IN THE MATTER OF THE ONTARIO *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

OTTAWA POLICE SERVICES BOARD
- The Employer

-and-

OTTAWA POLICE ASSOCIATION
- The Union

AND IN THE MATTER OF a grievance of Andrea Cuthill

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Margaret-Marie Steele	- Counsel
Christine Roy	- Labour Relations

On behalf of the Union:

Steven Welchner	- Counsel
Geoff Broadfoot	- Administrator
Andrea Cuthill	- Grievor

Hearing held November 21, 2006, January 5, January 30 and February 23, 2007, in Ottawa, Ontario.

AWARD

I. INTRODUCTION

The grievor is a police officer who took a maternity leave. Although the grievor indicated her wish to return to her position as case manager in Court Liaison following her maternity leave, she was transferred to a patrol position because her case manager position had been filled pursuant to an Employer policy limiting temporary transfers to six months. The grievance alleges that the transfer was discrimination on the basis of sex and was contrary to the collective agreement and the *Human Rights Code.*

II. THE FACTS

The Ottawa Police Services Board, the Employer, operates the Ottawa Police Service and the Ottawa Police Association, the Union, represents the sworn police officers. Andrea Cuthill, the grievor, is a first class police constable.

Evidence of the grievor

The grievor joined the Ottawa Police Service in 1991. For the next 11 years she worked in a variety of positions including patrol, community response, and drug squad. In February 2002 she obtained a position as case manager in the Court Liaison Section where she worked a straight day shift with no work on weekends or holidays. In that job she reviewed criminal files and ensured that the witnesses and the material evidence were available for trial. In addition, she served as Coroner's Constable, where she was involved in coroner's inquests.

The grievor testified that she sought the case manager position, in part, because it was a day shift position. She said that she had been having difficulty sleeping when working a rotating

shift.

In July 2004 the grievor learned she was pregnant and she promptly advised the Employer she would be taking a maternity leave.

The collective agreement provides that a pregnant officer is to be assigned light duties. Soon after the grievor advised of her pregnancy, she was transferred from her case manager position and assigned to “Active Staffing” where her light duties consisted entirely of work she had been doing in case management, although she was relieved of her Coroner’s Constable duties as that work required that an officer be able to use force (gun, handcuffs, etc.). Another officer was transferred on a permanent basis into Court Liaison as a case manager and took over the grievor’s duties as Coroner’s Constable.

The grievor took a one year maternity leave from February 28, 2005, until February 27, 2006. During the year and a half period from the time of notifying of her pregnancy until the end of her leave, she clearly advised the Employer that she wished to return to her case manager position following her maternity leave.

The grievor testified that when she held the case manager position she was able to use her skills, such as her familiarity with RMS software, to assist in training others and improve the operation of the section. She said that she had received positive feedback as to her performance and, as of the time she began her leave, there had been no indication that her transfer was being considered.

The grievor testified that she first learned in November 2005 that she would not be returning to her former position following her maternity leave. The Employer contacted her and advised her that there were no vacancies in case management and that she would be placed

in a pool of officers available for vacant positions. As the Employer regularly seeks officers' preferences regarding new positions, the grievor was asked to update her expression of interests form.

The grievor testified that when she learned she would not be returning to her case management position she was confused as there had been no indication before she left that there had been any problem with her performance. She testified that she had made it clear that she wished to return to case management and case managers had only been transferred out when they had requested this. Moreover, she testified that case managers often stayed in that position longer than three years. She repeated her request to return to case management.

The grievor was contacted again in early January 2006 and was again asked for an updated expression of interests form. On her form she indicated that she wished to return to case management or to a position in the high tech crimes unit, a unit in which the officers also worked the day shift.

Additional telephone calls from the Employer followed. The grievor was finally advised by Superintendent Ralph Erfle late Friday February 24, 2006, that she would be assigned to a patrol position in East Division. The grievor said that she and Superintendent Erfle had discussed the matter of her position and the grievor said she should get her old position, or an equivalent position, on her return from maternity leave. The grievor testified that Superintendent Erfle said that the Police Service did not hold positions for officers on leave and that officers who were seconded, or went on peace keeping duties, or were on sick leave, did not have their positions held for them. The grievor said she advised Superintendent Erfle that she disagreed and that one of the positions which had been discussed for her return was a temporary position replacing an officer on sick leave until that officer was able to return

to work. The grievor said that Superintendent Erfle had replied that sick leave was different as there was an element of choice in maternity leave and no element of choice in sick leave. The grievor said that she was "dumbfounded" by Superintendent Erfle's comment and that she felt she was being punished for taking a maternity leave.

The grievor said she did not think she would have been transferred had she not become pregnant and taken a maternity leave. She said she knew of males who had taken paternity leaves and none of the male officers had lost their positions. She testified that, contrary to what Superintendent Erfle had told her in their telephone discussion, she knew of officers who had taken positions providing security for the Prime Minister, or peace keeping in the Middle East, and had returned to their old positions upon their return. In addition, the grievor noted that her replacement in case management, Constable Bond, had been off work on sick leave for some six months in 2006 and had not been replaced. He had returned to his position in case management.

The grievor testified about the stress of the late notice of transfer to East Division. The grievor said she had been mentally prepared to return to a day shift position and had then been advised on the last weekday of her leave regarding her new assignment to a position involving rotating shifts. She said it had been very stressful waiting for her new assignment. She testified that she was angry that the Employer, who had known of her leave for some 19 months, waited until the end of that leave to tell her of the new position. She said she felt helpless and manipulated through the entire process. She also testified that she had suffered health difficulties after her return to work and was subsequently placed on light duties.

The grievor agreed that she had never been assured by the Employer that she could remain in case management as long as she desired and she agreed that officers were often transferred from one position to another, as she herself had been in her first 11 years with the Employer.

The grievor also agreed that she retains the same rank and pay as she had before her maternity leave.

The grievor testified that the case manager position requires an officer to have two years of investigative experience. She said that officers with two years of investigative experience receive a detective's salary, which is the same as the pay of a sergeant, and that officers involved in investigations often receive considerable extra pay for their overtime work and for the extra time spent in court. The sergeant's pay was an additional $7,000 per year and she said that one officer estimated that taking the case manager position would result in a reduction in pay of some $20,000 per year. She also noted that the hours of work in case management were flexible, unlike patrol positions. She said that she did not think the case manager position was a highly sought position. She agreed that some officers like rotating shifts and that some do not. She noted that some patrol shifts are longer (10 or 12 hour shifts) allowing for more days off and that some officers prefer to have more days off work. However, the grievor said that she liked the straight day shift position.

Finally the grievor testified that in 2004 there had been a backlog in case management and that a number of officers, perhaps 10 in total, had been assigned temporarily to case management to assist with the backlog.

Evidence of Geoff Broadfoot

Geoff Broadfoot is the Administrator of the Union, a position he has held since 2001. Prior to that he was President of the Union. He began working for the Employer as a police officer in 1977.

