

Date Issued: January 26, 2009
File: 3882

Indexed as: de Lisser v. Traveland Leisure Vehicles and others, 2009 BCHRT 36

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Hailey de Lisser

COMPLAINANT

A N D:

Traveland Leisure Vehicles Ltd., Dale Howes, Margaret Favre, and Connie
Drake

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Diane H. MacLean

Counsel for the Complainant:

Scott Marcinkow,
Articled Student

Counsel for the Respondent:

Joe Coutts

Hearing Dates:

November 19, 20, 21, 2007

I INTRODUCTION

[1] Ms. de Lisser filed a complaint against Traveland Leisure Vehicles Ltd. (“Traveland”), Dale Howes, Margaret Favre, and Connie Drake alleging that they discriminated against her in her employment because of her sex (pregnancy) contrary to s. 13 of the *Human Rights Code*.

[2] The essence of Ms. de Lisser’s complaint is as follows. She had been working part-time at Traveland since August 2005. Her twin sister, Ms. Ouimet, had been working full-time as a warranty clerk at Traveland since July 2003. Ms. Ouimet announced her pregnancy in January 2006 and it was decided that Ms. de Lisser would be her maternity leave replacement in the warranty clerk position, subject to confirming her baby-sitting arrangements. Then, Ms. de Lisser became pregnant. When she informed Traveland of this, she was told she could not be her sister’s maternity leave replacement, because she would not be available for the entire period of her sister’s leave. On April 12, 2006, Ms. de Lisser’s employment in the part-time position was terminated. Ms. de Lisser said she could have done her sister’s job until she herself went on maternity leave on August 20, 2006. Alternately, she should have been considered for a receptionist position or other employment opportunities at Traveland.

[3] The respondents deny the allegations. Further, they say they had concerns about Ms. de Lisser’s attendance and her commitment to a full-time position. As well, in response to Ms. de Lisser’s and Ms. Ouimet’s assertions that Ms. de Lisser could easily take over Ms. Ouimet’s position with minimal training, they argue that it would have taken her several months to become minimally proficient and by then she would herself be going on leave.

[4] There was one other defendant named as a respondent. At the hearing, no evidence was led regarding this respondent. Therefore, the parties agreed that his name could be removed from the list of respondents, and I did so.

II WITNESSES AND CREDIBILITY

[5] Six witnesses testified, two (including Ms. de Lisser) on behalf of Ms. de Lisser and four on behalf of the respondents.

1. Ms. de Lisser

[6] At the time of the hearing, Ms. de Lisser was 26 years old. She worked part-time at Traveland from August 25, 2005 to April 12, 2006. She has two young children and lives in Abbotsford with her husband, a crane operator. Although I believe that Ms. de Lisser may have, on occasion, exaggerated her evidence or underplayed certain elements of the respondents' defence, in general, I relied on her evidence.

2. Ms. Ouimet

[7] Ms. Ouimet is Ms. de Lisser's twin sister. She had been working at Traveland since July 2003. At first, she worked as a full-time receptionist, occasionally doing clerical work for the warranty manager. In November 2004, she started working full-time with the warranty manager. Ms. Ouimet became pregnant in late 2005 and went on maternity leave in April 2006. She did not return to Traveland at the end of her maternity leave. In general, I felt that Ms. Ouimet gave her evidence in a straight-forward manner, although I thought she probably underestimated what would be required to be fully trained as a warranty clerk.

3. Mr. Habart

[8] At the time of the hearing, Mr. Habart had worked for Traveland for five years. He worked as a senior customer representative. He has always worked in the customer service business in very similar types of roles. In general, Mr. Habart gave his evidence in a straight-forward manner. He was put in the difficult position of having to describe, from Traveland's point of view, Ms. de Lisser's terms and conditions of employment, when he had not been the one to hire her. However, as explained below, I had difficulty believing Mr. Habart when he said he was concerned about Ms. de Lisser's attendance on Saturdays, when he admitted he did not make it clear to her that he wished her to work Saturdays. As well, his concerns were inconsistent with his attempts to find her other work when the work available in the sales department declined, as will also be discussed below.

