IN THE MATTER OF:	The Nova Scotia *Human Rights Act*
	- and -
IN THE MATTER OF:	Board File No. H15-0691
BETWEEN:	
	MELANIE YUILLE (The Complainant)
	- and -
	THE NOVA SCOTIA HEALTH AUTHORITY (The Respondent)
	- and -
	THE NOVA SCOTIA HUMAN RIGHTS COMMISSION (The Commission)
Board of Inquiry:	Eric K. Slone, LL.M. (ADR)
Heard:	January 10, 11 and 12, 2017
Counsel:	Rebecca Saturley and Sean Kelly for the Respondent
	Jason Cooke and Thomas Blackburn (student) for the Commission
	Melanie Yuille, Complainant, was self-represented
Date of Decision:	March 17, 2017

DECISION OF BOARD OF INQUIRY

INTRODUCTION

I. On May 11, 2016, at the request of the Nova Scotia Human Rights Commission, I was appointed by the Chief Judge of the Provincial Court of Nova Scotia as a one-member Board of Inquiry under the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214, to inquire into the May 22, 2015 complaint of Melanie Yuille against Nova Scotia Health Authority ("the Authority").

II. The Complainant, Melanie Yuille, is a registered nurse. She alleges that the Authority[1] discriminated against her contrary to the *Nova Scotia Human Rights Act*, when it failed or refused to accommodate her physical disability.

III. Specifically, the Authority rescinded a job offer already conditionally made to her, to work as a clinical nurse on 4-West at the Dartmouth General Hospital, after it learned that because of certain health conditions, she could not work night shifts and could not change her shift rotation every few days, as is customary in many clinical nursing units, including the one for which she had applied.

IV. This case raises several important issues, both factual and legal:

A. What is the extent of the duty to accommodate a person who is not yet an employee, but who is being considered for employment, or who was (as here) conditionally offered the job subject to (among other things) satisfactory clearance from the occupational health (or employee health) department?

B. If there is such a duty to accommodate outside job applicants, is it narrower or lesser than the duty owed to existing

[1]At the time the Capital District Health Authority, often referred to as the "CDHA"

employees who enjoy the benefits of a collective agreement, including union representation and seniority, and other employee benefits such as disability insurance?

C. Assuming there is such a duty, on the facts of this case, would it have been "undue hardship" for the Authority to fit the Complainant into the schedule on 4-West, working only day or evening shifts, and not changing shifts (even between those two) more often than every six weeks or so?

D. If there was a duty to accommodate, did such duty require the Authority to look farther afield or was the duty only to consider accommodation for the very job on 4-West applied for?

E. Again assuming that there was a duty to accommodate, did the Complainant later unreasonably refuse (or was she too inflexible) when she was offered a .8-full-time-equivalent (FTE) position on 4-West? Was this a failure to mitigate her damages?

V. As the following reasons will set out, I find that the Authority did not meet its duty to accommodate the Complainant on 4-West, and remedies will follow. Some of the other questions, as set out above, will be considered and answered, to the extent required.

THE EVIDENCE

VI. The hearing of this case took place in Halifax over the course of three days in January 2017. The Authority was represented by experienced counsel. The Complainant represented herself, although she had the benefit of some legal advice before and during the hearing. The Commission was represented by experienced outside counsel. I mention this not merely as a matter of record, but also to highlight the asymmetrical nature of hearings such as this. Complainants such as Ms. Yuille can rarely afford

the cost of legal counsel for a Human Rights Board of Inquiry. And while counsel for the Human Rights Commission supplied some balance, he (in this case) was not charged with the responsibility of advocating for the Complainant. The task of Commission counsel is to assist the chair by (for example) supplying legal authority, and otherwise assisting in the presentation of a good and fair hearing.

VII. I remarked at the end of the hearing that I believed the Complainant had done a good job of presenting her case. I was sincere in this comment. Fortunately for the Complainant, there was not a great deal of factual controversy in the evidence. It did not require her to perform the type of cross-examinations that are designed to "shred the witnesses' credibility" or even something less extreme. Her cross-examinations were directed at eliciting additional facts from witnesses who were, without exception, credible and well-meaning. As such, I believe the facts came out fully and fairly.

VIII. Given all this, the task of fact finding does not require me to dismiss or reject anyone's evidence. Rather, it comes down to the making of certain inferences and determining what facts have been proved, and considering whether the parties have met their respective burdens under the legislation and jurisprudence.

IX. What follows is a summary of the evidence presented, not necessarily in the order presented, nor strictly chronological, but rather ordered for narrative purposes.

Melanie Yuille

X. The Complainant, Melanie Yuille is currently the single mother of a 13-year old son, although at the time she had applied for the job in question, her marriage was still intact. She and her husband separated in February 2016, partly (she says) because of the stresses associated with her inability to received an accommodation from the Authority, and the resulting Human Rights Complaint.

XI. She received her BSN degree in the year 2000, and has been employed in a nursing capacity ever since. She worked for the then-CDHA in a research coordinator role, and was so employed when she first started having epileptic seizures in 2010. As she sought and received treatment for this condition, she began to have difficulty working any type of rotating shift schedule. For some period of time she was on sick leave or disability. At some later point she left CDHA and began to work in a private long-term care facility where the scheduling of shifts was more lenient, so to speak.

XII. With her epilepsy and sleep disorder somewhat under control, in early 2015, she gave some thought to her career and realized that she was losing her acute care skills and would be well-advised to attempt to find work that renewed those skills.

XIII. She started looking on the jobs website Career Beacon, and found an ad for the nursing job on 4-West at the Dartmouth General site. She understood that this was an acute-care unit, which houses patients who are very ill, and might best be described as one step down from the ICU or surgical floors. On about February 24, 2015 she submitted her application for the advertised job, included her resume, and was soon thereafter

offered an interview. The interview took place on March 6, 2015. The interviewer was Sharon Ingram, the Health Services Manager responsible for (among other things) 4-West.

XIV. The interview went well. It was acknowledged that the Complainant might need some retraining on some of the "competencies" pertaining to the work on4-West, but this was not considered to be an obstacle. It was assumed that there would be a chance for the Complainant to receive some mentoring in the early going, if she was offered the job.

XV. The Complainant conceded that there had been some discussion of the rotating shift schedule, and of the fact that there was a more urgent need for nurses to work the night shift. She said she was told that there were three vacant positions at the time. The Complainant said that she was not aware of the specifics of the shift rotation, but she knew (and kept to herself) the fact that she would likely be unable to do any type of rotating shift. She also stated that she was aware of the basics of Human Rights law, and the concept of bona fide occupational requirement, or "BFOR." It was her opinion (then and now) that the ability to work rotating shifts was not a BFOR. She also believed that, even if she could not work on 4-West (because of the shift schedule), assuming that she was otherwise qualified for the job, the Authority would have a duty to find her an accommodated position.

XVI. At this time, the Complainant did not believe that she would be prohibited from working nights; only that frequent changes in shift would be something she could not do, because of her medical condition.

XVII. On March 26, 2015, the Complainant received a conditional offer of the job. Many of the conditions were routine, and simply required the Complainant to supply the Authority with required information and documents. The significant condition, as far as this case is concerned, was the Employee Health Record which would be reviewed by Employee Health, whose assent was necessary in order for the Complainant to be cleared for work.

XVIII. It was in the questionnaire for Employee Health that the Complainant first disclosed that she had epilepsy and a sleep disorder (and some other irrelevant health issues). She was very candid in admitting that she had not made any earlier disclosure of her medical conditions, such as in the interview with Sharon Ingram. The Complainant had been in an epilepsy support group where the subject of what to disclose in job interviews, and what not to disclose, was openly discussed. The advice was not to make such disclosure too early, because of the possibility that it would factor into the decision whether or not to offer someone a job. The better approach, she was told, was to wait until a job was offered and then seek an accommodation.

XIX. The Complainant admitted that she felt a bit uncomfortable with this approach. This speaks well to her character, as a person who did not want to start an employment relationship on a note of dishonesty. However, I cannot fault the advice which she was receiving, which seems to be realistic. One cannot help but wonder how many people with disabilities are denied opportunities, with ostensible reasons given that disguise the fact that there is a form of discrimination going on. In the case here, the Complainant's disability is invisible. By omitting any mention of her

condition, the Complainant put herself in a position to ask for an accommodation. And it places this Board of Inquiry in a position to determine whether the duty to accommodate was met.

XX. The first step after filling in the Health Record was for the Complainant to have a meeting with the Occupational Health Nurse at Employee Health, who turned out to be Amy Urquhart. The meeting took place on April 8, 2015. What followed thereafter were discussions and correspondence, including email, to ascertain what limitations would apply to the Complainant and what, if any, accommodation would be offered.