Mr. Broadfoot testified about the transfer of officers within the Police Service. Officers are

asked to complete expressions of interests forms which are used in making transfers, but he agreed that the police chief could transfer an officer whether or not the officer was interested. He said that some transfers were permanent and some were temporary and he testified that typically an officer who receives a temporary transfer returns to his or her old position at the end of that temporary transfer. He identified the Employer's Transfer Policy which indicates that temporary transfers are not to exceed six months "except in extenuating circumstances to meet the exigencies of the Police Service."

Mr. Broadfoot testified that he was aware of nothing which would have prevented the Employer from filling the grievor's position on a temporary basis and then putting the grievor back in that position following her maternity leave. He identified a number of recent temporary transfers, each of which lasted less than six months, but he testified that he recalled two instances where officers had been transferred on a temporary basis and the temporary transfer had exceeded six months - one involving Paul Batista which lasted more than one year and another involving Don Lacase which lasted about three years.

Mr. Broadfoot testified that there were steady day and afternoon shifts for patrol officers, in addition to rotating shifts. He said that the day shifts and afternoon shifts were popular with officers. As an example of police officers' preference for day shifts, he noted that the positions on both the day and the afternoon patrol shifts were staffed by volunteers in order of seniority and that there had always been sufficient volunteers to fully staff those day and afternoon positions.

Evidence of Ralph Erfle

From 2003 through July 2006, Ralph Erfle was the Superintendent in charge of the Support Services Division which includes the Court Liaison Section in which the grievor worked.

Superintendent Erfle explained "active staffing," the grievor's assignment when she had light duties. Active staffing is a pool of some 35 officers who were fully trained and ready to "backfill" staff shortages in order to maintain service. He said that there are approximately 1300 officers in the Ottawa Police Service and, at any time, as many as 10% of them were on leave of one type or another. Prior to active staffing there would often be gaps in service and active staffing was intended to alleviate some of those problems. Because the grievor was entitled to light duties when pregnant, Superintendent Erfle said she had been transferred to active staffing.

Superintendent Erfle said he was responsible for transfers within his Division and he met regularly with other Superintendents to discuss transfers among Divisions. In 2006 there had been some 800 transfers within the Police Service. Police officers' expressions of interests, as well as career development and succession planning, are considered when making transfers.

Months before the grievor was to return from her maternity leave, Superintendent Erfle said he advised the Inspector responsible for the grievor's area of the need to have an expression of interests form completed by the grievor. He said that he later learned that the grievor was interested in staying in case management or in moving to high tech crime.

Superintendent Erfle testified that he learned of vacancies in East Division during a meeting of Superintendents. As the grievor lived in the east end, he testified that he felt the grievor would probably prefer to work in the East. A transfer to East Division was then arranged. After that he spoke twice to the grievor - first to tell her she was being transferred to East Division and later to advise the grievor of her particular shift, platoon, etc.

Superintendent Erfle agreed that in his second conversation with the grievor he had discussed

with the grievor issues relating to her transfer and her return from leave. He said he had advised the grievor that she had a right to her rank, but not to her position, when returning from maternity leave. He agreed that he had spoken of an element of choice in maternity leave. By this comment, he said he meant that an officer on a maternity leave chooses the day on which she returns to work and it is easier to plan than with sick leave and other types of leaves in which the end dates are unknown.

Superintendent Erfle expressed the view that after two or three years in a position an officer has learned all that he or she is likely to learn. He indicated that, had the grievor not taken a maternity leave, she probably would have been transferred as she had spent three years in the position and the Police Service likes to rotate officers regularly in order to keep them from becoming stagnant.

With respect to the grievor, Superintendent Erfle agreed that the transfer out of case management to active staffing had been due to the grievor's pregnancy. He also agreed that as of the time of that transfer there had been no discussion with him about a transfer for the grievor.

Finally, Superintendent Erfle agreed that it was common to protect the position of fathers who take parental leave. He said that fathers take a maximum of a four months parental leave. Superintendent Erfle said that he was not aware of any father who had lost his position while on a parental leave.

Evidence of Debbie Erfle-Storie

Debbie Erfle-Storie is the Court Liaison Manager, a position she has held since 1999. She was responsible for the grievor's work in case management. She agreed that during the

grievor's years in case management, the grievor's work had been entirely satisfactory.

Ms Erfle-Storie testified about the staffing of case management and about various transfers in and out of her section. She testified that the grievor was transferred to active staffing as she was pregnant and was entitled to light duties. Ms Erfle-Storie agreed that pregnancy had been the reason the grievor lost her case management position. She agreed that, had the grievor had not become pregnant, she might still be working in case management.

Ms Erfle-Storie testified that Constable MacMillan, who had started in case management in May 2003, remained in case management as of January 30, 2007, and that there was no plan in place to transfer him. She agreed that Constable Tom Bond, who had replaced the grievor when the grievor became pregnant, had been on sick leave in 2006 and he had returned to his case management position following his sick leave .

Finally, Ms Erfle-Storie testified that no other officer in her section had been transferred out of the section against the officer's wishes. All other transfers from her section had the consent of the officer being transferred.

III. THE AGREEMENT AND THE *CODE*

The key provisions of the parties' 2000-2002 collective agreement are as follows:

ARTICLE 2 - MANAGEMENT RIGHTS

2:01 The Association acknowledges that, subject to the Police Services Act, R. S. O. 1990, as amended, and Regulations made pursuant thereto, it is the function of the Board and it has the exclusive right to:

(a) . . .

(b) hire, discharge, direct, classify, transfer, promote, demote or suspend or otherwise discipline any employee.

2:02 The Board agrees that no member will be dealt with adversely without reasonable cause, and that it

will exercise the function outlined in paragraphs 2:01 (a) and (b) fairly, without discrimination and in a manner consistent with this Agreement, the Police Services Act and the Regulations made thereunder by the Lieutenant Governor in Council.

ARTICLE 7 - ACCIDENT, SICKNESS, MATERNITY LEAVE

. . .
7:03 MATERNITY LEAVE/PARENTAL LEAVE

[The agreement contains a lengthy provision dealing with maternity leave, including the right to light duties when pregnant and the right to return following the leave, but it is silent as to the position to which an employee returns.]

The key provisions of the *Human Rights Code* are as follows:

Preamble

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is the public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;
. . .

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of . . . sex . . .

. . .

10. (1) . . .
"equal"means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination;
. . .

(2) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

. . .

11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
(b) it is declared in this Act, other than in section 17, that to discriminate because of

such ground is not an infringement of a right.

(2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

IV. UNION POSITION

Although the Employer had a right to transfer police officers, a right which is recognized in the managements rights article of the collective agreement, the Union noted that the collective agreement limits the Employer's power to transfer employees. It specifies that transfers must be done fairly and without discrimination. The Union submitted that the grievor was transferred in violation of both the management rights article and the *Human Rights Code.* The Union submitted that the *Code* was an implied term of the collective agreement.

Although the Union acknowledged that the *Police Services Act* gave the chief of police the right to transfer officers, the Union said that the exercise of that right is subject to the *Code*. The Union noted that the *Human Rights Code* should be interpreted "liberally" and has "near constitutional status" in relation to other laws, including the *Police Services Act*.

