breaks and the Complainant did testify she did remove the note when she returned.

The Board finds from the uncontradicted testimony of Mr. Gibson, that other employees who they had issues with being away from their work stations, were given similar restrictions for leaving a note when they were going to be away, and thus the Complainant was not singled out. The Board finds the Complainant was given as much time as she needed to attend to the washroom, to have snacks and cool down breaks as a result of her pregnancy related issues.

The Board further finds the Complainant testified employees were talking about her having to leave notes, yet the Board finds there is nothing in her complaint in that regard. Further, the Board finds during cross examination, she testified she couldn't recall particulars about jokes, but she believed there were jokes; although, she didn't raise this issue with her Supervisor or Human Resources. The Board finds if she was concerned about that issue, there would have been some mention made to her Supervisor or Human Resources and the Board finds her testimony on that issue is not credible. The Board finds because of her past history of roaming,

which she conceded she did, it began to be problematic, and the Board finds for her to notify her Supervisor or Charge Hand she was leaving and returning to her workstation, was reasonable under the circumstances.

Further, the Board finds the Respondent permitted the Complainant to leave a note and remove the note when she returned, which she did, instead of verbally telling the charge hand or her supervisor. The Board finds that was a reasonable way to approach the matter. The Board finds with respect to the notification issue, it was unrelated to her pregnancy, but had to do with her wandering and roaming behaviour away from her work station.

The Board finds the Respondent had an attendance management program (A.M.P.) referred to in Exhibit R-1, tab 3, which was implemented June 1, 2010, and laid out procedures for dealing with employees who had culpable and innocent absences.

The Board accepts the evidence of Ms. Fromm and Ms. Flemming that, as attendance is important, due to staffing and production requirements, as delays can prevent parts from getting from one department to the next department. Ms. Fromm testified culpable absences are those that are within the control of the employee, such as not setting their alarm clock, whereas innocent absences are those that are beyond the control of the employee, such as illness. Only culpable absences are disciplinary; although, the Board finds if there are a number of innocent absenteeism, for example, some employees were put on the A.M.P. once they reached an absent rate of 6% in any three month period. The Board accepts Ms. Fromm's testimony that it is not a discriminatory program, nor is it disciplinary.

The Board finds the program was intended to improve employee's attendance. The Board finds the Complainant had absentee issues before and during her pregnancy, and accepts the testimony of Ms. Gilfoy and Ms. Fromm in that regard, and also from the testimony of the Complainant. The Board finds the Complainant was placed in the A.M.P. program for innocent absenteeism on September 10, 2010, referred to in Exhibit R-1, tab 25, and finds as her attendance did not improve, she was given an additional letter asking for a medical report on October 7, 2010, referred to in Exhibit R-1, tab 32, to help her improve her attendance, and the Respondent did not know what more could be done. The Complainant testified she also was unsure if anything could be done to improve her attendance. The Complainant testified she felt her job was at risk, as the letter of September 10, 2010, referred to in Exhibit R-1, tab 25, stated as follows:

"... if, after an extended period, you continue to have an excessive absenteeism record, and there is no reasonable expectation that you are able to attend work on a regular, timely basis, then the Company may determine that the employment relationship must come to an end and terminate the employment contract."

The Board finds the Complainant acknowledged up until that point in time, namely, at receiving the letter of October 7, 2010, Exhibit R-1, tab 32, she didn't feel her job was at risk due to her absenteeism due to pregnancy related matters, and once she got the letter, she did feel her job was at risk. However, the Board finds the Complainant acknowledged her union representative was aware of this letter and she did not raise any concern when she received the letter, to the Respondent or to her union. The Board further finds she did not appear to be concerned about losing her job, when the Complainant sent a memo to Ms. Gilfoy, referred to in Exhibit R-1, tab 39, where she quotes as follows:

"Please advise Alyson this was very inconvenient and contains no more information than previously submitted. It was inconvenient for me, the doctor and the other patients waiting in the lobby. It has also aggravated my condition due to the stress she has caused me. Should there be another pregnancy at IMP I would hope she could figure out a better way to satisfy her needs."

The Board finds and accepts the testimony of Ms. Fromm, that no employee had been terminated on the innocent absentee program and that program had improved generally the attendance of all the employees at the work site, and further finds, upon reviewing the letter of September 10, 2010, Exhibit R-1, tab 25, there was no immediate threat of termination of the Complainant, but was mainly to advise the Complainant of exceeding the innocent absenteeism policy of the Respondent.

The Board was referred by Counsel of the Respondent to a decision of an innocent absenteeism program, in *Sluzar v. Burnaby (City)* [2010] B.C.H.R.T.D. No. 19 which supported and innocent absentee program.

> 236 I cannot find that the attendance management letters of November 2007 and February 2008 amount to adverse treatment of Mr. Sluzar. I come to this conclusion based both on the contents of the letters in question, and also in light of the Tribunal's decisions on the subject of attendance management issues.

237 First, with respect to the letters themselves, in both letters, the City outlined its concern, noted that an improvement in Mr. Sluzar's level of attendance was required, and required Mr. Sluzar to provide a medical report for all future absences, including the cause and nature of the illness, date(s) he was unable to work, and date(s) medical assistance was sought. The letters did not, in fact, outline any other consequences to Mr. Sluzar. In the circumstances of this case, I cannot find that a requirement to provide medical notes with respect to absences constitutes adverse treatment.