XXI. The Employer had reports from both Dr. Sadler and Dr. Childs, who had both treated the Complainant, and which reports were reviewed by the Authority's Occupational Health physician (Kevin Bourke) for his opinion. It was his opinion (which he stood by at the hearing) that the Complainant could be cleared for work on two conditions:

A. Her shift rotation should not change any more frequently than after six weeks (sometimes expressed as 45 days, though the difference is of no significance); and

B. She should not work <u>any</u> night shifts as part of her regular rotation. He later allowed for the possibility that she could work an <u>occasional</u> night shift, which did not really change anything.

XXII. The Complainant considered this to be good news, in the sense that she was actually being cleared to work, albeit with restrictions. The decision to preclude nights, or later any but the <u>odd</u> night shift, came as a bit of a surprise to her, but she did not directly protest this condition, understanding that it had been arrived at with her best interests at heart.

She strongly believed that the Authority could and would accommodate her.

XXIII. By then, namely in early April 2015, she had given her notice at the long term care facility where she had been working. (As will be commented upon later, counsel for the Authority argued that this resignation was precipitous on the part of the Complainant.)

XXIV. On April 21, 2015, an email message was sent to the Complainant, rescinding the job offer. The Complainant says that she was "dumfounded" as she believed that the accommodation she was asking for was reasonable and achievable. She tried in vain to find someone in the HR Department who would discuss it with her. When she did speak with someone, she was told that she was free to apply for other jobs. She was also told that it was not the role of the HR Department to oversee the accommodation process. She had a discussion with someone from the legal department at the Authority, but nothing concrete came of this.

XXV. In May 2015 the Complainant initiated this complaint under the Nova Scotia *Human Rights Act.*

XXVI. At this point, the Complainant had been out of work for some time and she knew that she needed to work. She managed to get some part time work at the Admiral (her former workplace) and continued to look for full-time work. She testified that she was entirely without income for two months. She has since then worked in long-term care on a full-time basis.

XXVII. As she was monitoring job postings in the aftermath of her failure to be hired for 4-West, she took note of the fact that 4-West posted three full-time nursing positions in June 2015, which were identical to the position for which she had applied in February. She noticed that there was a slight difference in the language of the posting. In February, there had been no mention of shift works or rotating shifts, while such a job requirement was written into the June posting.

XXVIII. While the change in language regarding shift work is suspicious, there was evidence that earlier postings had mentioned rotating shifts. Also, it is a common feature of nursing jobs that there will be rotating shifts, including nights, and the Complainant was not in any doubt that this would be the case here. I therefore make no inferences from this change in wording, such as by imputing any sinister motives to the Authority.

XXIX. In about September 2015, as a result of the complaint that the Complainant had filed, and in accordance with its practice, the Commission engaged the parties in a Resolution Conference, to explore possible resolution of the complaint. Obviously, this process was not successful, or the matter would not have come before a Board of Inquiry.

XXX. So why is it necessary to mention it? The reason is that the Authority, while it denies that it failed to accommodate the Complainant earlier in 2015, argues that it provided accommodation options at that time that either cured any earlier failures, or at least mitigated the effect of any earlier failures.

XXXI. As such, as I later consider this evidence, I propose to analyze what occurred at the Resolution Conference through more than one lens.

A. The question must first be asked whether, before the Resolution Conference was held, there was a breach of the *Human Rights Act*, in the sense that the Authority failed to provide reasonable accommodation to the Complainant, a person with a physical disability. If so, I would have to conclude that whatever happened as a result of the Resolution Conference could not have entirely cured that breach.

B. The next question to answer is - assuming a breach had occurred - whether what came out of the Resolution Conference had the effect of mitigating the Complainant's damages.

XXXII. The Complainant described some of the things discussed at the Resolution Conference. She says that she told the representatives of the Authority that there were many nursing jobs that she could do, with an accommodated schedule. She said that she was not well-received. As related by the Complainant, the Authority took the position that shift work is a bona fide occupational requirement (BFOR) in nursing. The Authority said that it did not have a duty to accommodate new hires. It acknowledged that its duty did extend to its own employees, who (incidentally) had a union to represent them.

XXXIII. In other words, the Complainant came to understand the Authority's view of accommodation as somewhat narrower than she had assumed it to be.

XXXIV. Even so, the Authority came to the Resolution Conference with some alternative jobs that it was prepared to offer. One was a night shift job on 4-B, a transitional care unit at Dartmouth General. Another was a part-

time day shift at 4-B. The third was a .8 full-time equivalent job (with days and evenings only) at 4-West. The Complainant says that she was told that the 4-West job was temporary only, which is why she rejected it.

XXXV. The question of whether this .8 job was temporary or permanent is a disputed point. The Complainant insists that this was the information provided to her by the Human Rights Commission facilitator. The Authority insists that there was no such restriction. I will return to this point later.

XXXVI. While the Complainant was considering her options, the 4-B positions were withdrawn from consideration, because the jobs were no longer available for budgetary reasons unrelated to the Complainant.

XXXVII. The Complainant also indicated that (in the context of the Resolution Conference) acceptance of the .8 position at 4-West would have required her to discontinue her discrimination complaint, which she was reluctant to do. Although it was only .8, and she was hoping for full time work, this would not in itself have deterred her because she understood that there would have been the possibility of picking up extra shifts bringing this job close to, or possibly even, full time.

Medical evidence - Dr. Sadler

XXXVIII. The Employer called as a witness Dr. Robert Mark Sadler, who is a specialist in medicine as it pertains to epilepsy. The Complainant was referred to him by her family physician in 2010, after she had experienced some seizures. He embarked on some investigations and therapies to determine, if possible, the cause of the seizures and to seek to prevent

further seizures. He saw her a total of 8 times between 2010 and 2014, when he discharged her from his care. He reported that the Complainant had been seizure-free since the fall of 2012. He testified that the Complainant had experienced between 12 and 14 seizures in the years 2010 through 2012. The seizures stopped with the use of anti-epilepsy drugs.

XXXIX. He also reported that the origin of the seizures was never determined, which was (for him) good news, as it meant that there was no lesion such as a tumour.

XL. As he understands it, the Complainant is now on a low-dose of the anti-seizure medication, which appears to be sufficient to control the condition.

XLI. It was Dr. Sadler who referred the Complainant to an expert in sleep disorders, Dr. Childs, as the Complainant had reported to him that she was suffering from severe insomnia. He made a connection between the insomnia and epilepsy, in that it is <u>possible</u> that the sleep disruption may have exacerbated the condition and may have been a trigger for some of the seizures.

XLII. Dr. Sadler was of the opinion that it would be detrimental to the Complainant for her to have frequent changes in her shift rotation, because shift work can tend to create sleep disturbance which, in turn, could provoke seizures. His point, he said, was that the Complainant needed consistent shifts. He did not rule out (nor did he recommend) a shift schedule consisting of only nights.

XLIII. He did not quarrel with the stipulation placed by Employee Health, that the Complainant not work any nights.

Medical evidence - Dr. Childs

XLIV. The Complainant called Dr. Christopher Childs as a witness. Dr. Childs was trained in the UK in internal medicine, and had a general medical practice for many years before branching out to become a well-recognized specialist in sleep medicine. He saw the Complainant on a referral from Dr. Sadler in 2012. He did an additional assessment, and saw her twice more before discharging her from his care. At the time of the referral, the Complainant was experiencing serious insomnia problems and was taking what he regarded as an excess amount of sleep medication (hypnotics). His approach was gradually to reduce her sleep medication to a more reasonable level. By the time he had last seen her in 2013, she was down to one tablet every second night. He hoped she might eventually wean off sleep medication entirely.

XLV. Although he did not put a firm restriction on nights, he agreed that it was desirable that the Complainant not work regular night shifts, because of potential disruption of sleep patterns. It is his view that it is important for someone like the Complainant to have the same sleep hours every night, if possible.

XLVI. He deferred any issues about the Complainant's epilepsy to Dr. Sadler, who is the expert in this condition.

Sharon Ingram

XLVII. Sharon Ingram, the Health Services Manager who oversaw 4-West, and who interviewed the Complainant, testified on behalf of the Authority. She is a very experienced nurse and manager with some 35 years of relevant experience.

XLVIII. She described 4-West in some detail. At the time in question, there were 23 beds for patients with acute medical or cardiac conditions. Patients are sent to this ward usually after spending time in the ICU or the Emergency unit. It is the only unit in the hospital which does telemetry - which is an automated communications process by which measurements and other data are collected from the patients and transmitted to a central location in the unit for monitoring. Equipping patients for telemetry is a specialized skill that the Complainant would have had to be trained to do, had she been hired to work on the floor.