The *Code* prohibits discrimination on the basis of sex (Section 5) and makes it clear that discrimination on the basis of pregnancy is discrimination on the basis of sex (Section 10). In addition, the *Code* (Section 11) prohibits discrimination through the application of an otherwise neutral employer rule or policy, such as the transfer policy, that results in the exclusion, restriction or preference of persons in a group who are identified by a prohibited ground of discrimination - sex - unless the policy is reasonable and *bona fide.* Even in that situation, the Code requires that the Employer accommodate the needs of the members of the

group (women) to the point of undue hardship. This sort of discrimination is often referred to as adverse effect discrimination.

In this case the Union said the application of the transfer policy, which generally limits temporary transfers to six months, was a policy that resulted in adverse effect discrimination. The policy appears neutral and applies to all officers. However, only women take a year long maternity leave. The limit on temporary transfers is thus more likely to apply to a woman than to a man. The policy discriminates against women on the basis of their sex.

In this situation of discrimination due to the Employer's limit on temporary transfers in the transfer policy, as in all cases of discrimination, the Union said the Employer must meet the three part test set out by the Supreme Court in the *Meiorin* decision (below) which requires the Employer to show that:

1. The policy was adopted for a purpose rationally connected to the performance of the job;
2. The policy was adopted in an honest and good faith belief in its necessity; and,
3. The policy is reasonably related to the accomplishment of that purpose. To demonstrate that the policy is reasonably necessary the Employer must show that it is impossible to accommodate those sharing the characteristics of the grievor (women) without undue hardship.

The Union accepted that it had an onus of proving a *prima facie* case of discrimination. But once it did so, the Union said the onus of proof shifted to the Employer to show that the policy was a bona fide occupational requirement under the *Meiorin* test.

To prove discrimination, the Union said it need only prove that the maternity leave was a factor in the transfer, not that it was the only factor.

The Union submitted the grievor suffered an adverse effect when she was transferred out of a position in which she worked only the day shift and into a different position that required that she work a rotating shift. Regular shifts are preferred by officers. This transfer had an especially adverse effect on the grievor who had difficulty with sleeping when on a rotating shift.

The Union said it need not show a loss of rank or income for an adverse effect, that it was enough to show some disadvantage.

Moreover, the Union said it was no defence for the Employer to assert that it had a right to transfer officers and did so on a regular basis if, as here, the transfer was motivated by the discriminatory factor of a maternity leave. The fact that there could have been a transfer made for proper reasons does not negate the fact that this particular transfer was motivated by an improper factor.

In the alternative, the Union said that, assuming the Employer could transfer the grievor upon her return from leave, the hours of work and related issues in any new position must be comparable. The transfer of the grievor to a position with different hours of work, different functions, and at a different location, amounted to discrimination.

There was no evidence that there would have been any undue hardship had the Employer accommodated the grievor by making one or more replacements by way of temporary transfers.

In addition, the Union said that the Employer failed to properly apply the transfer policy as that policy is written. The transfer policy allows for exceptions to the six month limit on temporary transfers in "extenuating circumstances." The Union submitted that issues of

human rights would amount to extenuating circumstances which would justify longer temporary transfers, but there was no evidence that the Employer had even considered this possibility.

As for remedy, the Union referred to a number of the authorities below and asked for an award of $10,000 for general damages for compensation for the humiliation, hurt, loss of dignity, etc. The Union noted that it sought nothing for mental anguish, and also noted that it was not relying upon the grievor's testimony about health issues which had arisen as a result of the transfer. In addition, the Union sought a declaration that when returning from a maternity leave, unless the maternity leave is not a factor in a transfer, the officer is entitled to return to her previous position, or at least to a comparable position. Finally, the Union noted that it did not seek the grievor's reinstatement in the case manager position.

In reply to the Employer, the Union said the Employer is responsible for the conduct of its management employees. The Union agreed that officers have no right to a particular assignment, but they do have a right not to be transferred for discriminatory reasons. The Union noted that it was unable to find any evidence of a father losing his position after a parental leave and that Superintendent Erfle had testified to the same effect. As for the issue of why a grievance was not filed when the grievor was transferred to active staffing, the Union said that was an accommodation mandated by the collective agreement and only when the grievor returned from her leave did the Employer fail to accommodate her.

The Union relied upon the following authorities: *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)* [2003] S.C.J. No. 42, [2003] 2 S.C.R. 157; *Ontario (Human Rights Commission) v. Simpson Sears Ltd.* [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536; *Bhinder v. Canadian National Railway* Co. [1985] S.C.J. No. 75, [1985] 2 S.C.R. 561; *Insurance Corp. of British Columbia v.*

Heerspink [1982] S.C.J. No. 65, [1982] 2 S.C.R. 145; *Brooks v. Canada Safeway Ltd.* [1989] S.C.J. 42, [1989] 1 S.C.R. 1219; *Hazelwood v. Leask Agro Services Ltd.* (2004), 50 C.H.R.R.D./447 (Sask. H.R.T.); *Child v. E.D.M. Enterprises Ltd. (c.o.b. Culpepper's Restaurant)* [2003] B.C.H.R.T.D. No. 7 (Humphreys); *Parry v. Vanwest College Ltd.* [2005] B.C.H.R.T.D. No. 310 (Lyster); *Prescott-Russell County Roman Catholic English-Language Separate School Board and Ontario English Catholic Teachers' Assn. (Prescott-Russell Elementary and Secondary Branch Affiliates Unit) (Horner Grievance)* [1998] O.L.A.A. No. 263 (Marcotte); *Mains Ouvertes - Open Hands Inc. and Ontario Public Service Employees Union, Local 458 (Seguin Grievance)* [1999] O.L.A.A. No. 12 (Roach); *Ontario Public Service Employees Union, Local 458 v. Open Hands Inc.* [2000] O.J. No. 1651 (Divisional Court); *Vanderhoof Specialty Wood Products v. Industrial Wood and Allied Workers of Canada, Local 1-424 (Persson Grievance)* [2004] B.C.C.A.A.A. No. 95 (Blasina); *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)* [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] S.C.J. No. 73, [1999] 3 S.C.R. 868; *United Nurses of Alberta, Local 115 v. Calgary Health Authority* [2004] A.J. No. 8 (Alberta Court of Appeal); *Rhode v. Kamploops Society for Community Living* [2005] B.C.H.R.T.D. No. 41 (Beharrell); *Armstrong v. Crest Realty Ltd. (c.o.b. Re/max Crest Realty)* [1996] B.C.C.H.R.D. No. 48 (Eastwood); *Canada (Attorney General) v. Mongrain* [1991] F.C.J. No. 945, 135 N.R. 125 (C.A.); *Re Victoria County Memorial Hospital and Canadian Auto Workers, Local 607* (1994), 42 L.A.C. (4th) 194 (O'Connell); *Re Canadian Airlines International Ltd. and Canadian Union of Public Employees, Airline Division* (1993), 32 L.A.C. (4th) 398 (Springate); *Hoyt v. Canadian National Railway* [2006] C.H.R.D. No. 33 (Loyd); Ontario Human Rights Commission, *"Policy and Guidelines on Disability and the Duty to Accommodate"* para. 3.3; Brown and Beatty, *Canadian Labour Arbitration,* 3rd edition, s. 7:6120; Lynk, "Disability and the Duty to Accommodate: An Arbitrator's Perspective",