238 Second, as outlined by the Tribunal in Senyk v WFG Agency Network (No. 2), 2008 BCHRT 376, and Horn v. Norampac (No. 2), 2009 BHCRT 243, it is not adverse treatment for an employer to alert an employee that their level of absenteeism is of concern, and to advise the employee of potential consequences if their attendance does not improve. In fact, an employer is legally obligated to provide such a warning prior to taking any action that would have an adverse impact on the employee.

The Board finds the absenteeism program was not discriminatory and the Complainant acknowledged it was within management's right to institute such a program.

The Board finds the Complainant in her testimony indicated she has no respect for the HR Department, and is still working there today, however, she now documents everything. The Board finds there appears to be a great deal of animosity by her towards the HR Department and the Board finds this was prevalent before her notification of pregnancy to her employer and the Board finds she grieved many instances of disciplinary actions which did not lead to any formal grievance procedure by the union, which is still a concern of the Complainant. The Board finds the disciplinary actions that were taken prior to and during her pregnancy had nothing to do with a violation of the *Nova Scotia Human Rights Act, supra.,* in particular, discrimination based on pregnancy, but were normal work place disciplinary issues. The Board makes no finding on whether or not the discipline that was administered was appropriate or not.

The Board further finds the Respondent quickly accommodated the request of her physician, Dr. Flynn, to give her day shifts, and she did not obtain any further modification from her doctor that she could work evening shifts.

The Board further finds the Complainant supplied a list of chemicals that she could not be working around and this was totally complied with by the Respondent.

The Board further finds the Complainant, as a fitter assembly worker trainee, due to her restrictions, she could train 50% on her new job. Further, the Board finds the Complainant was given ample snack breaks and the Board finds there was no limit as to the quantity or duration of either snack breaks, staying in 'war room" to cool down or with respect to bathroom breaks and finds the Respondent accommodated her with regard to her pregnancy and medical issues.

The Board finds due to the past history of the Complainant roaming away from her work area, and her acknowledgment that she had been a roamer, the Board finds the Complainant did in fact roam and leave her work station on numerous occasions for lengthy periods of time both prior to and during her pregnancy. The Board finds her Supervisor's and others had to try to locate her and the Board, accordingly finds, the request for the Complainant to notify her Charge Hand or Supervisor, by leaving a note on the desk or informing them and when she was leaving and returning, was no way related to her pregnancy and there was no discrimination or singling out of the Complainant with respect to this notification, but due to her being away from her work area by roaming frequently, without notifying her supervisor or charge hand. The Board also finds requests by the Respondent for information on her medical issues was not unreasonable considering the amount of time absent from her work.

The Board finds the Respondent did accommodate the Complainant through her pregnancy and where the evidence differs between that of the Complainant and the Respondent, the Board gives more weight and credence to the evidence of the Respondent in that regard for the reasons stated, and finds the Complainant's allegations that she was not accommodated due to her pregnancy and sex are not substantiated. The Board further finds the Complainant's allegations that she was discriminated against by the Respondent is further not substantiated for the reasons stated, and any disciplinary actions that were taken, were due to matters unrelated to her pregnancy.

The Board finds there were no acts or continuing acts of discrimination by the Respondent against the Complainant from when she notified the Respondent in June 2010 of her pregnancy, and an August 31, 2010 letter, supra., regarding breaks, and October 7, 2010 letter, supra., regarding absenteeism, to when she left employment early in late October 2010, including the matters surrounding the October 14, 2010, disciplinary letter, supra., with respect to this complaint. The Board has already found in this Decision that there would have to have been acts of discrimination with respect to the October 14, 2010, letter or continuing acts of discrimination from the August 31, 2010, letter in order for the Complainant to be within the

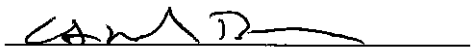
limitation period set out in the *Human Rights Act* for filing a complaint in this matter.

For the reasons stated in this decision, the Board finds no such discrimination occurred with respect to this Complaint for the period from June 2010 to late October 2010, when the Complainant left employment early. Further, the Board finds the letters of August 31, 2010, October 7, 2010, and October 14, 2010, did not involve any acts of discrimination by the Respondent towards the Complainant pursuant to section 5.1 (m) of the *Human Rights Act* as referred to in the Complaint.

The Board accordingly finds for the reasons stated, on the balance of probabilities after hearing the testimony of the Complainant and witnesses for the Respondent and thoroughly reviewing the exhibits tendered and the authorities cited, the Respondent has not discrimination against the Complainant contrary to section 5(1)(m), sex (gender/pregnancy) of the *Human Rights Act*, RSNS 1989 c.214 as amended, and the Complaint is hereby dismissed.

Accordingly, as the Complaint is dismissed, the Board does not have to consider any remedy.

DATED AT BEDFORD, NOVA SCOTIA THIS 29th DAY OF July, 2014.



E.A. Nelson Blackburn, Q.C.
Chair, Board of Inquiry