XLIX. 4-West currently has 27 beds.

L. In 2015, there were approximately 13 Registered Nurses (RN) and perhaps 11 Licenced Practical Nurses (LPN) working on 4-West. There were also a few part-time RN's working, plus a casual pool of RN's who might be called in, but who had a great deal of control over whether or not they worked.

LI. The shift schedule on 4-West is typical of many medical units that require 24-hour, 7-day coverage. RN's mostly work 12-hour shifts, rotating between days and nights, usually 2 day shifts, some days off, then 2 night

shifts. Some RN's worked 8-hour shifts, either 7:00 a.m. to 3:00 p.m. (8-hour days) or 3:00 p.m. to 11:00 p.m. (8-hour evenings).

LII. She acknowledged that night shifts are unpopular with RN's, because of how hard it is on them physically to have to change their sleep schedules so often. RN's tended to call in sick disproportionately when scheduled for nights, with the result that there was often a scramble to find replacements. Quite often, a day or evening RN would stay on and work the night, at overtime rates. Occasionally, the shift was simply not filled, with the result that extra pressure was placed on the other night RN's.

LIII. Ms. Ingram described certain studies that were being done in the 2014 time frame to assess the needs and operations of 4-West. One of the recommendations was to hire more RN's.

LIV. Ms. Ingram stated that she understands the duty to accommodate, and often works with the Occupational Health Consultant and with Human Resources to work out an accommodation. When she interviewed the Complainant, she had no idea that an accommodation was needed. At the time, she had three (or possibly four) full-time positions to fill. At the time, she was struggling to fill night shifts and was hoping that these additional hires would ease that pressure.

LV. She believed the interview with the Complainant had gone well, and though she did not formally offer her the job at the time, there was some discussion about next steps including the relatively routine requirements for references, a criminal records check, proof that her nursing licence was current etc., plus clearance from Employee Health.

LVI. During the interview with the Complainant, Ms. Ingram explained the shift schedule in place at 4-West. She recalled the Complainant asking about a possible schedule that was nights-only. (It may be recalled that the Complainant did not at that time necessarily object to working nights, but rather she knew that frequent changes of shift were the problem because of the sleep disruption caused by changing shifts so often.)

LVII. Ms. Ingram first became aware of the Complainant's restrictions by an email from Employee Health on the 3rd or 4th of April 2015. She spoke to the Complainant about a week later and stated that the restriction of no-nights would be problematic. She consulted with the HR consultant, Susan Kline. Ms. Kline also testified, and her evidence will be discussed below.

LVIII. As a result of deliberations involving Ms. Ingram and HR, the decision was made to rescind the job offer. Her concern, as expressed at the hearing, was that there would be a negative impact on morale within the unit, if she hired an RN who could not do her share of night shifts. She admits that she gave no consideration to trying to post an "all-nights" position that might have fulfilled her needs and offset the Complainant's requested all-days position. She stated that she believed such a position could not be created under the existing collective agreement with the Nurses' Union. She also explained that RN's need to be exposed to all aspects of the work done on the floor, including the involvement of other professionals such as physicians and occupational therapists. As such, some learning opportunities (including lunch'n'learn sessions) are only available during

the day and a nights-only RN would potentially suffer a degradation of their skills and qualifications.

Post-complaint facts

LIX. Ms. Ingram became aware of the Human Rights Complaint sometime after it was filed by the Complainant in May 2015. Shortly thereafter, they opened an additional 3 beds at 4-West. It was proposed that they post 2.8 full-time equivalent RN positions, namely two full-time and one .8 position, to meet the additional and existing nursing needs. The .8 position would have rotated between days and evenings. She knew that the Complaint was headed for a Resolution Conference, and believed that this .8 position might be a good fit for the Complainant. As noted, it was offered to the Complainant and declined. It was soon thereafter filled by someone else. Ms. Ingram insisted that it was a permanent position, and not merely temporary as the Complainant appeared to have believed,

LX. Mr. Ingram was also part of a process where, just days before the hearing, a similar offer was made to the Complainant on a “with prejudice” basis. This offer was declined, and the hearing went forward.

LXI. Ms. Ingram admitted that she had never previously been involved in a process of seeking accommodation for a new hire - only for existing employees. It was her opinion that, assuming she could not accommodate someone in this particular unit, she had no legal obligation to look to other units where an accommodation might be more easily found. In her view, it would have been the responsibility of the Complainant to look for other opportunities and apply for them.

LXII. Ms. Ingram conceded that at the time the Complainant was seeking an accommodation, there were no other RN's being accommodated on 4-West.

Amy Urquhart

LXIII. Ms. Urquhart is the Occupational Health Nurse who dealt with the Complainant and her pre-employment screening. It was she who first noted the issues and sought the advice of Dr. Kevin Bourke, the Occupational Health physician.

LXIV. She generally understood that the concern for the Complainant was that switching shifts from day to night might be a trigger for the Complainant's epilepsy. This was not a problem that she had encountered in the past.

LXV. Ms. Urquhart met initially with Dr. Bourke on April 14, 2015, at which time he asked for some further information. This included a follow-up letter written by Dr. Sadler dated April 17, 2015. Ms. Urquhart met again with Dr. Bourke on April 21, 2015, after which the email was generated setting out the specific restrictions that would be placed on the Complainant, namely no change of shifts more frequently than every 45 days (later amended to 6 weeks) and no nights (later amended to "occasional nights only.") Mr. Urquhart relayed these conditions to the Complainant who seemed to be content with them, at the time.

LXVI. Mr. Urquhart's involvement essentially ended at this point, until August 2015, after the Human Rights Complaint was filed and the Complainant's

restrictions were being reconsidered in connection with a possible accommodation. It was at this time that the slight amendments to the restrictions, as noted above, were made. Ms. Urquhart was part of the Resolution Conference process. She recalled that at that conference legal counsel for the Complainant sought clearance for the Complainant to work nights. Dr. Bourque did not give way on that point except to the limited extent of allowing an "occasional" night shift.

LXVII. Ms. Urquhart has had involvement in the past with accommodations, but none in connection with a new hire. From her point of view, there was no difference, in the sense that the person needing accommodation would be reviewed in the same way, and the same set of recommendations would be made.

Dr. Kevin Bourke

LXVIII. Dr. Bourke specializes in providing occupational health services, on a contract basis. He basically confirmed what was presented through other witnesses. He clarified that his restriction on nights was based both on the epilepsy and insomnia conditions. He based his decisions on the medical information provided, as well as the updated information that he was able to acquire.

LXIX. He stated that night shift work is hard, even for completely healthy people, and he just could not see exposing the Complainant - as someone with health problems - to the added stress of night work. He saw no problem with her working 8-hour days and 8-hour evenings, so long as they only changed after at least six weeks.

Susan Kline

LXX. Ms. Kline was the HR Consultant with the Authority who was largely responsible for the ultimate decision that the Complainant could not be accommodated. Because of the importance that I attributed to her evidence, I caused it to be transcribed.

LXXI. Ms. Kline explained the process for a prospective new hire who could not do the job was that the offer would be rescinded:

Q. Okay - okay. All right. So Susan have you ever dealt with individuals who require accommodation during - you know during this process? So you know that the job for which they've applied… is something they need accommodation in that job.

A. I recall a couple of instances where that the restrictions had been identified in the hire process over the years. I don't - I wasn't involved directly with them.

Q. Okay - okay. So do you - let's - an - and I don't know if you know the answer then to this question or not. If an individual applies for a job and they can't do that job because of disability-related reasons…

A. M-hm.

Q. …what happens?

A. So an assessment's already been done?

Q. Right. So the…

A. You're assuming that…

Q. Yeah.

A. Of - whether or not they - and if they can't do the position then the offer would be rescinded from the……individual you know once the full assessment's been done.

Q. Have you ever been involved in a situation where Capital Health or what - whatever. NSHA… took that application and assessed an individual for other positions?

A. No.

LXXII. Ms. Kline explained that it was the manager's ultimate decision whether or not to rescind a job offer because of an inability to accommodate, but she gave advice and - in this case - did not disagree with the manager:

Q. Okay. And - and what did you understand her concerns to be?

A. I understood them to be the nightshift. At the time we understood that Melanie wouldn't be able to work the - the nightshift and that was a concern for the area because they had a shortage of night nurses - or a shortage of nurses that was impacting the nightshift.

Q. Yeah.

A. And that's what they were recruiting for at the time was more nurses so they could fill up their - their nightshift as well and - and ensure the safety of the patients on that shift.

Q. And what was your views on - on Sharon's concerns?

A. I think they were relevant you know as an Organization we do need to give due consideration to restrictions when they're raised and the way Sharon described the - how it would impact the - the Unit you know she - she was able to demonstrate to me that it - she had valid safety concerns.