2001-2002, Labour Arbitration Yearbook, Volume 1, Lancaster House, 51 at 58; *Bowater Canadian Forest Products Inc. v. Industrial Wood and Allied Workers of Canada, Local 2693 (Giardino Grievance)* [2003] O.L.A.A. No. 597 (Surdykowski); *Chamberlin v. 599273 Ontario Limited* (1990), 11 C.H.H.R. D/110 (Ont. Bd. of Inquiry, Springate); *Re West Park Hospital, Toronto and Ontario Nurses' Association* (1996), 55 L.A.C. (4th) 78 (Emrich); *British Columbia Institute of Technology v. B.C. Government & Service Employees' Union* [1997] B.C.C.A.A.A. No. 162, 62 L.A.C. (4th) 168 (Kelleher); *Bonetti v. Escada Canada Inc. (c.o.b. Plaza Escada)* [1995] B.C.C.H.R.D. No. 21 (Williamson); *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation* [2006] B.C.C.A.A.A. No. 20 (Taylor); *Re CFRN-TV and Communications, Energy and Paperworkers Union of Canada* (1997), 69 L.A.C. (4th) 37 (Elliott); *Winnipeg Sun, a Division of Sun Media Corp. v. Communications, Energy and Paperworkers Union of Canada, Local 191* [2005] M.G.A.D. No. 53 (Jones); *Vestad v. Seashell Ventures Inc. (c.o.b. Rose & Crown Pub)* [2001] B.C.H.R.T.D. No. 37 (Parrack); *Duggan v. Francines Stores Inc.* [1993] B.C.C.H.R.D. No. 14 (Williamson); *McDonnell Douglas Canada Ltd. (c.o.b. Boeing Toronto Ltd.) v. National Automobile, Aerospace, Transportation and General Workers Union, Local 1967 (Classification Accommodation Grievance)* [1999] O.L.A.A. No. 605, 84 L.A.C. (4th) 428 (Gorsky); *Dana Corp. v. International Assn. of Machinists and Aerospace Workers, Local 2330 (Hepditch Grievance)* [2006] O.L.A.A. No. 77 (Shime); *Ingersoll (Town) v. Canadian Union of Public Employees, Local 107 (London Civic Employees) (Alyea Grievance)* [2003] O.L.A.A. No. 554 (Williamson); *Cugliari v. Clubine* [2006] O.H.R.T.D. No. 7 (Faughnan); *Abouchar v. Metropolitan Toronto School Board* [1998] O.H.R.B.I.D. No. 6 (Laird); *Sanford v. Koop* [2005] O.H.R.T.D. No. 53 (Gottheil); *Smith v. Mardana Ltd. (c.o.b. Mr. Lube)* [2002] O.H.R.B.I.D. No. 15 (Rosenberg); *Lord v. Haldimand-Norfolk Police Services Board and Lee Stewart* (1995), 23 C.H.R.R. D/500 (Mikus); *The Kingston Police Services Board and The Kingston City Police Association* (November 4, 2002) unreported (Starkman); *Abdolalipour v. Allied Chemical Canada Ltd.* [1996] O.H.R.B.I.D.

No. 31 (Mercer); *Deroche v. Yeboah-Koree* [2005] O.H.R.T.D. No. 26 (Faughnan); *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto* [1998] O.J. No. 2681, 39 O.R. (3d) 487 (Ont. Ct., Gen. Div.); *Moore v. British Columbia (Ministry of Education)* [2005] B.C.H.R.T.D. No. 580 (MacNaughton); *Sandhu v. International Forest Products Ltd.* [2006] B.C.H.R.T.D. No. 189 (Tyshynski); *Ottawa-Carleton Regional Police Services Board v. Ottawa-Carleton Regional Police Assn. (Meehan Grievance)* [1999] O.L.A.A. No. 771, 80 L.A.C. (4th) 309 (Starkman); *Toronto Police Services Board v. Toronto Police Assn. (Rossi Grievance)* [2001] O.L.A.A. No. 800 (Brent); *Regional Municipality of York Police Services Board and Regional Municipality of York Police Association* (2001) unreported (Marcotte); Employment Insurance Fact Sheet; and *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal* [2007] S.C.J. No. 4.

V. EMPLOYER POSITION

The Employer indicated that it agreed with the Union on the law in general, but that it differed with the Union as to its application to these facts.

The Employer noted that under the *Police Services Act* the Police Services Board - the Employer - cannot direct individual officers. It is the police chief who assigns duties to officers under Sections 41 and 42. Moreover the award of an arbitrator cannot affect the working conditions under Section 42. Unlike many employment relationships, a large part of police officers' working conditions is not subject to review by an arbitrator.

The management rights article specifies that the Article is subject to the *Police Services Act*. As assignments and transfers are made by the police chief under that *Act,* the Employer has no authority over the transfers.

The Employer also reviewed the *Employment Standards Act* in which there is a duty to reinstate an employee after a maternity leave to either the position most recently held or, if that position no longer exists, to a comparable position. The Employer noted that the *Employment Standards Act* does not apply to police officers and said the Union was trying to read that provision of the *Employment Standards Act* into the collective agreement.

The Employer said the grievor held the position of first class constable and that to suggest she had a right to an assignment as a case manager was incorrect. The Employer noted that arbitrators have generally concluded that employees covered by other collective agreements had no right to a specific assignment. Given the practice of regular transfers of officers in this police service - over 800 in a year - that same general conclusion should be adopted here. The Union sought a right for the grievor that no other officer had - an entitlement to a work assignment. The Union sought superior status for those on maternity leaves and a superior status is not equality.

If the Union were correct in its assertions, then the next obvious question would be: How long is the grievor entitled to that position? As there was no clear answer to this question, the Employer suggested that the Union submission was flawed.

Instead, the Employer said that the grievor was entitled to her rank, with no loss of pay and no loss of benefits. The collective agreement lists salaries based only on rank, not on position. There is no mention of duties in the collective agreement - duties are assigned by the chief of police who is not a party to the collective agreement and the Employer cannot direct the duties of an officer. Assignment to a different shift schedule does not amount to a violation of the agreement or the *Code*.

The police service is a dynamic organization and officers normally have a variety of

assignments, as the grievor had in her first 11 years. Transfers are made by orders. There are 800 transfers in a year. The grievor was on leave for 12 months and was replaced by another officer by means of a permanent transfer. There was no clear evidence that there were any temporary transfers longer than six months. The policy makes it clear that temporary transfers are generally under six months.