4. Ms. Favre

[9] Prior to her retirement on February 1, 2007, Ms. Favre had worked for Traveland for 20 years. She has an accounting background and, toward the end of her employment, was

Traveland's controller. As I will refer to in detail later, I had some issues with her credibility, in particular, when she testified she looked for other work for Ms. de Lisser, and then admitted that she had not considered her for a vacant receptionist job and had not investigated whether the rental department would have any openings.

5. Ms. Drake

[10] At the time of the hearing, Ms. Drake had worked for Traveland for 12 years. Throughout, she was the warranty manager. I had some difficulty with Ms. Drake's credibility. First, she is a respondent in this complaint. As well, her credibility was affected, as will be explained later, by her willingness to have Ms. de Lisser as a maternity leave replacement until she became pregnant, and only then raising concerns about her qualifications.

6. Mr. Howes

[11] Mr. Howes is the president of Traveland's operating company and owns 50% of Traveland. At the time of the hearing, he had been involved with the company for more than 30 years. Mr. Howes did not appear to have much to do with the events complained of by Ms. de Lisser, that is, his managers had the authority to make personnel decisions and he was 'kept in the loop'. However, he provided useful background information and I relied on him for that.

III EVIDENCE

[12] Although I have not referred to all of the evidence entered by the parties, or to all of their submissions, I have considered all of it.

1. Traveland

[13] Mr. Habart and Ms. Drake provided much of the background information about Traveland. Traveland employs about 75 people and sells and maintains motor homes, travel trailers, and fifth wheel trailers. The business is located in one large building with an annex for retail sales. It carries a wide range of products and has sales, parts, service, and warranty departments. In addition, there are employees who carry out office functions such as payroll

and accounting. The controller (Ms. Favre at the time of the events in this complaint) dealt with human resource issues.

[14] The technicians, mechanics, and office personnel are located in the large building while the service department is located in a small part of the retail sales area. The set-up for the service department is very similar to a car service department, except that a motor home is far more complex. Any work that has to be done goes through a scheduling foreman to a technician. The company does both warranty and non-warranty repairs.

[15] At the time of the hearing, there was a service manager and four service writers reporting to him. Mr. Habart was the senior service writer and, as the oldest and most experienced, he had an informal leadership role in the department.

[16] There was also a warranty department located in the service area. Employees in both departments work in close proximity to each other. Ms. Drake was the warranty manager, dealing with claims to about 15 manufacturers of motor homes, trailers, and other miscellaneous manufacturers. At one point, Ms. Drake was the only person handling warranties but later Ms. Ouimet started to work with her. Ms. Ouimet had been working as a full-time receptionist. She had no training in warranty work, but when Ms. Drake got very busy, which happened frequently, she would take work which could be done manually, such as writing out a claim from a work order, to Ms. Ouimet and she would write it out. For example, she would transfer Traveland's information to the manufacturer's claim form. Then Ms. Drake would review it, complete it, and send it to the manufacturer.

[17] However, by 2004 the business was growing and the amount of warranty work was becoming overwhelming, so Ms. Drake needed someone full-time to do more of the everyday paperwork. As a result, in November 2004, Ms. Ouimet started doing more warranty work and moved to Ms. Drake's office. Sharing an office was an advantage as Ms. Drake could answer questions and guide her and Ms. Ouimet could listen to Ms. Drake on the phone. As well, the work Ms. Ouimet was doing became more detailed. She had to do time tickets on work orders and she had to know the terminology and how to word everything so that manufacturers would understand and pay the claim. She had to learn how to "flat rate" (a certain number of hours to do a particular job) properly to determine the amount each manufacturer would pay for a certain warranty job. Each manufacturer has its

own flat rate manual and Ms. Ouimet had to learn how to use each manufacturer's manual and guidelines.

[18] Ms. Drake described what happens after a claim goes in to a manufacturer. The manufacturer reviews the claim and decides if it will be paid. They may send the claim back because there's not enough information. If so, Ms. Drake reviewed it and told Ms. Ouimet what was missing. It was part of the training process. Ms. Ouimet would correct the claim and re-send it. The company could also get a cheque from the manufacturer that was less than expected and Ms. Drake would investigate. If Ms. Ouimet had done something wrong, Ms. Drake would review it with her.