Q. Do you have the ability to disagree with a manager and is that within your - your - you know let's say - say that her restrictions had been - her - her viewpoint on the restrictions had been wrong.

A. M-hm.

Q. Do you have any scope of authority to deal with that situation?

A. I - I do. In that I would certainly identify my concerns with the manager if she had you know perhaps not considered fully the issues that were raised you know identify her - to her obligation as an Organization and the issues and - and you know what - what would happen at - if she wasn't fully considering restrictions. At the end of the day it's the manager's decision. I don't have the authority to - to decide for her, for example, but I do have the you know - it's my responsibility to

advise her appropriately and if I had concerns I could raise them beyond her as well to engage others to discuss.

Q. Did you raise any concerns in this situation?

A. No.

LXXIII. She further described (in an exchange with the Chair), the different practices that apply in the case of internal candidates vs. external candidates:

THE CHAIR: Before we go over to Mr. Cooke, I just want to - I just want to expand a little bit on this area that Ms. Yuille opened up. I mean and this has been in - this has already been on my mind and I - I wondered about this. The distinction between how you accommodate existing employees who are union members versus external hires who don't come under the collective agreement until or unless they're hired. Is there within the Health Authority some kind of - let's call it accommodation officers, czar, guru, or something whose, not saying only job, but who has the responsibility to take an accommodation request and scan the whole Organization to find possible accommodated positions? Is there such a person?

MS. KLINE: There is.

THE CHAIR: Right. Is that - to your knowledge is that in the collective agreement or is that just simply an organizational fact?

MS. KLINE: It's not in the collective agreement. Their primary role is for individuals who are in - in their current job have become - they've become disabled are no longer able… to do their current job so they

THE CHAIR: I mean just using Ms. Yuille as an example.

MS. KLINE: Sure.

THE CHAIR: Somebody in that existing clinical nursing position might develop the same medical conditions that she had and might receive the same recommendations for restrictions. And that nurse would in effect be - have the benefit of that accommodation czar's efforts to find some other place in the Organization?

MS. KLINE: Correct.

THE CHAIR: That's - yeah.

MS. KLINE: Yeah.

THE CHAIR: Okay. But an external hire you're saying never gets to that person if they can't be accommodated in the very specific job they've applied for?

MS. KLINE: Correct.

THE CHAIR: That's the practice?

MS. KLINE: Right.

LXXIV. There was other evidence called, though it is not recited as it will not bear on the result.

SUMMARY OF FACTS

LXXV. Stated in simplistic terms, a highly qualified nurse (with a physical disability) applied for a job with the Authority in a clinical setting, that she was capable of doing in all respects except that she could not work the shift schedule that was in effect. She could not change shifts as often as the schedule provided, and she could not work nights. She could work days and evenings, and could change shift every six weeks or so.

LXXVI. The Authority in this case is one of the largest employers in the province, if not the largest, and has a virtual monopoly on acute care health services in the region.

LXXVII. The manager of the unit in question (4-West) had budgetary approval to hire nurses, and needed not only to increase the complement but also needed to shore up the staffing of night shifts, which are (perhaps understandably) not popular with nursing staff.

LXXVIII. The evidence was clear that the practice on this floor is consistent with that on many; namely, there is a shift rotation that toggles between days and nights every few days - at least for the nurses doing 12-hour shifts, which here represented most of the nurses. There were some nurses doing 8-hour days or evenings.

LXXIX. There were no nurses at the time on 4-West being accommodated as a result of their health conditions.

LXXX. I believe it is fair to say that the evidence established that the hiring of the Complainant would not have helped with the immediate problem of getting more nurses willing to work the night shift, and to that extent continuing with the hiring process would have created a “hardship,” though the question of whether the hardship was “undue” is a judgment call.

LXXXI. It is also established by the evidence that the Complainant’s need for an accommodation was considered, but that effort only went so far. Once it was established that she would not be hired for the specific job on 4-West, the job offer was rescinded and she was essentially “back to square one.” She was free to apply for other jobs, if she saw anything that interested her, but the Authority was not prepared to look for an accommodated position for her elsewhere in its system. That type of treatment is reserved for existing employees who, if they become disabled and unable to work at their previous job, even with an accommodation, go on a list and (usually if not always while collecting benefits) are considered for other jobs that may become available that are within their capabilities.

LXXXII. Ms. Ingram believed the hiring of the Complainant in an accommodated position might raise a safety issue, in the sense that the need for night nurses was acute and when night shifts are short of RN's, patient safety could be at risk. This evidence was not offered with much elaboration.

LXXXIII. The evidence also establishes that the Authority sprung to action once faced with the Human Rights complaint. What followed thereafter was an attempt to settle, which unfortunately did not succeed, for a variety of reasons including (perhaps) a misunderstanding about the permanence or otherwise of a job on another floor.

What the evidence did <u>not</u> address

LXXXIV. What I did not hear was any evidence that explained why shifts <u>must</u> rotate at the frequency they do. Specifically, there was no evidence that other types of schedules are not possible, or that they have been tried and found to be unworkable. I get the distinct impression that the type of schedule in place is accepted as "the way things are" and, indeed, may well be fully endorsed by the unions representing nurses at the Authority, and specifically - here at the Dartmouth General - by the Nova Scotia Nurses Union. Even if so, I do note that there is some flexibility in the applicable article of the collective agreement, which will be referred to later in this decision.

LXXXV. I also did not hear any evidence as to what it might have cost the Authority to create an accommodated shift schedule that would have suited the Complainant's restrictions. There was no evidence of any

process by which a manager (such as Ms. Ingram) could seek additional budget to fund an accommodation.

LXXXVI. The suggested safety concerns were not backed up by any specific evidence that might have potently proved the point, or revealed the extent of the safety risk. Also, while the statement was made by some of the witnesses that such an accommodation would affect the morale on the unit, there was no concrete evidence put forward to substantiate, or measure, the effect on morale. The evidence on this point could be described as "impressionistic," if not entirely speculative.

LEGAL PRINCIPLES

Human Rights Protection in Employment

LXXXVII. The statutory obligation in an employment context begins with Section 2 of the Nova Scotia *Human Rights Act*, which sets out the purpose of the Act:

> 2 The purpose of this Act is to....
>
> (e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life .....

LXXXVIII. In the sections following, there are particular provisions that prohibit discrimination against people with disabilities. Section 3(l) defines physical or mental disability:

> 3 In this Act, ...

(l) "physical disability or mental disability" means an actual or perceived

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

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

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

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

(v) condition of being mentally impaired,

(vi) mental disorder, or

(vii) dependency on drugs or alcohol;

LXXXIX. Sections 4 and 5 go on to define discrimination and specifically prohibit it in respect of (among other things) employment:

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

5 (1) No person shall in respect of

(d) employment; ....

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

(o) physical disability or mental disability;

XC. The *Human Rights Act* (like other such statutes elsewhere) does not contain the terms “reasonable accommodation” or “undue hardship.” These terms derive from several decades of jurisprudence which have established a test to determine whether discrimination on the basis of a protected characteristic (such as disability) has taken place.

XCI. The concept of accommodation, and the extent of its operation, has been a virtual “sea change” in the area of employment law. As eloquently noted ten years ago by Professor Michael Lynk of Western University Law School in his oft-cited 2007 article, *Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada* (footnotes omitted):

> For much of the twentieth century, the concepts of "frustration of contract", "innocent absenteeism" and "dismissal for incapacity" decisively shaped the legal relationship between employees with a disability and their employers. As a condition of obtaining or maintaining employment, an employee was expected to productively perform the entire range of his assigned job responsibilities. If that could not be accomplished because of a pre-existing condition, or in the aftermath of a medium or long-term disabling condition, the employer was entitled to treat the incapacity as a frustration of the employment contract, and lawfully terminate the employment contract. The only exception was if the collective agreement, the individual contract of employment or the applicable labour standards statute contained a protective provision, which was uncommon. Otherwise, an employee with a disability had to adjust to the workplace exactly as it was. Failing that, he had no legal claim to a job, because the law of the workplace imposed no obligation upon an employer to alter the workplace in any way, or to offer an accommodation or re-employment.
>
> However, over the past twenty years, disability rights at work in Canada have undergone an extraordinary sea change. The rise of human rights obligations, and, in particular, the emergence of the duty to accommodate, has become the most significant workplace law development in recent times. Flowing from this has been a tsunami of cases decided by the courts, labour arbitrators and human rights tribunals that have measurably expanded the scope and perimeters of employment rights for employees with disabilities. What was once a one-way street of settled prerogatives belonging largely to the employer has become, after the tipping point in the early 1990s, a two-way boulevard of complex and demanding legal responsibilities.