In any event, the Union must show a *prima facie* case of discrimination. In order to do so, the Union must show a link between the grievor's transfer and the grievor's maternity leave. The likelihood of returning to one's former position is slight when one goes on any leave longer than six months. Although the Union submitted that the transfer policy had an adverse effect upon the grievor, both men and women may take parental leave longer than six months. Men may take leaves as long as 37 weeks. It follows that there is no link between women and leaves longer than six months. There was no evidence that a leave of the length of the grievor's leave was only available for women. There was no evidence that parental leaves are "women only" leaves such that those leaves have an adverse impact on women. As for an allegation of sex discrimination, where was the grievance when the grievor was transferred to active staffing in 2004?

Discrimination requires evidence of a distinction. There no evidence of a distinction here. There was no evidence of a distinction based on the enumerated ground of sex. There was no impairment of the grievor's exercise of her rights. There was no evidence of any burden, obligation or disadvantage on or to the grievor. Without showing some disadvantage, there can be no violation of the agreement or *Code.* Women are not the only ones subject to the transfer policy, and the grievor suffered no detrimental distinction.

As for the declaration requested by the Union, the Employer said I had no jurisdiction to issue such a declaration.

The Employer asked that the grievance be dismissed.

The Employer relied upon the following authorities: *Re Durham Regional Police Services Board and Durham Regional Police Association (Watts)* (2000), 95 L.A.C. (4th) 323 (Jackson); *Mains Ouvertes - Open Hands Inc. and Ontario Public Service Employees Union, Local 458 (Seguin Grievance)* [1999] O.L.A.A. No. 12 (Roach); *Ontario Public Service Employees Union, Local 458 v. Open Hands Inc.* [2000] O.J. No. 1651 (Divisional Court); *Re School District No. 67 and British Columbia Teachers' Federation* (2003), 120 L.A.C. (4th) 301 (Dorsey); *Re Niagara District School Board and Elementary Teachers' Federation of Ontario* (2004), 126 L.A.C. (4th) 247 (Shime); *Re Toronto District School Board and Elementary Teachers' Federation of Ontario* (2003), 117 L.A.C. (4th) 78 (Beck); *Elementary Teachers' Federation of Ontario v. Toronto District School Board* (2004), 130 L.A.C. (4th) 225 (Divisional Court); *Elementary Teachers' Federation of Ontario v. Toronto District School Board* (2005), 142 L.A.C. (4th) 283 (Court of Appeal); *Re Grace Chemicals Ltd., Cryovac Division and Canadian Union of Operating Engineers, Local 101* (1974), 9 L.A.C. (2d) 45 (Weatherill)*; Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500* (1975), 8 L.A.C. (2d) 34 (Brandt); *Re Essex Police Services Board and Essex Police Association* (2002), 105 L.A.C. (4th) 193 (Goodfellow); *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)* [2003] S.C.J. No. 42, [2003] 2 S.C.R. 157; *Ontario (Human Rights Commission) v. Simpson Sears Ltd.* [1985] 2 S.C.R. 536, [1985] S.C.J. No. 74; *Commission scolaire régionale de Chambly v. Bergevin* [1994] 2 S.C.R. 525, [1994] S.C.J. No. 57; *C.N.R. v. Canada (Human Rights Commission)* [1987] 1 S.C.R. 1114, [1987] S.C.J. No. 42; *Law Society of British Columbia v. Andrews* [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal* [2007] S.C.J. No. 4; and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la*

personne et des droits de la jeunesse) v. Boisbriand (City) [2000] 1 S.C.R. 665, [2000] S.C.J. No. 24.

VI. CONCLUSIONS

As will be obvious from the lengthy lists of authorities above, this is a "case rich" area of the law. The societal view of discrimination has evolved significantly in Canada over the last few decades and, as a result, the various pieces of human rights legislation, including the Ontario *Human Rights Code*, have frequently been amended. In part, the many authorities cited in this case are a reflection of this evolving concept. Although I have reviewed them all, I will refer only to those authorities which I rely upon for a particular point.

The central questions in this grievance are:

1. Was the grievor's transfer an instance of sex discrimination under the *Human Rights Code* due to the Employer's policy of a six month limit on temporary assignments? and, if so,
2. Was the six month limit on temporary transfers protected as a *bona fide* occupational requirement?

Preliminary Issues

I begin by addressing three of the Employer's preliminary submissions.

1. Is the Employer responsible for transfers?

The Employer noted the unique statutory nature of the Police Service under the *Police Services Act.* Under that *Act* the chief of police administers the police force (Section 41) and police officers are to perform the duties assigned by the chief (Section 42). The Employer -

the Police Services Board - is prevented from giving directions to individual police officers other than the chief, and is not allowed to direct the chief with respect to the day-to-day operation of the police force (Section 31). Because of that clear statutory division of responsibility with the Employer instructing the police chief who then assigns duties to the police officers and administers the day-to-day operations, the Employer said it could not be held responsible for the grievor's transfer, even assuming there had been discrimination.

That argument fails based on the language agreed upon by the parties in this collective agreement. The agreement in Section 2:01 says that transfers are a function of the Employer and that the Employer has the exclusive right to transfer (subject to certain limits specified) and then in Section 2:02 provides that the Employer will make those transfers without discrimination. As the parties have specifically agreed in their collective agreement that the Employer has the exclusive right to transfer, I do not see how I as arbitrator under this agreement, which has the usual language preventing an arbitrator from changing the agreement or making a decision inconsistent with the agreement, can find that the Employer is not responsible for transfers. Assuming that the Employer - the Police Services Board - had no direct role in a particular transfer, it nevertheless is clear that under Section 2:02 of the collective agreement the Employer has taken responsibility for ensuring that transfers are done fairly and without discrimination.

Apart from the particular language of this collective agreement, I read the *Human Rights Code* as prohibiting discrimination in employment and making the Employer, that is the Police Services Board, responsible for discrimination by the Employer, or by persons acting on behalf of the Employer. Assuming that the Police Services Board did not make this transfer, it was nevertheless done on behalf of the Employer. I do not find any conflict between the *Police Services Act,* which gives the police chief the authority to make transfers, and the *Human Rights Code,* which makes the Employer responsible for any discrimination.

But even assuming a conflict between the *Code* and the *Police Services Act*, the Supreme Court has concluded that human rights legislation has a special status in Canada in comparison with other legislation and the special status of the *Human Rights Code* suggests that the provisions in the *Code* would prevail.

2. Is this an attempt to apply the *Employment Standards Act?*

As for the second issue, the Employer said that the Union was attempting to apply the concepts established under the *Employment Standards Act,* an *Act* which does not apply to police officers. That *Act* provides a right for a woman to return to her old job after a maternity leave regardless of an employer's valid business reasons to transfer the woman.

I do not find any attempt on the Union's part to incorporate the *Employment Standards Act* into this situation. Instead, the Union accepted that the Employer could have transferred the grievor as long as its reasons were valid business reasons unrelated to the maternity leave. The Union sought to enforce only the grievor's rights under the collective agreement and the *Human Rights Code.*

3. Was there a disadvantage?

As for this third issue, the Employer submitted that the basic concept of discrimination requires that there be some disadvantage. For example, in *Law Society of British Columbia v. Andrews* (above) Mr. Justice McIntyre described "discrimination" as follows:

> . . .discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. . . (at para. 37)

This description has been cited and relied upon frequently in later cases

The Employer submitted that because the grievor kept the same rank and salary there was no disadvantage and that without some harm, some negative impact, some disadvantage, there could be no finding of discrimination.