[19] Ms. Ouimet started her job in November 2004 and left in April 2006, when she went on maternity leave. She was not at Ms. Drake's skill level by the time she left. As Ms. Drake explained, she has been in the industry for 15 years and is still learning. There are certain things where you had to be doing it all that time in order to know the right questions to ask and Ms. Ouimet would not have been at that point on some more technical problems.

[20] Ms. Drake testified that she would not have left Ms. Ouimet alone, after three weeks, to take a claim from start to finish and send it off. After three or four months, she could be left on her own to do mundane transactions from beginning to end. As she continued working, she became more proficient. However, even after a year, Ms. Drake would still correct some wording on Ms. Ouimet's claims.

[21] During her testimony, Ms. Drake was asked what happens when a claim is made and the manufacturer disputes it. She explained that she would go back to the technician to see if there was something the warranty department misunderstood and perhaps word the claim a bit differently. Ms. Drake might also contact the manufacturer or put the technician on the phone to explain.

[22] Ms. Ouimet also explained that she started as a receptionist and assisted Ms. Drake with some warranty work. Ms. Ouimet said that after she transferred to the warranty department, she required a few weeks further training. She was trained on-the-job, going through each work order step-by-step. Her training was on and off as things came up.

2. Ms. de Lisser's Hiring

[23] Before working at Traveland, Ms. de Lisser worked full-time, for approximately two years, at a fertilizer company as an administrative assistant. She ran the front office, answered the phone, did filing, customer orders, payroll, invoicing, and banking, and arranged trucking. She was on maternity leave the year before she starting working at Traveland. She didn't return to her previous employer because she didn't want to go back to work full-time with a young son. Therefore, when she started working at Traveland, she had a very young child at home and worked part-time.

[24] Her sister, Ms. Ouimet, heard about a job opening at Traveland and told Ms. de Lisser. Ms. de Lisser had a telephone interview with a foreman, who explained the particulars of the job, what they were looking for, and what Traveland did. They discussed her experience and then she talked to Ms. Favre about her wages.

[25] The foreman told her that it was a permanent job. Ms. de Lisser said she had been earning money caring for children at home and needed to know that the job would last. She was told it would not be for a short period of time. The foreman also told her that her duties would include work orders, filing, and time tickets. In regard to work orders, she would take the comments made on a form by a technician working on the vehicle and enter them into the computer. Or, if a customer came in, she would start a work order, based on the customer's description about what was wrong with the vehicle.

[26] Ms. de Lisser testified that her hours of work were very flexible, as she had a young son. However, she was told there were more hours of work available if she wanted them. By mutual agreement, Ms. de Lisser worked four hours a day on Mondays, Wednesdays and Fridays. Ms. de Lisser said that the foreman felt that Mondays, Wednesdays and Fridays provided the best coverage. I note that the foreman did not testify in these proceedings.

[27] Mr. Habart also provided information about how Ms. de Lisser came to work for Traveland. He explained that before she was hired, they only had three service writers. In the summer of 2005, it was obvious that they needed help in the service department. They were not able to keep up and to get the work orders entered. Mr. Habart met with Mr. Howes and they agreed to hire a fourth service writer. They didn't have anyone at that time, so they decided to get a casual person to assist for a few months to help the department get caught up and then hire a permanent person as a service writer. There was a forklift driver

who was suitable for the position who would be moved over to the service department around October 1, 2005.

[28] In the interim, it was decided that someone would be hired to do bulk type work orders, answer the phones, do time tickets on Saturdays, and help out as required. In regard to time tickets, Mr. Habart explained that Traveland technicians work on time clocks. They punch in when they change jobs and when starting and ending work. The times are traditionally entered onto an Excel spread sheet on Saturdays. It is then tabulated and sent to accounting on Mondays for payroll.

[29] Mr. Habart said he was not part of Ms. de Lisser's hiring process. However, he said it was his understanding that it was clear that the job was a 'fill-in' kind of position.