> An employee with a disability is still required to productively perform the core aspects of her job in order to maintain the employment relationship, but that has now become subsumed by the considerable obligations acquired by the employer through the accommodation duty. (Emphasis added)

XCII. Certainly it has become settled law since the seminal 1999 decision of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* [1999] 3 S.C.R. 3 ("*Meiorin*") that there is a structured analysis to be followed. The so-called *Meiorin* test first requires an employee seeking an accommodation in the workplace to establish certain things:

A. She must show that she comes within the coverage of a statutory human rights ground, and

B. She must show that her human rights ground is linked to the necessity for a workplace accommodation.

XCIII. Once these two elements have been met, the onus then shifts to the employer, who (in order to prevail) must satisfy three elements of the defence to the accommodation duty:

A. It must establish that its rule or practice is rationally connected, in the general sense, to the workplace operations (e.g. whether safety rules are necessary in the particular place of work);

B. It must establish that the rule or practice was created in good faith (i.e. no discriminatory intent); and

C. It must establish that it has been impossible to create an accommodation for the employee, short of undue hardship.

XCIV. While some cases have confused the issue of the reverse onus, in the sense of whether it is an evidentiary onus only, or an onus of proof, I doubt that it makes any practical difference. Very few cases are decided on the question of legal onus. Assuming all the relevant points have been addressed in the evidence, adjudicators will weigh all of this evidence. Only in the rare, if not entirely theoretical case of an evenly split, or 50-50 case, will the question of legal onus become the determinative factor.

XCV. No one familiar with the law in this area would now dispute the test, as put in these simplistic terms: An individual seeking (or enjoying) employment is entitled to ask for, and receive, accommodation for his or her physical or mental disability. The employer (or prospective employer?) is obligated to "reasonably accommodate" the disability, unless to do so would create "undue" (or unreasonable) hardship, in which case the employer may refuse to accommodate and thus deny the person the modified employment that they seek.

XCVI. The question of undue hardship is intimately linked with that of a bona fide occupational requirement ("BFOR"), which now has a basis in s.6 of the *Human Rights Act*:

> 6 Subsection (1) of Section 5 does not apply ...
>
> (f) where a denial, refusal or other form of alleged discrimination is ...
>
> (ia) based upon a bona fide occupational requirement ....

XCVII. Put in plain language, the point of undue hardship will not be reached where the things a disabled person cannot do are not "bona fide

occupational requirements;" i.e. the restrictions do impact on the core requirements for the job.

XCVIII. The question of undue hardship is, in many cases, a difficult one that the employer must judge. This assessment should not lightly be second-guessed by a third party such as a Board of Inquiry. The employer is due a certain amount of deference on the question of whether or not a particular job requirement is a BFOR, but it is ultimately up to the person adjudicating the claim to make a finding on that point, based on all of the evidence. Otherwise, the rights provided by the *Act* would be entirely elusive.

XCIX. In the result, if a Board of Inquiry, or arbitrator or court otherwise having jurisdiction, finds that a refusal of accommodation was unreasonable, for any number of possible reasons, the person adversely affected by such refusal has established a violation of s.5(1) of the *Human Rights Act* and is *prima facie* entitled to relief.

C. The remedial section of the *Human Rights Act* is s.34(8), which provides:

> (8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.

The Duty to Accommodate an Outside Candidate

CI. At the outset of this decision, I noted that there were some critical questions, namely:

A. What is the extent of the duty to accommodate a person who is not yet an employee, but who is being considered for employment, or who was (as here) conditionally offered the job subject to (among other things) satisfactory clearance from the occupational health (or employee health) department?

B. If there is is such a duty to accommodate outside job applicants, is it narrower or lesser than the duty owed to existing employees who enjoy the benefits of a collective agreement, including union representation and seniority, and other employee benefits such as disability insurance?

CII. As for the first part, the simplistic view, and I believe the correct one, is that the *Human Rights Act* should provide protection against employment discrimination to all persons, regardless of whether or not they already enjoy employee status within the organization which they are seeking to join. But the extent of the protection must surely depend on other factors.

CIII. The right to seek an accommodated job may clash with rights enjoyed by existing employees, whether or not they are protected by a collective agreement. It is arguable that the point of undue hardship is more easily reached in the case of a prospective employee, than with (say) a long-term employee.

CIV. Putting theory aside, in a practical sense it is a rare case where a prospective employee can prove that they were passed over for employment because of a disability. Employers choosing between prospective outside candidates typically do not have to justify their choices to anyone, let alone the unsuccessful candidates. An employer choosing

from a pool of qualified candidates, one or more of whom has a disability, and others of whom do not have any limitations, may well prefer to choose - for financial or other reasons - the non-disabled candidate who requires no special accommodation. It is hard to imagine that such an employer could be criticized, let alone legally sanctioned, for simply explaining that they believed the successful candidate to be the best choice, in their judgment.

CV. Logically, the fact that it may be hard to prove discrimination in a given context - such as prospective employment - does not mean that the *Human Rights Act* does not apply. It just means that it is harder to make out a case. Here we have a disabled person who was told that she would have received the job but for the fact of her disability and its impact on her ability to work the shifts that the employer expected her to work.

CVI. The case law is not particularly helpful on the extent of the duty to accommodate prospective employees, given the rarity of a clear case of discrimination against a prospective employee. Not surprisingly, much of the jurisprudence in the area of accommodation comes from labour arbitration decisions. Because they are not already covered by a collective agreement, prospective employees do not have access to that union-funded remedy. The cases before human rights tribunals are fewer and farther between.

CVII. One case cited to me did involve a prospective employee. In *Formosa v. Toronto Transit Commission*, 2009 HRTO 54 (CanLII), an Ontario adjudicator expressed a concern that the duty to accommodate should only provide equal opportunity, and not preferential opportunity for jobs:

> [69] Accommodating a job applicant with a disability does not mean giving them another job if they are not capable (after considering accommodation, short of undue hardship) of doing the job they applied for. That would afford persons with disabilities preferential access to job vacancies, not equal opportunity to apply for job openings. In this situation the applicant was a "job applicant" for the position of bus operator, conditional upon successfully completing the job training program. I have already concluded that the applicant is not capable of successfully completing the bus training program and performing the essential duties of a bus operator position, even with accommodations. The TTC is not obliged to accommodate the applicant by searching out other positions in its organizations which the applicant might be capable of doing, with or without accommodation.

CVIII. In the particular circumstances of that case, the job applicant applied for a job which they were incapable of doing, namely driving a bus, and the duty to accommodate did not extend to looking for a completely different job within the TTC. I do not quarrel with the conclusion, on the facts.

CIX. A close, though imperfect, analogy would be cases that have sought to distinguish between the duty owed to a permanent employee vs. a probationary employee. Several such cases were cited.

CX. The case of *Telecommunications Workers Union v Telus Communications Inc.,* 2014 ABCA 154, is a good example of a situation where a probationary employee was seeking an accommodation. The Alberta Court of Appeal (considering an arbitration award on judicial review) had this to say:

> [44] The Arbitrator also approved the decision in *Re Dominion Castings and U.S.W.A.*, Local 9393, [1996] OLAA No 958 (QL) (para 36). There the *Bonner*[2]

[2]*Bonner v Ontario (Ministry of Health),* (1991) 16 CHRR 52

decision was cited with approval for the proposition that probationary status is relevant to the question of accommodation:

> The Code does not distinguish between seniority and a probationary employee but the question, of course, remains as to whether probationary status is relevant to the issue of accommodation to the point of undue hardship. Certainly the case of *Bonner v. Ontario (Ministry of Health)*, supra, (which also dealt with a probationary employee) would indicate that it is. There, the issue of the accommodation of the employee's handicap was clearly confined to his particular job and there was no suggestion whatsoever of any obligation on the employer to consider alternative modified or light work within the probationary employee's capabilities or restrictions. In that regard, it is noteworthy that the Board of Inquiry in the Bonner case expressly considered the character or purpose of probation being to assess the performance of the employee in meeting the requirements of his position. Given that basic purpose of the probationary period in a workplace, it seems eminently reasonable to address the duty to accommodate a handicap in terms of the particular work for which a new employee was hired, as the Board did in the Bonner case.

[45] Finally, the Arbitrator was influenced by *Worobetz v Canada Post Corporation*, [1995] CHRD No 1 (QL). The Canadian Human Rights Tribunal held that Canada Post did not have to consider reassigning an on-call, casual employee to a new position when that employee was failing to meet performance standards as a result of significant cognitive impairments arising from a brain injury.

[46] These authorities suggest that probationary employees need only be accommodated within the scope of the position for which they were hired. As the Arbitrator pointed out, the appellant has not cited any authority where it has been held that reassigning a probationary employee is a reasonable accommodation when that employee cannot be accommodated within their existing position. We need not decide that question of whether probationary status changes the tests. The Arbitrator found that substantive accommodation (even in another Telus job) was not possible.