I understand transfer as used in this collective agreement to mean a situation in which an officer keeps the same rank and salary and simply changes job assignment as the grievor did. But the collective agreement contemplates that a transfer can be made for discriminatory reasons as it prohibits discriminatory transfers. It follows that the parties have agreed that, contrary to the Employer's submission, some transfers can result in a disadvantage to the officer who is transferred and thus amount to discrimination. The question is: Was there a disadvantage to the grievor in this transfer?

In *Bonetti v. Escada,* above, a decision of the British Columbia Council of Human Rights, the complainant, Bonetti, was a department head in a retail store and she was transferred from one department to another department within the same store, in part because she took a maternity leave. However, her pay and her position (department head) remained the same. The award considers whether the transfer within the same store could be a disadvantage in the absence of a loss of salary and concludes that it was. The factors considered related to the perception that the former department head position involved greater status and responsibility. The Council noted:

> One of the purposes of human rights legislation is to prevent and remedy such "intangible" harm as injury to feelings, dignity and self-esteem. Although the transfer caused Bonetti no economic or material disadvantage, I conclude . . . that the impact of the transfer, to the extent it was based on her pregnancy-related absence, was such as to impose some disadvantage on her and therefore constituted adverse effect discrimination. (at para. 89)

Having found that there was discrimination, the Council then considered whether the employer, Escada, had a defence - was the rule reasonable, was it *bona fide*, and did the Employer accommodate Bonetti to the point of undue hardship. In the end result, the Council found that the Employer had accommodated Bonetti to the point of undue hardship

and on that basis dismissed the complaint. Nevertheless, I note the finding that a transfer within the same store, while keeping the same position, the same hours and the same pay, was a disadvantage.

In this case, although the grievor's rank and pay remained the same after the transfer, the grievor was transferred from one work location to another. Her duties changed. Her hours of work changed from a straight day shift, with flexible hours and no work on weekends or holidays, to a rotating shift which involved working day, afternoon and night shifts, including weekends and holidays, without flexible hours.

I note that in this collective agreement the Employer has agreed to pay a shift differential, that is an additional amount of money, for all hours worked on a shift when the majority of the hours on a shift are worked after 3:00 p.m., and even more money when the majority of the hours are worked after 9:00 p.m. I interpret this as a recognition by the parties that the day shift is preferred, the afternoon shift is next best, and the night shift is the worst shift. Of course, the grievor's rotating shift encompassed all three.

I also received opinion evidence suggesting that the case manager position was unpopular, that police officers generally preferred the day shift, that some officers preferred to work longer shifts and have more days off, that officers generally preferred positions in which they had an opportunity to earn extra money through overtime and court pay, etc. However, as discrimination generally involves the protection of the rights of members of a minority, I do not think a finding of disadvantage, or lack of a disadvantage, should be based on the preferences of a group of employees, and in particular not on the preferences of a majority of that group. As a result, I place no reliance upon this evidence of police officers' preferences.

The simple fact is this - the grievor was transferred from a position she had sought and liked to another position at a different work location, doing duties she had not sought, and working shifts regarded by the parties as worse. I conclude that the grievor suffered a disadvantage of the type which would be needed to support a finding of discrimination, and I now turn to the question of whether that disadvantage was in fact improper discrimination in this case.

Discrimination under the collective agreement as compared with the Code

This grievance involves a transfer. The Employer has the right under this collective agreement to transfer employees, but there are limitations on that right. Under the management rights article of the collective agreement (Section 2, above) transfers must be conducted fairly and without discrimination. The collective agreement does not define discrimination.

In addition to the collective agreement, the Ontario *Human Rights Code* applies to these parties. The parties agreed that I have authority to apply the provisions of the *Code,* as well as the collective agreement. The Ontario *Human Rights Code* prevents the Employer from making a transfer for reasons which are discriminatory under the *Code*.

But are the concepts of discrimination in the collective agreement and in the *Human Rights Code* the same or do they differ? Neither party suggested that there was any difference.

In Ontario, the *Human Rights Code* is regarded as a very important piece of legislation. The Supreme Court has indicated that the *Code* has special status in comparison with most other legislation - see for example, the comment of the Supreme Court in *Simpson Sears,* above*,* in reference to the *Code,* "Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary . . ." (at para. 12). Given the special status

of the *Human Rights Code,* had these parties intended a different meaning for discrimination than that which is found in the *Code,* I would have expected that they would have said so expressly. They did not do so, and I conclude that the parties intended to incorporate the meaning of discrimination as it is in the *Code.* In other words, I find no difference between the Employer's limitations regarding discriminatory transfers under the collective agreement and those limitations under the Ontario *Human Rights Code*.

Discrimination

The purpose of the Ontario *Human Rights Code* is to "recognize the dignity and worth of every person" and to ensure "equal rights and opportunities" (Preamble) in, among other aspects of life, employment. The *Code* prohibits improper discrimination. Improper discrimination occurs when an employee is denied equal treatment with respect to employment because of a prohibited ground, such as sex (Section 5). "Equal" treatment allows for the use of all the Employer's usual "requirements, qualifications and considerations" provided they are not based on a prohibited ground, such as sex (Section 10 (1)). The *Code* then makes it clear that improper discrimination on the basis of sex occurs when a woman is denied equal treatment because she is, or may become, pregnant (Section 10 (2)). Although not specified in the *Code,* there are many authorities which establish that to deny a woman equal treatment because the woman takes a maternity leave is sex discrimination, a point which the parties agreed upon.

The above provisions deal with the traditional view of discrimination, that is with direct discrimination such as "We don't hire any married women" or "You're pregnant so you're fired." Under those provisions of the *Code*, had the Employer simply decided to transfer the grievor from her case manager position because she was pregnant and took a maternity leave, it would be discrimination and such a transfer would be prohibited by the *Code.* In this case

no such decision was made. The Employer did not decide to transfer the grievor because she was pregnant - instead, the Employer transferred the grievor to active staffing because she had a right to light duties due to her pregnancy and the Employer had a corresponding duty to accommodate her.

But the *Human Rights Code* also prohibits another type of discrimination, referred to by a variety of names such as indirect, constructive, adverse impact, or adverse effect discrimination. Section 11 of the *Code* deals with this aspect of recognizing the dignity and worth of persons and of ensuring equal opportunities by preventing this form of discrimination, which I will refer to as adverse effect discrimination. In 1985, at a time when there was no specific mention of this concept of adverse effect discrimination in the *Code,* the Supreme Court described the concept as follows:

> . . . there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. . . (*Simpson Sears*, above, at para. 18)

Section 11 of the *Human Rights Code* now specifically prohibits adverse effect discrimination - that is, it prohibits the use by the Employer of any "requirement, qualification or factor" which appears neutral on its face but which "results in the exclusion, restriction or preference" of the members of a group who can be identified by a prohibited ground of discrimination. Applying that provision to the circumstances of this case, Section 11(1) of the *Code* prohibits the use of the six month limit on temporary transfers included in the transfer policy, which is not discriminatory on the basis of sex, if the use of that limit excludes or restricts women taking maternity leave, unless the transfer policy is reasonable and *bona fide*. Moreover, under Section 11(2) such a limit can only be found to be reasonable and *bona fide* if the needs of women to maternity leave cannot be accommodated by the Employer without undue hardship.