[30] Mr. Howes also explained how Ms. de Lisser came to be hired. He said that Mr. Habart is a very conscientious employee and in 2005 he came to Mr. Howes and said he was overworked. Mr. Howes asked him what he needed and they agreed to hire a fourth service writer. The next likely candidate would be the forklift driver. However, it was in the middle of summer and they didn't want to take him off the forklift and they had no time to train him. They decided they would start training him in October. Service writing is a difficult job and it takes a long time to train someone. In the meantime, they agreed to hire someone to help with the time tickets and other clerical work. The idea was to prepare work orders in advance for the customers, *i.e.*, when the customer phoned in. Mr. Habart suggested someone could start these work orders. They didn't have to be absolutely correct at that point and the service writer could work on them when the customer came in. Mr. Howes approved the new position and said that, in a few days, he was delighted to hear they had hired Ms. de Lisser. Her sister, Ms. Ouimet, was a great employee and had a wonderful personality, as does Ms. de Lisser. Ms. de Lisser started working shortly after. The time sheets provided by the parties show that her first day of work was August 25, 2005.

3. Ms. de Lisser's Employment Experience at Traveland

[31] Ms. de Lisser testified that her work schedule was flexible. If Mr. Habart was away for a day, she could work Thursday, instead of Friday. There were only one or two occasions on which she was asked to work and was unable to do so. It was not a big issue, she could work the next day, and she never left work uncompleted. She also worked

Saturdays in the beginning, but as work started slowing down, she stopped doing that. There was never a discussion about Traveland needing her to work more hours. In particular, Ms. de Lisser testified that no one ever told her that they had problems with her attendance, or more specifically, her attendance on Saturdays.

[32] Ms. de Lisser identified time sheets from her first to last day of employment. Those time sheets show that the days of the week she worked did change throughout and Ms. de Lisser said it all depended on when she was asked to work.

[33] I have reviewed Ms. de Lisser's time sheets. These records show the time worked in each half-month. They show that, on average, Ms. de Lisser worked about 12 hours a week. She worked regularly on Mondays and Wednesdays and slightly less often on Fridays. She also worked about six Tuesdays and six Thursdays. Until February 2006, it appears that she worked at least one Saturday in each half-month period. I have summarized the days Ms. de Lisser worked in Table 1 attached to this decision.

[34] Ms. de Lisser testified that Mr. Habart trained her. However, if he was busy, she would ask questions of other employees in that section. Ms. de Lisser said it was "hands on" work and she was learning as she went. In particular, Ms. Ouimet and Ms. Drake showed her how to do things.

[35] Ms. de Lisser explained her work. She answered the phones and greeted customers. If a customer came in, a work order would be typed out and then it would go to the mechanics, where it would be determined how many hours were required and which mechanic would do the work. Ms. de Lisser also noted that if a work order was warranty-related, *i.e.*, still under warranty, it would go to the warranty office. In addition to these specific duties, Ms. de Lisser also did some filing and other clerical work for the sales department, and time sheets. There was a punch clock and Ms. de Lisser would do a spread sheet of the number of hours worked from the punch cards. She also was being trained on warranty doing various work orders for them as well.

[36] Ms. de Lisser said she started learning aspects of Ms. Ouimet's job in November 2005. Nobody arranged for it – there was work that needed to be done in warranty and Ms. Drake came to her. Both Ms. Ouimet and Ms. Drake showed her how to do the work. Even after the new service writer was trained, Ms. de Lisser said she continued to do some service

work, not just overflow, but current work. She did time tickets and typed up work orders, in addition to warranty-related work.

[37] When asked in cross-examination if Traveland wanted her to work 20 or more hours per week, Ms. de Lisser said there was never a set amount of hours. Mr. Carter was very flexible; if she wanted 20 hours, she could work it. Mr. Habart also said she could work more hours. Ms. de Lisser said he never told her that he wanted her to work Saturdays, but she was sometimes asked if she wanted to work on Saturdays if there was extra work. Ms. de Lisser said that Traveland did want to work on the time records on Saturdays and she did work Saturdays in the beginning when it was busy. Later, she didn't work them, not because she didn't want to, but because it was slowing down.

[38] In cross-examination, Ms. de Lisser maintained that Traveland never expressed to her that they wanted her to work more hours (as opposed to having the option of doing so). In regard to Saturdays, she said there were a couple of times she couldn't work on a Saturday, but she always called if she couldn't come in.

[39] Ms. Ouimet testified that Ms. de Lisser started working in the warranty department or did warranty work, starting about a month or two after she was hired. Ms. Ouimet did not recall whose idea it was for her to do so, but she was brought in to help out with some of the backlog. She said that she and Ms. Drake would show her how to do the work.