CXI. From this I accept the view that probationary status, or even the lower status of "job applicant," would be relevant to the question of how far an Employer must go to provide a reasonable accommodation, although the extent of the duty is still a question of mixed fact and law to be determined on the unique facts of each case.

CXII. To recap, in my respectful view, there is no question that the anti-discrimination provisions of the *Human Rights Act* do apply to prospective employment. A plain reading of the *Human Rights Act* suggests that it does. The purpose of the Act states the intent, namely "*to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life.*" While the obligation on existing employers is undoubted, and has been recognized for some time, if this provision in the *Human Rights Act* is to have any real impact, it must apply to all employers who are faced with an individual who needs work, has qualifications and is looking to make a positive contribution to society. Acknowledging that there is a difficulty of proof in many situations does not diminish the right or obligation. It may be that the lack of transparency in hiring processes may come up in another case, but it is not something that should trouble me, because here we know exactly what occurred and what went through the minds of the individuals involved.

What were the obstacles to providing an accommodation here?

CXIII. There is no dispute on the evidence that the Complainant has, or could easily acquire, all of the required skills and knowledge to perform the job for which she applied. The reason her offer of employment was rescinded can be articulated as this:

A. Hiring her would not have met the need for nurses able and willing to work night shifts. In other words, the ability to work night shifts is alleged to be a BFOR.

B. Hiring her to work only 8-hour days and evenings, or 12-hour days, would have required others to work fractionally more nights.

C. There might have been an extra cost to fill those night shifts with nurses working overtime.

D. Putting extra pressure to fill night shifts raised possible issues of patient safety.

E. There might have been a negative impact on the morale within the workforce, due to the perceived preferential treatment of the Complainant and/or the extra night shifts required of other staff.

CXIV. It is argued by the Employer that the combined effect of these represents an undue hardship.

CXV. In my respectful view, none of these reasons taken individually, or collectively, rises to the level of undue hardship.

CXVI. The Ontario arbitration case of *CAW-Canada, Local 1941 v. Siemens VDO Automotive Inc.* 2006 CarswellOnt 8754 (Watters) provides some useful guidance. There, the grievor's type I diabetes prevented her from working night shifts. She asked for, and was refused, a days-only position. She grieved this denial as discrimination on the basis of disability.

CXVII. Because it is a close parallel, I will quote from the case at some length:

> 11 It is the position of the Union that the grievor was denied the job sought solely on the grounds of her disability. The Union's representative noted that the grievor is required to work a steady day shift in order to better manage and control her Type I diabetes. He submitted that the Employer's decision to not award the grievor one (1) of the Relief Person positions, based on her inability to rotate shifts, was discriminatory and constituted a violation of both articles 4 and 13 of the collective agreement and the provisions of the Human Rights Code, R.S.O. 1990, c. H.19. From the perspective of the Union, the requirement to rotate shifts is not a reasonable, necessary or bona fide requirement of the Relief Person job. I was asked to find that the Employer could, and indeed should, have accommodated the grievor in that position, instead of simply denying her the opportunity based on a medical restriction arising from a disability.

.....
14 From the Employer's perspective, the grievor was not denied the position sought because of her disability. Rather, she was not awarded a Relief Person job because of her inability to rotate shifts, as required. The Employer's representative described this requirement as an "essential part of the job" and asserted that an employee in the Relief Person classification must be able to rotate across shifts. As a consequence, he argued that the grievor was unable "to satisfactorily perform the work required", as mandated by article l3:04(b) of the collective agreement.

15 The Employer's representative submitted that to accommodate the grievor, by restricting her to the day shift in the Relief Person position, would cause significant disruption and displacement of other employees. He referenced the options advanced by the Union and asserted that adoption of same could have the following negative effects:

> i. certain employees would never be able to work the day shift;
>
> ii. a number of employees could be displaced through the operation of the reduction language found in article 12:02 of the collective agreement;
>
> iii. the company could be adversely affected in terms of work assignment, scheduling and overtime canvassing and equalization. Reference was made to article l5:08(g) of the collective agreement. On the Employer's account, keeping track of overtime data would be an administrative burden for supervisors and support staff; and
>
> iv. seniority rights of other employees could be disrupted and employee morale could be adversely affected. In substance, it is the Employer's position that it would experience undue hardship if the grievor was awarded a Relief Person position. Its representative observed that the Employer's solution does not displace or affect any other employee vis a vis their duties or shifts. He further submitted that remaining in the Production Operator classification will not serve to undermine the grievor's dignity or self esteem for two (2) reasons. First, work of that classification is considered as productive work in the context of this plant and, second, Production Operators are paid at the same rate as Relief Persons. For all of these reasons, the Employer asked that I dismiss the grievance.

.....

31 ..... In the final analysis, I have not been persuaded that placing the grievor in a Relief Person position on the day shift would result in undue hardship to the Employer. While some hardship might be occasioned through the displacement of employees and by reason of the additional administrative burden in assigning work, scheduling employees and keeping track of overtime, I have not been convinced that such hardship would be undue. .....

> 32 I was not provided with any information as to how other employees may react to the desired accommodation of the grievor. The effect, therefore, is merely a matter for speculation. I do, however, find the following excerpt from the decision in *Central Okanagan School District No. 23* to be compelling reasoning on how to approach this factor in the context of an accommodation:
>
> > "The reaction 'of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. .....
>
> 34 ..... For the reasons given above, I find that the denial of a Relief Person position to the grievor because she could not rotate shifts, without any real consideration of whether she could be accommodated short of undue hardship, constituted discrimination on the grounds of handicap and/or disability contrary to article 4:01. The denial was also in conflict with the statutory duty to accommodate as provided for by the *Human Rights Code*. (emphasis added)

CXVIII. While there are obvious differences between the case before me and the *CAW-Canada* case, namely that the complainant there was an existing employee with seniority, I find it to be a persuasive precedent.

CXIX. Looking at the facts before me, the evidence in this case on employee morale or patient safety is speculative, and impressionistic. As for morale, it is almost a given that some employees will feel aggrieved when it appears that someone else - particularly an outsider - receives what might be seen as preferential treatment. There is a cost (financial and otherwise) to accommodation. But this factor, if given too much weight, ignores the fact that people are inherently generous and, if the situation is properly explained to them, they will perhaps balance their negative feelings with kindness and generosity toward the person who is struggling with health issues and is trying to make a positive contribution. Another way of saying

this is that fellow employees share in the duty to accommodate. To the extent that they have "attitudes inconsistent with human rights" those concerns would be, as stated in the quotation above, irrelevant.

CXX. As for patient safety, I acknowledge that night shifts have to be adequately staffed, but the Authority did not demonstrate that accommodating the Complainant would significantly affect patient safety.

CXXI. As for the potential financial cost of accommodation, the evidence before me was not concrete but rather was the type of impressionistic evidence that does not carry a lot of weight. It does not appear that the people involved with seeking an accommodation for the Complainant even attempted to find the money necessary to create the accommodated shift schedule, perhaps because they did not think they had any prospect of obtaining additional funding.

CXXII. Apart from the specific evidence that might be offered, there are some objective factors to consider when determining whether or not increased cost might amount to undue hardship. It is obvious that the size of the employer would be a large factor. A small, "Mom and Pop" enterprise may be able to show that it does not have the financial resources to afford an accommodation, while a larger enterprise may not be able to succeed with such an argument.

CXXIII. The onus is on the employer to prove that cost places an undue burden. One cannot expect a prospective employee to have that information. The Supreme Court of Canada in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR

868, 1999 CanLII 646 (SCC) - (the oft-cited "*Grismer*" case) has spoken authoritatively on this point:

> 41 The Superintendent alluded to the cost associated with assessing people with H.H., although he offered no precise figures. While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This Court rejected cost-based arguments in *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice. Government agencies perform many expensive services for the public that they serve. Moreover, there may be ways to reduce costs. For example, in this case the Motor Vehicle Branch might have used simulators or tests available elsewhere. The Superintendent's evidence did not establish that the cost of accommodation would be excessive and did not negate the possibility of cost-reduced alternatives. It was therefore open to the Member [**i.e. the adjudicator hearing the complaint**] to reject the Superintendent's argument based on cost.

CXXIV. It is worth repeating two of the statements made by McLaughlin J. (as she then was):

A. one must be wary of putting too low a value on accommodating the disabled, and

B. impressionistic evidence of increased expense will not generally suffice.

Obligations of and impacts upon union

CXXV. I acknowledge that there could be impacts resulting from any accommodation upon the union and its members, here the Nova Scotia Nurses' Union (NSNU), which could weigh into the calculus of undue hardship. I note here that there was no evidence before me that the NSNU was ever consulted, or even informed, about the Complainant's application

or the process of considering an accommodation. It appears that no one considered asking that the NSNU be added as an intervenor in this proceeding. The assumption seemed to be that since the Complainant was not a member of the union, the union had no interest in this process. I question that assumption.