For many years there was a difference in the treatment of direct discrimination and adverse effect discrimination. In 1999 the Supreme Court, in its decision *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)* (above), was confronted with the issue of whether an aerobic standard imposed on all forest firefighters discriminated against females. The Supreme Court took the opportunity to reconsider the old approaches to the two forms of discrimination and replaced them with one unified approach. I will return shortly to the content of that new approach, but for now simply note that, as the Supreme Court stated in its subsequent *British Columbia (Superintendent of Motor Vehicles)* decision (above) in summarizing the impact of *Meiorin:*

> 19 . . . The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. . . .
> 20. Once the plaintiff establishes that the standard is prima facie discriminatory, the onus shifts to the defendant . . . (at para. 19 and 20).

Has the Union demonstrated a prima facie case?

The parties agreed that the Union had to prove a *prima facie* case of discrimination before the Employer was required to respond.

A *prima facie* case has been described by the Supreme Court as follows:

> . . . A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. . . . (*Simpson Sears*, above, at para. 28)

What must the Union prove in this grievance in order that the Employer must respond?

In *Sandhu v. International Forest Products Ltd.* (above) the British Columbia Human Rights Tribunal dealt with an allegation of discrimination on the grounds of disability under the

equivalent section of the B. C. Code. After referring to the *Simpson Sears* reference quoted immediately above, the Tribunal wrote as follows:

> 24. In order to establish a prima facie case of discrimination . . . the Complainants must establish that they belong to one of its protected groups . . . that they were treated adversely by [their employer] and that there is evidence upon which it is reasonable to infer that the prohibited ground of discrimination, was a factor in the adverse treatment . . . It is not necessary that the discriminatory reasons be the sole or even the primary reason for the denial; it is sufficient that it is one of several factors that influenced the treatment or decision. . . (at para. 24)

If this discrimination complaint had been made about an Employer policy that read "Every female officer shall be transferred upon her return from a maternity leave exceeding 6 months" (a case of direct discrimination) it would be sufficient to prove that:

1. The grievor was female and thus a member of a protected group, based on sex - a point on which there was no dispute;
2. She was transferred following a maternity leave exceeding six months - a transfer which I found above was a disadvantage, or adverse; and
3. The application of the Employer policy was at least partially responsible for her transfer - a matter not yet addressed.

In this case then, given that the distinction between direct and adverse effect discrimination has been eliminated, the Union needs to prove the same three points. There was no issue with respect to the first point, and I have found the transfer was a disadvantage, or adverse. But was the application of the six month limit on temporary transfers in the Employer's transfer policy at least partially responsible for the grievor's transfer?

Was the grievor's transfer a result of the six month limit in the transfer policy?

When the grievor announced that she was pregnant, she was assigned light duties; that is, the grievor's needs during her pregnancy were accommodated.

The grievor then took a maternity leave and she was transferred to a new position upon her return from that leave. At the end of her maternity leave the grievor was transferred to a patrol position - not placed back in her former case manager position - because her case manager position had been filled on a permanent basis. The only reason advanced as to why the case manager position was filled on a permanent basis, rather than on a temporary basis, was the transfer policy which states that temporary transfers shall not exceed six months "except in extenuating circumstances to meet the exigencies of the Police Service."

I note that the grievor had been in her case management position since 2002 and that officers are frequently transferred after they have spent three or so years in a position. This is done in order to expose officers to new areas of policing and to keep officers from becoming stagnant. Although there might well have been a valid reason to transfer the grievor, there was no evidence of any such reason having been considered, or relied upon, in this instance. There was no evidence that when the grievor returned from maternity leave in 2006 anyone considered whether she should be transferred in order to expose her to new areas, or for any other reason. Instead, the sole reason provided for her transfer to patrol was the fact that under the transfer policy her case manager position had been filled on a permanent basis because she would be away longer than six months.

As the six month limit on temporary transfers contained in the Employer's transfer policy was the only reason advanced for filling the case manager position, and the absence of a vacancy in that position was the only reason advanced for the grievor's transfer, I conclude that the application of that six month rule was, at a minimum, a factor in the grievor's transfer.

Historically, in order to demonstrate a *prima facie* case, the Union would also have had to show that the policy had a different impact on women than on men. Following the *Meiroin*

decision that is no longer the situation. Instead, those issues are now dealt with in the consideration of whether the policy was reasonable, whether it was adopted in good faith, and whether the needs of women could be accommodated without undue hardship. This change is partly a result of a change in the societal view of human rights. The issue used to be one of equal treatment, however it is now accepted that treating all persons the same is inadequate. The focus now is to ensure the inclusion of all groups in society as is reflected in these words from the Preamble to the *Code*:

> . . . it is the public policy in Ontario to recognize the dignity and worth of every person . . . and [to] . . . creat[e] . . . a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province. . .

However, if I am wrong on the above issue as to when and how the issue of differential treatment between men and women is to be addressed, I note that the Union also said the application of the transfer policy had an adverse impact upon women as a group, as compared to men, as women are the only persons who take maternity leaves and many take maternity leaves which last a year. Although the Employer submitted that men also take parental leaves lasting more that six months, longer than the limit on temporary transfers, there was no evidence of those longer parental leaves by men. While the collective agreement speaks of parental leaves, it does not specify the duration.

The evidence at the hearing indicated that although both men and women take leaves related to the birth or adoption of children, men take shorter leaves (Superintendent Erfle testified about four month leaves) and men are uniformly placed back in their old position when they return. No witness could recall any situation of a male officer being transferred upon his return from parental leave. In particular, Superintendent Erfle, who would have had the best access to the relevant information because of his involvement in transfers, testified he could recall no instance in which a father lost his position after taking a parental leave.

I note as well that the Employer used expression of interest forms in which officers indicated their preference for positions. Superintendent Erfle said the forms were an important factor in assigning officers to positions. More generally then, given that many officers were in positions which they had sought through the expression of interest forms, they will be in positions of their choice where they believe they can use their experience and skills. In many instances they will be able to seek a transfer at a time which suits them and at a time when a position that they desire is available. On the other hand, by not allowing for the use of a temporary transfer to replace a woman on maternity leave, the transfer policy effectively compels the transfer of a woman officer effective as of the day she returns from a maternity leave, rather than at a time when there is an attractive position open and the officer chooses to seek a transfer.

I conclude on the facts before me that, not only did the application of the six month limit on temporary transfers lead to the transfer of the grievor, but this limit has a different and adverse impact on women as compared to men, given that only women take maternity leaves and those leaves are often longer than six months.

As a result, I find that the Union has established a *prima facie* case of discrimination in this instance.