[40] In the context of discussing Ms. de Lisser's ability to perform the warranty clerk position, Ms. Ouimet explained a bit about her job duties. She would take a work order from a technician and then type the technician's notes regarding warranty repairs. She then would finalize the work order, put it into claim form and submit it to the manufacturer. Ms. Ouimet said that Ms. de Lisser wrote some of the claim forms or coded the specific jobs and entered them. When asked if there were parts of her job that Ms. de Lisser could not do when Ms. Ouimet left on her maternity leave, she said that Ms. de Lisser hadn't dealt with manufacturers either by phone or by e-mail, but nothing else. Ms. Ouimet was asked how long it would have taken her to show Ms. de Lisser those parts of the job and she said it wouldn't take very long, just a few weeks.

[41] Ms. Ouimet said that she could not remember anyone at Traveland ever saying anything negative about Ms. de Lisser's work performance or attendance, although she couldn't remember hearing positive things either.

[42] Mr. Habart said that he discussed Ms. de Lisser's work and hours with her. They were fairly casual regarding some hours, but needed someone on Monday and Saturday to do time tickets (which he testified was critical) and one or two other days during the week that would work best for her. On Monday and Saturday, they wanted 8 hours, but it could have been less on other days. Ms. de Lisser could work as many as 25 hours a week. Mr. Habart said he explained this to Ms. de Lisser and he believed she found this to be satisfactory. He doesn't recall her saying it was unacceptable.

[43] Mr. Habart testified that Ms. de Lisser worked 25 hours most weeks, although she wasn't able to make it on some Saturdays for various reasons. He talked to her about it in a general casual way. Her reasons for not working on Saturdays were that she was sick or someone else was sick, or she had no babysitter. Mr. Habart suggested that it was causing some difficulties because he then had to do the time tickets on Sunday. Ideally, the time tickets were to be done for Monday. In Mr. Habart's opinion, he felt the understanding in the first few weeks of Ms. de Lisser's employment was that she would work 25 hours per week. He believed she did so for a very few weeks and then her hours fell off considerably. The average later was down to 10 or 15 hours per week.

[44] After reviewing Ms. de Lisser's time sheets, and as set out in Table 1, I find that Mr. Habart was in error in regard to this. There never was a half-month period where Ms. de Lisser worked more than 33 hours. Therefore, she was not averaging 25 hours per week in the beginning. As well, her hours never fell off significantly. She was still working between 20 and 30 hours in most half-month time periods in 2006.

[45] Mr. Habart testified that, when the forklift driver started in the service department, they trained him to enter work orders and by November 2005, there was less work for Ms. de Lisser. There was not enough work for the long term, so Mr. Habart asked Ms. Drake if there was work in the warranty department. Ms. de Lisser was a good employee and he felt it would be good for there to be something for her to do, and it helped to have the time tickets done.

[46] Therefore, Ms. de Lisser continued doing some time tickets and typing for the service department and did more warranty work for Ms. Drake. If Ms. Drake hadn't been able to give Ms. de Lisser work, she would have been laid off. Mr. Habart emphasized that he never told Ms. de Lisser that her position was permanent – it was a fill-in, catch-up job.

[47] In cross-examination, Mr. Habart was asked about his concern about Ms. de Lisser working Saturdays. Although he casually spoke to Ms. de Lisser about the Saturdays when she didn't show up, he didn't tell her it was a big problem because she always had a legitimate reason. However, he let her know, in a general way, that it was a problem. He said his role was that of a coach, not a boss. However, he agreed that, since he had taken on an informal supervisory role, part of his role would be to deal with things he thought were a major problem. However, he agreed that if it was major problem he could have talked to her more sternly. He also agreed in cross-examination that he didn't have to go to Ms. Drake to suggest that Ms. de Lisser be given work if missing Saturdays were such an issue. Mr. Habart said he approached Ms. Drake because he wished to help Ms. de Lisser and keep her employed through Christmas.

[48] Mr. Habart said working Saturdays was essential because they always did timesheets on Saturday, to be ready for Monday morning. It was critical if it was a payday period. If it wasn't a payday period, the accounting department could have the information on Tuesday or Wednesday, but it would have been a heavier strain for payroll, so the rule was to have it for Monday. Mr. Habart's understanding was that it was an unwritten policy, it had to be done. It didn't need to be done on Saturdays, but it had to be done on Monday and Traveland was not open on Sunday.