CXXVI. While the union's position might have been useful, I note that the applicable collective agreement does not mandate that there must be any particular shift schedule. The language is this:

> **7.11 Rotating Shifts**
>
> (a) Nurses required to work rotating shifts (days, evenings and nights) shall be scheduled in such a way as to equitably as possible assign the rotation. This does not preclude a Nurse from being continuously assigned to an evening or night shift if the Nurse and the Employer mutually agree to such an arrangement.

CXXVII. First of all, the word "equitably" leaves open the possibility that not everyone will have the same schedule. Arguably the last sentence means that a permanent day shift could not be negotiated without the input from the union, but no such argument was made to me and I am quite aware that contract language may have a specialized meaning in a particular context, as a result of past practice or other factors. Moreover, unions as well as employers have a duty to accommodate, and I would have a hard time accepting that this (or any) collective agreement would stand in the way of creating an accommodation. Human rights obligations have a special "quasi-constitutional" status that would tend to trump any contractual obstacle that was to the contrary.[3]

[3]The special status of human rights legislation has been said to be "quasi-constitutional." More than thirty years ago, in *Craton v. Winnipeg School Division No. 1,* [1985] 2 S.C.R. 150 the

CXXVIII. It is well understood that unions owe a duty of accommodation in the context of unionized environments. Since there was no evidence that the union knew anything of her prospective hiring, it is hardly possible to say that the union failed in any way to accommodate her. Nevertheless, had the Authority gone as far as to provide the Complainant with an accommodated position outside of 4-West, this could arguably have impacted on the union and its members. On the evidence, there is an "accommodation list" within the Authority, where existing employees seeking some form of accommodation are placed.

CXXIX. Issues of fairness and differential treatment could have arisen, had the Authority jumped to an accommodation (in another unit) that had the effect of leapfrogging existing employees waiting for an accommodated position to be found.

CXXX. I do not propose to try to sort out all of the conflicting duties that might have arisen, had the employer looked at jobs elsewhere in the Authority, perhaps by-passing someone else waiting for an accommodation. There was no argument directed to this issue. There are considerations going both ways. The Complainant might well point out that she is in a weaker position, more deserving of accommodation, given that most, if not all, of

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Supreme Court explicitly declared that human rights legislation was "quasi-constitutional" in nature, placing it second in the legal hierarchy below only the Canadian Constitution and the Charter, and giving it paramountcy over other statutes and rules. Subsequent rulings from the Court stated that human rights statutes are a unique form of remedial legislation, and they are therefore to be given a particularly broad and purposive interpretation by legal decision-makers such as to enable these laws to achieve their indispensable social objectives. *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114

the existing employees on the list would have benefits such as short-term or long-term disability benefits to tide them over. Someone in the position of the Complainant would have no such financial protection, other than (perhaps) their existing employment elsewhere.

Conclusions on undue hardship

CXXXI. I propose first to answer the question asked early on in this decision: On the facts of this case, would it have been "undue hardship" for the Authority to fit the Complainant into the schedule, working only day or evening shifts, and not changing shifts (even between those two) more often than every six weeks or so?

CXXXII. It is my opinion that it would not have been an undue hardship. Even more so, given that there was no one else on the unit being accommodated at the time, it would not have been an undue hardship to find an accommodated schedule for one of the 24 or 27 RN's working on the unit.

CXXXIII. The Employer has not established with anything other than somewhat weak impressionistic evidence that it would have cost the Authority an inordinate amount of money, or that it would have seriously impacted on the morale of the unit, or on patient safety, to fit the Complainant into a shift schedule that met her restrictions.

CXXXIV. It is true that hiring the Complainant would not have met the need for night nurses, but I reject the notion that an ability to work nights is a BFOR in all of the circumstances of this case.

CXXXV. I believe the Authority, probably in common with other similar institutions, is steeped in a culture that cannot accept a model other than that nurses should be able to rotate frequently and relentlessly through day, evening and night shifts, regardless of how punishing this is to their health, and how poorly it may affect their quality of life. Such a regime is hard on everyone, but more so on nurses with particular health problems.

CXXXVI. At the hearing, I somewhat jokingly asked one of the Authority witnesses if they had ever tried to attract night nurses with a financial incentive greater than the very small shift differential that already exists. The spontaneous answer was, to the effect "I wish!" - meaning that she wished there were money available to do that, and did not think highly of the prospects of getting such money.

CXXXVII. As has been made clear by the Supreme Court of Canada in *Grismer*, there is a cost to accommodation, and we (meaning society as a whole, and not just individual employers, or by adjudicators) must not place too low a value on the obligation to provide reasonable accommodation.

CXXXVIII. In the case of an employer as large as the Authority, it was not too much to ask that it absorb the cost associated with accommodating the Complainant by giving her the job within the parameters set by its own Employee Health experts.

CXXXIX. Part of what it might have had to absorb was the cost of finding other ways to fill night shifts. I do not presume to tell the Authority how it could have done that, but some obvious answers that occur to a layperson such

as myself, include creating a nights only position and making it attractive enough to ensure that it would be filled, or absorbing the additional cost of paying more overtime.

CXL. I accordingly conclude that the Authority breached s.5 of the *Human Rights Act*, by failing to accommodate the Complainant for the job applied for on 4-West. From this breach a remedy will follow, regardless of what took place thereafter.

Was there an obligation to look at other positions?

CXLI. Given that I have found a failure to accommodate the actual job on 4-West, it is not strictly speaking necessary for me to decide this issue. However, the Complainant argued that the duty to accommodate her did not necessarily stop at the point when the job offer for 4-West was rescinded. She says that the failure to look at other jobs within the Authority represented a further breach, or a new breach, of the *Human Rights Act*.

CXLII. With all due respect, I believe the current weight of authority is against that proposition. The cases on probationary employees and new applicants, few though they may be, suggest that the duty is to accommodate an employee who is qualified to do the job for which they applied, and no more. This makes sense. Accommodation is a two-way street. If a prospective employee cannot perform the core duties of a job, there is no reason why the employer should be the one to look for other vacancies that might be suitable. The employee him or herself can look for a vacancy and apply for it. The employer cannot be expected to <u>create</u> a vacancy that does not already exist. There must be work available,

needing to be performed, that the employee can perform, albeit with an accommodation.

CXLIII. The duty to existing employees to look for accommodated positions elsewhere in the organization is a greater and more complex one. Some of that duty derives from the *Human Rights Act*, but there are other duties owed to such employee and to the union, if any, under the applicable contract or collective agreement. There may be duties owed to disability insurers, such as the duty to assist in rehabilitating the employee. In short, there is a hierarchy of duties. As stated in *Formosa* (above), a prospective employee should not be given preferential treatment in the provision of employment, where the aim is to provide for equal treatment or access.

CXLIV. While the duty would not have extended beyond 4-West, the Authority would not have been precluded from considering an alternative job to offer the Complainant. Such an offer might have amounted to a reasonable, if not perfect, accommodation. However, that is not what happened here. The Complainant ought to have been accommodated on 4-West. The issue of other jobs within the Authority did not arise until the complaint was lodged and the parties were already into a settlement process.

The Resolution Conference and thereafter

CXLV. From my perspective, the Authority was in breach of its obligations under the *Human Rights Act* once it rescinded the job offer in April 2015. The Complainant's entitlement to a remedy had crystallized. Later events could not entirely cure the breach; they could only mitigate the harm.

CXLVI. I applaud the Authority's efforts to find another job for the Complainant. From a career perspective, it might have been for the best for the Complainant to have taken one of the positions offered. However, from a legal perspective, I do not see that she was ever offered full redress. She had already suffered the indignity of being discriminated against, and had a viable argument for general damages and perhaps loss of income. Nothing in the Authority's offers in August 2015 promised to address that. Nor did the "with prejudice" offer made on the eve of the hearing.

CXLVII. The Complainant may well have wanted her "day in court," as counsel for the Authority stated. If so, it was because she believed that she had been the subject of discrimination and did not see the possibility of full redress short of taking her chances at the hearing.

CXLVIII. I do not propose to resolve the question of whether the .8 job offered at the Resolution Conference was temporary or permanent. This might have been more relevant had the Complainant been unemployed at the time, in which case accepting the job (even temporarily) might have mitigated her financial damages. By then she was back working full-time at a long term care facility.

CXLIX. As stated earlier, her claim crystallized when the job offer on 4-West was rescinded. I am satisfied that she reasonably mitigated her losses by going back into long term care once she realized that she was not going to be offered an accommodation.