Is the six month limit on temporary transfers in the transfer policy nevertheless permitted as a bona fide occupational requirement?

Some discriminatory employer policies are protected under the *Human Rights Code.* Section 11 makes it clear that to be protected by the *Code* the policy has to be reasonable and *bona fide*, and it must be demonstrated that the needs of women to maternity leave cannot be accommodated without undue hardship. A policy which meets these requirements is often

referred to as a *bona fide* occupational requirement.

Returning to the *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)* decision (above), the Supreme Court considered a provision on *bona fide* occupational requirements in the British Columbia legislation similar to the one in the Ontario *Human Rights Code*. In that case the Supreme Court adopted a three-step test for determining whether a discriminatory policy was a *bona fide* occupational requirement. Under that test the Supreme Court decided that an employer had to establish, on the balance of probabilities:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> (3) that the standard is reasonably related to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer. (at paragraph 54)

As the language of the Ontario *Code* is very similar to the British Columbia legislation considered by the Supreme Court in *Meiorin,* I find that the above approach should be followed in determining whether the use of the Employer's restriction on temporary transfers to six months is permissible here.

The Supreme Court has said that the onus, that is the responsibility to prove the point, in each of the three parts of the test is on the Employer.

Although I received evidence about the general operation of the Ottawa Police Service, about the large number of transfers and about the desire to train officers in different areas of police work, there was no evidence about the actual factors considered by the Employer in adopting its transfer policy and, in particular, no evidence as to why the Employer adopted the six

month limitation on temporary transfers. There was no evidence that the Employer had considered, for example, a three month, or twelve month limit, and, assuming that other limits were considered, no evidence as to why those other limits were rejected in favour of six months.

Not only was there no evidence from the Employer, but there was also no submission by the Employer that the six month limit was "adopted for a purpose rationally connected to the performance" of police work.

In this instance where there was neither evidence nor submission in support of a six month limit on temporary transfers, I find that the Employer has failed to meet its onus of proving that the six month limit on temporary transfers was adopted for a purpose which, using the words in *Meiorin,* was "rationally connected to the performance of the job" of a police officer or alternatively, using the language of Section 11 (1) of the *Code,* was "reasonable."

Given my conclusion with respect to the first part of the test, it is unnecessary to consider the second and third parts.

As a result, I conclude that the six month limit on temporary transfers is not a *bona fide* occupational requirement.

As the Union has established a *prima facie* case of discrimination against the grievor through the application of the transfer policy with its six month limit on temporary transfers and, as the Employer has failed to establish that the six month limit contained in the transfer policy on temporary transfers is a *bona fide* occupational requirement, it follows that the Union has established that the Employer discriminated against the grievor.

In terms of the language of Section 11(1) of the *Human Rights Code* I find that this six month limit was a "qualification or factor" which acted as a "restriction" on the grievor keeping, or returning to, her case manager position after she took a maternity leave, that the six month limit was not established to be a "reasonable" qualification, and that the six month limit infringed the grievor's right to "equal treatment" in Section 5. In terms of the language of Article 2:02 of the collective agreement I find that the Employer has violated its obligation to exercise its right to transfer "without discrimination."

Remedy

The first remedy sought in this grievance was damages. The Union sought $10,000 by way of general damages for the upset and disruption - put generally, for the pain and suffering.

The *Human Rights Code* contemplates an award of damages when a person's rights are infringed. Apart from the more common damages for pain and suffering, in situations in which the infringement of the *Code* has been willful or reckless, the *Code* allows for additional monetary compensation for "mental anguish." As noted above, the Union did not seek damages for mental anguish and it did not rely on the evidence regarding the grievor's health issues which arose after the transfer.

In the recent case of *Sanford v. Koop*, above, the Ontario Human Rights Tribunal addressed the factors to be considered in an award of damages. The Tribunal wrote:

> General Damages
>
> 34. The Commission asks that the Tribunal award $25,000 in respect of general damages. In support of its position, the Commission submits Tribunal jurisprudence has established the principle that there is an intrinsic value to the rights enumerated in the Code, and the infringement of those rights warrants the assessment of general damages in addition to an award for mental anguish. . . . Further, it argues, there is no ceiling on general damage awards and in making such awards, the Tribunal should not set the quantum too low, since doing so would trivialize the social importance of the Code

> by effectively creating a "license fee" to discriminate. . . .
>
> 35. The Commission provided a number of cases which set out the criteria to be used in assessing the appropriate quantum of general damages. These factors include:
> -- Humiliation experienced by the complainant
> -- Hurt feelings experienced by the complainant
> -- A complainant's loss of self-respect
> -- A complainant's loss of dignity
> -- A complainant's loss of self-esteem
> -- A complainant's loss of confidence
> -- The experience of victimization
> -- Vulnerability of the complainant
> -- The seriousness, frequency and duration of the offensive treatment
>
> . . .
>
> 36 The Tribunal accepts the submissions of the Commission. . . . (para. 34-36, authorities omitted)

While I accept that those are factors to consider, calculating damages in a case such as this where there is no monetary loss is still difficult. What value does one put on pain and suffering? Ultimately, I have found it helpful to review the damage amounts that other arbitrators or adjudicators have placed on pain and suffering in somewhat similar cases and to compare the facts of those cases to the particular facts before me.

Of the many cases cited, I will review only *Lord v. Haldimand-Norfolk Police Services Board* (above) as the Union submitted it was the closest comparison. In that case Constable Lord was denied light duties during two pregnancies. She was concerned about her own safety and that of her unborn child and felt compelled to take maternity leave early. In the second pregnancy the Employer offered to accommodate Constable Lord by allowing her to resign as a police officer and take a lower paying position. Constable Lord found this stressful. Constable Lord was tearful, had trouble sleeping and was anxious during her pregnancy. She was concerned about her future with her employer. The Board of Inquiry awarded her $10,000 for pain and suffering.

While there are a few similarities between the *Lord* case and this one, in my view Constable Lord was treated more poorly, and suffered far more than this grievor.

In all the circumstances of this case I have concluded that an award in the amount of $3,000 is appropriate. I direct the Employer to pay the grievor the amount of $3,000 in general damages.

The Union also sought a declaration that a woman returning from a maternity leave is entitled to return to her old position, or to a similar position. The Employer said I had no jurisdiction to make such a declaration. In addition the Employer submitted that the grievor had no right to her case manager position and that police officers do not "own" their positions.

While the Employer is correct that police officers do not "own" their positions, police officers do have a right in relation to transfers under both the collective agreement and the *Human Rights Code.* That right is a right not to be transferred out of their positions for discriminatory reasons. A woman will get the same job upon her return from maternity leave unless the Employer has a non-discriminatory reason for making a transfer. If there are reasons for a particular transfer that do not involve discrimination, I find nothing in the *Code* or in the collective agreement which limits the positions into which the woman may be transferred.

As any declaration I might make would simply be a repetition of the rights and obligations under the collective agreement and the *Human Rights Code,* I decline to make a declaration of the type requested by the Union.

The grievance is allowed to extent set out above.

I will remain seised to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 31st day of March, 2007.

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Howard Snow, Arbitrator