[49] Mr. Habart said the season slows down in the winter, by this he meant that the volume of telephone calls from customers dropped. The reason why Ms. de Lisser's work load changed drastically was that she was only doing the work temporarily until they had trained a service advisor.

[50] Mr. Habart agreed that one of the reasons why he wanted to see if Ms. de Lisser could do work for Ms. Drake was because she had helped the service department when it had a backlog. As well, she continued to do time tickets into December, January and February, although she did not regularly come in on Saturdays. Ms. de Lisser did them on Monday. There were never any times when people didn't get paid, but Mr. Habart had to sometimes come in on Monday to ensure they did so. He agreed in cross-examination that if he could come in and work on time tickets on Monday, then Ms. de Lisser could as well. When she did the time tickets on Monday, it worked, in most cases, but it wasn't ideal. Mr. Habart reiterated that he was generally happy with the quality of Ms. de Lisser's work.

[51] Ms. Favre also testified about her understanding of how Ms. de Lisser came to be working for the warranty department. Sometime in November 2005, Mr. Habart brought Ms. de Lisser to her office. The forklift driver was now working as a service writer and, except for time tickets, they didn't have other work and wondered if Ms. Favre could use Ms. de Lisser. Ms. Favre knew that a large manual had been accidentally deleted from the computer system, so she thought Ms. de Lisser could input it. They were just coming off the busy season so Ms. de Lisser could write some warranty claims and input other manuals, because, at that time of year, manufacturers would send their updates for the manuals.

[52] Ms. Favre believed that Ms. de Lisser continued to do the time tickets for Mr. Habart. There were never any set hours for her because it was a part-time arrangement. Ms. de Lisser came in three mornings a week on Mondays, Wednesdays and Fridays. It was a schedule set by Ms. de Lisser, not Ms. Favre.

[53] Mr. Howes generally agreed with the testimony regarding Ms. de Lisser's employment and how they looked for more work for her to do with Ms. Drake. In particular, he agreed that it was company policy not to lay off employees during the Christmas season. Further, Mr. Howes said that Ms. de Lisser was a nice person and has a good personality. He felt that Traveland tried to keep her employed with make-work jobs, such as inputting the manuals. That was a job no one wanted to do and, if Ms. Drake was taking her time to do it, it was costing the company money.

4. Ms. Ouimet's Pregnancy

[54] Ms. de Lisser testified that her sister became pregnant and, in early January, she told people at Traveland about it. Ms. de Lisser said she was asked if she wanted to take over Ms. Ouimet's warranty clerk position when she left on maternity leave. Ms. de Lisser said she would be interested but she had to find full-time day care, and would let them know. She later confirmed that she had full-time day care and was able to take the position. Both Ms. Drake and Ms. Ouimet were present during these conversations.

[55] There was also a discussion about what would happen when Ms. Ouimet returned to work. The plan was for the women to job share and take care of each other's children. Ms. de Lisser confirmed that this was also discussed with Ms. Drake. Ms. de Lisser also recalled

that Mr. Howes referred to her taking over for her sister. He joked that customers wouldn't know the difference because they are twins.

[56] Ms. de Lisser believed she was asked to take over for her sister because she already knew the extent of her job and what she did at work every day. She knew how to do her sister's duties except for talking on the phone to manufacturers.

[57] Ms. de Lisser agreed she was capable of working a lot more hours but, in the beginning, her child was young and that's why she wanted part-time work. Ms. de Lisser also agreed that Ms. Drake said that, before considering her for the maternity leave position, she wanted a commitment. However, she did not understand that to be a reflection on her attendance in her part-time position. Ms. de Lisser made arrangements for childcare and told Ms. Drake. Ms. de Lisser denied, on two occasions, Ms. Drake asked for a written commitment to work full-time or that she never gave that commitment.

[58] In cross-examination, Ms. de Lisser said that she would require minimal additional training to do her sister's job. She had already been doing much of it. Ms. de Lisser was adamant that by March 2006 she knew all of her sister's duties except for talking on the phone to manufacturers, and believed she could shadow her sister with respect to this aspect. She felt quite confident that she could take over her sister's job when she left. Ms. de Lisser thought of herself as a fast learner. She disagreed that everyone else thought she was nowhere close to being trained. Ms. de Lisser also said that she hadn't had any performance appraisals. The general comments she had received were that she picked up her job quickly. There was nothing negative expressed about her performance and there were no comments about attendance.