CL. Counsel for the Authority also criticized the Complainant for quitting her job before being sure that she would be accommodated. The Complainant

says that she honestly believed that she would be hired by the Authority, and felt an obligation to give her employer reasonable notice. Perhaps the Complainant ought to have foreseen the difficulty ahead, and hedged her bets (so to speak), but I am unwilling to count this against her, given that I have found that she ought to have been accommodated.

REMEDY

CLI. The Act and the case law identify a number of different remedies available for a breach of s.5 of the *Act*.

CLII. Boards of Inquiry are required to consider the public interest, and will sometimes fashion an order that specifically addresses the public interest, such as by requiring a party to undergo further education or training in Human Rights. No one suggested that such a remedy is required here, although there is an educational component to every case which interprets the *Act* and gives shape to the duties that are set out there in a very general way.

CLIII. The remedies that are appropriate to consider in this case are:

A. General damages;
B. Special damages, and
C. Ordering the accommodation.

General damages

CLIV. I will deal with the issue of general damages first.

CLV. Boards of Inquiry in this province have awarded amounts that are almost "nominal" in cases where the breach was not considered that serious, and the Board did not see a need for general deterrence. Some acts of discrimination are transient in nature, and will only attract a small award. In other cases, the harm suffered is just not considered that serious.

CLVI. In *Tanner v. Alumitech* 2015 CanLII 118, my fellow Nova Scotia Board of Inquiry Chair Gail L. Gatchalian ordered general damages "at the low end" in the amount of $2,500.00. She stated in her award that this was high enough to provide real redress for the harm suffered and to deter such actions, and not so low as to amount to a licence fee to discriminate. There are other cases in Nova Scotia that have apparently ordered as little as $1,000.00.

CLVII. Counsel for the Authority argues for a damage award at the low end.

CLVIII. The Complainant has asked for an award closer to the "high end." In Nova Scotia there indeed seems to be an upper end in the range of $15,000.00 to $25,000.00, as represented by such decisions as *Trask v. Nova Scotia (Department of Justice, Correctional Services)* [2010] N.S.H.R.B.I.D No. 2 ($15,000.00) and *Willow v. Halifax Regional School Board,* 2006 NSHRC 2 (CanLII) ($27,375.00). A review of these cases shows conduct that was more personally degrading to the complainants than would have been the case here. For Ms. Yuille, the discrimination was more institutional rather than personal.

CLIX. In *Willow*, the complainant had suffered ridicule and harassment (and false accusations) as a result of her sexual orientation. This is very much the high-water mark, in terms of the personal humiliation that Ms. Willow suffered. In *Trask* the discrimination was said to be more systemic than personal.

CLX. One could also look back some 14 years ago to *Johnson v. Halifax Regional Police Services* (2003), 48 C.H.R.R. D/307, where former boxer Kirk Johnson was awarded $10,000.00 for discrimination (being stopped by police) that was shown to be racially motivated. The damages were designed to compensate for the personal humiliation suffered.

CLXI. In *Cromwell v Leon's Furniture Limited*, 2014 CanLII 16399 (NS HRC), another case of racial discrimination, Board of Inquiry Chair Kathryn Raymond awarded damages of $8,000.00. She noted in her decision how damages must reflect the serious nature of discrimination, saying:

> 401. I do not agree that there continues to be a high watermark of $10,000.00 for general damages in Nova Scotia or that this is a case where nominal damages are appropriate. The need for damages to reflect the serious nature of discrimination and to be truly compensatory was noted in the *Cottreau*[4] case where the Nova Scotia Human Rights Board of Inquiry quoted with approval the following comments made in *Hill v. Misener (No. 2)* (1997) CHRR, Doc. 97-217 (NS Bd. Inq.) at para. 148:
>
> > In a physical injury, damages in the range of $2000, [sic] to represent an extremely minor physical problem which resolves quickly. People who sustain minor physical injuries do not question who they are, they do not question their self-worth, they do not question their value as human beings. An injury to one's self respect, dignity and self-worth is an injury that is far more destructive and painful and takes a longer time to heal than a minor physical injury.

[4] *Cottreau v. R. Ellis Chevrolet Oldsmobile Limited*, 2007 NSHRC 3 (CanLII)

> General damage awards which not have properly applied the compensatory principles do not reflect the serious nature of discrimination and fail horribly to uphold the principles which have been established by Human Rights Legislation.

402. The *Cottreau* decision considered other recent Nova Scotia cases where general damages were awarded that exceed $10,000.00. In general, awards for general damages have increased in recent years in other jurisdictions. In *Cottreau*, the Human Rights Board of Inquiry awarded Mr. Cottreau $10,000.00 in general damages even though there was no evidence from Mr. Cottreau, "that he suffered any long term psychological damage or injury to his self-worth".

CLXII. I believe it is important to bear in mind that some types of discrimination are more personal, and some are more institutional. That is not to say that institutional discrimination may not be damaging, or even devastating. It is just something different. Cases of racial discrimination, or discrimination based on sexual preference or identity, are largely unhelpful here.

CLXIII. In applying the precedents, I do not lose sight of the fact that the test for general damages is both subjective and objective. It is necessary to fit the award to the person affected.

CLXIV. In other areas of the law, where general damages are awarded, courts look closely at the actual suffering experienced. A so-called "meat chart" approach has been rejected. One cannot say that a whiplash is worth $X, without looking to see how it has affected the person's life. It is said that the tortfeasor must "take their victims as they find them," so long as their reaction to the wrong done to them is not out of all reasonable proportion to reasonable expectation (bringing into play the so-called "crumbling skull" concept.) By the same token, a perpetrator of discrimination must take their "victims" as they find them.

CLXV. I observed earlier on that I did not find any bad faith on the part of the Authority, and I stand by that finding. No part of what I award to the Complainant is meant as a denunciation of the Authority's motives. I simply believe that the Authority misconceived the extent of its duty. Had there been any malice shown by any of the individuals, I might have been inclined to increase the award. That is not necessary here. It is simply the effect of the discrimination on the Complainant that must be measured.

CLXVI. As I have stated, the general damages must bear some real relationship to the hurt and loss suffered, and attempt, as much as money can do, to provide redress for the suffering endured. When the accommodation was first refused, the Complainant was clearly shocked. She had already given up secure employment in the belief that the job was hers. She suffered financial stress, and she attributed the loss of her marriage to all of the stresses that came with pursuing her claim for accommodation through all of the steps. To the Complainant, the injury was not only to her personal feelings and sense of self-worth, but represented a real threat to her future career prospects. She is young enough to be rightly concerned that without this accommodation, her ability to work in her chosen field of clinical nursing was at stake, for years, if not decades to come. While the Complainant did not say much about her innermost feelings, I can easily infer from her evidence that she was very worried that her career may be over, or severely compromised, and that this was a source of great anguish for her.

CLXVII. In the result, I find that the appropriate amount of general damages is in the mid-to-high end of the range, and I set it at $15,000.00. Given that the

case moved expeditiously through the system, I do not propose to award any interest.

Special damages

CLXVIII. I believe that the Complainant is entitled to an award of special damages to compensate her for her financial losses incurred in the period from when she gave up her job, to the time she found other employment. This should take into account mitigation earnings. The parties indicated at the hearing that, in the event of such an award, they would be able to work out the amounts. As such, I will leave it to them to address the income loss claim, and will retain jurisdiction in the event that they cannot settle this amount.

Ordering the accommodation

CLXIX. This is a case where it is not too late to right the wrong, and for the Authority to accommodate the Complainant - assuming she still wants it - by providing her with a nursing position on 4-West. I am not ordering that a new position be created, but rather that the next available position be offered to her, and modified to conform to the restrictions already laid out by Employee Health. I believe that the Authority should have the right to refer the Complainant back to Employee Health, if it wishes to confirm that the restrictions have not changed in the last two years.

CLXX. I appreciate that there could be any number of complications in carrying out this aspect of my order, and will retain jurisdiction to hear further evidence or argument and make a further order, at the request of either party. I will reiterate that accommodation is a two-way street, and that the

Complainant is entitled to a “reasonable” and not a “perfect” accommodation.

CLXXI. I have a great deal of faith that the Authority, with the help of its advisors, and the cooperation of the Complainant, will be able to carry out the spirit of this order.

CLXXII. I will consider any written submissions that the parties may wish to make with respect to costs.

Conclusion

CLXXIII. For all of the foregoing reasons, the complaint is allowed and the Authority is ordered to provide the relief set out in the preceding paragraphs. Jurisdiction is retained to deal with some of the specifics of the relief, and on the question of costs.

Eric K. Slone, LL.M. (ADR)
Board of Inquiry Chair