[59] Ms. Ouimet testified that she told people at work about her pregnancy in early January. She was planning to start her maternity leave at some point in May, but she left at the end of April instead. There were discussions with Ms. Drake and Mr. Howes about Ms. de Lisser taking over her position. Ms. Ouimet couldn't remember there being any discussion about how much training would be involved for Ms. de Lisser to take over.

[60] In cross-examination, Ms. Ouimet provided more information about her time in the warranty department. By the time she went on maternity leave, she had been in the department for 16 or 17 months. She explained that a lot of the work was the same, but if an unusual problem arose she would ask Ms. Drake. By the middle of 2005, she had seen

most of the situations that would come up, so she would not need help from Ms. Drake nearly as often. By 2006, a lot of the learning process was over; she was doing the job by herself, but Ms. Drake was still available to help.

[61] Ms. Ouimet testified that certain parts of the job are clerical and easy to learn, while other parts of the job require discretion. Discretionary aspects included reading the technician's notes, deciphering them, figuring out the actual problem, its cause, and the solution.

[62] I note that during cross-examination Ms. Drake testified that, even with fifteen years experience in this type of work, she still made mistakes and had to reword her claims. She also said that Ms. Ouimet had not reached her level of competence and could not do some of the things that Ms. Drake did, such as negotiating with manufacturers regarding warranty claims.

[63] In any event, Ms. Drake testified that she first learned about Ms. Ouimet's pregnancy and maternity leave during the first week in January. At the time, Ms. Ouimet said she wanted to work up to close to her due date around mid-June.

[64] Ms. de Lisser was in the office and Ms. Drake thinks that Ms. Ouimet said that Ms. de Lisser would be interested in filling in for her while she was on maternity leave. After thinking it through, Ms. Drake said she needed a full-time person five days a week. Ms. Drake said she told Ms. de Lisser that if she was interested in the position, then she wanted a written commitment. At the time, Ms. de Lisser had her mother-in-law babysitting, who had health issues, and Ms. Drake wanted to make sure she had backup. It was a very busy, stressful office and Ms. Drake wanted Ms. de Lisser to understand the commitment she would have to make. Ms. de Lisser said she would check and get back to Ms. Drake.

[65] Ms. Drake said she asked Ms. de Lisser about this commitment at least three times, probably at least once more in January, at least once in February, and finally around the first of March when she told Ms. de Lisser that they couldn't wait any longer. The first time Ms. Drake asked if she had made arrangements and if she was going to get the letter. The second conversation was the same. Both times Ms. de Lisser said she was working on it.

[66] Ms. Drake said that once she had Ms. de Lisser's commitment, she would have had her work full-time immediately and moved her in beside her sister where she would have started the day-to-day work with her sister overseeing. Ms. Drake planned to have them

overlap for the remaining two or three months before Ms. Ouimet left. Ms. Drake believed that the first time she asked Ms. de Lisser for a commitment, she told her that training would not start until she made the commitment. Ms. Drake said that Ms. de Lisser never did say she had things resolved.

[67] In cross-examination, Ms. Drake agreed it was uncommon for anyone at the office to sign a contract when they started. Ms. Drake was unshaken in her testimony that she asked for a written commitment.

[68] Ms. Favre said that, at the end of January or the beginning of February, she had discussions with Ms. Drake about her wanting Ms. de Lisser to commit to the warranty clerk position on a full-time basis. On a few occasions, Ms. Drake came to her office saying she did not have a commitment from Ms. de Lisser and that she would need somebody else if she could not commit to the job. Ms. Drake said she needed that commitment particularly from Ms. de Lisser because of her record, as her days of work varied. Also, Ms. Drake said that Ms. de Lisser needed more time because there was a problem with babysitting and she had to be sure that Ms. de Lisser had child care in place.

[69] Mr. Howes testified that he heard about Ms. Ouimet's pregnancy and upcoming maternity leave a few days after Christmas. He was walking by the warranty office and Ms. Drake invited him in. Both Ms. de Lisser and Ms. Ouimet were there and Ms. Drake said that Ms. Ouimet was pregnant and that "it gets better", because Ms. de Lisser and Ms. Ouimet are going to job-share after the baby was born. Mr. Howes said "That's great."

[70] Sometime around the end of January, Ms. Drake came to see Mr. Howes and said she was concerned about Ms. de Lisser taking over the warranty clerk position because she needed someone full-time. Ms. Drake said she was concerned about Ms. de Lisser because she had phoned in as "unavailable" (this is presumably in reference to some Saturdays that Ms. de Lisser missed) and she was worried that she might not be able to commit to the position. Mr. Howes advised her to make sure she got a full commitment and Ms. Drake said she had asked Ms. de Lisser for one. Mr. Howe explained that Ms. Ouimet's position was important to the company financially. Without someone doing that job, it might mean a substantial amount in lost billings from the manufacturers. Mr. Howes remembered hearing again that Ms. de Lisser was working on getting a babysitter and that it was a bit up in the air. He remembered thinking the situation could not remain up in the air indefinitely.

5. Ms. de Lisser's Pregnancy

[71] While the discussions about replacing Ms. Ouimet were going on, Ms. de Lisser found out she was pregnant. In early February, her doctor did an ultra sound to date the pregnancy. There were some abnormal results, so Ms. de Lisser didn't advise anyone of the pregnancy at that time. She had a second ultra sound about the beginning of March. She was told everything was fine and therefore started telling everybody.

[72] Ms. de Lisser said that she told Ms. Drake that she was expecting and Ms. Drake seemed "put out" and annoyed. There were discussions about why Traveland should train her further in the warranty position if she was going to be gone in four months. Ms. de Lisser noticed that jobs were slowly being taken away from her and given to other people. Ms. de Lisser starting to get nervous and, in the beginning of April, talked to the manager of the sales department about whether there was work for her to do there. He said it was a busy dealership, going into the busy season and there was work to be done. However, after that discussion, she definitely noticed she wasn't doing time tickets. Her part-time position had been dissolved and someone else was being interviewed for the warranty position.

[73] Ms. Ouimet testified that Ms. de Lisser told people at work that she was pregnant in early March. The arrangement that Ms. de Lisser would be taking over for Ms. Ouimet was never really discussed after that.

[74] Ms. Drake described what happened in early March, when Ms. de Lisser informed her of her pregnancy. Ms. Drake had again told Ms. de Lisser that she expected a commitment to full-time employment and confirmation regarding her child care arrangements. She recalled that, on a Friday, she gave Ms. de Lisser a deadline of the next Monday. When Ms. de Lisser came into work that Monday and said she was pregnant, Ms. Drake told her that she needed a full-time person. At that point, Ms. de Lisser said "You can't fire me." Ms. Drake didn't say anything further about training Ms. de Lisser for a job she wasn't going to be able to fill. Ms. Drake thought that she also said that she would have to start looking for someone else for the position. A few days later, Ms. Drake told Ms. de Lisser that when she found someone to fill the warranty clerk position, the new person would have to work with Ms. Ouimet and Ms. de Lisser would have to be laid off. Again, Ms. de Lisser said that Ms. Drake couldn't fire her.

[75] Ms. Drake testified that she started looking for a replacement for Ms. Ouimet. The replacement, who had five years experience in warranty work, started April 17. Ms. Drake noted that the new person, while experienced in warranties, was not experienced with Traveland's manufacturers. However, she was much faster and more efficient (presumably than Ms. Ouimet). Ms. Drake noted that Ms. Ouimet left on her maternity leave in April, which was earlier than expected.

[76] Ms. Drake did not agree with Ms. de Lisser's assessment that she was almost a fully-trained warranty clerk. She did do some typing of work orders but that didn't make her a fully qualified warranty clerk. Ms. Drake described the cost of training Ms. de Lisser for the warranty clerk position. She said it could take two or three months at \$14 an hour for a 40-hour week.

[77] Also in cross-examination, Ms. Drake was asked if there was tension between her and Ms. de Lisser after she told Ms. Drake she was pregnant. Ms. Drake said tension occurred when she stopped training Ms. de Lisser on the work orders. Ms. Drake explained that the training was going on without her permission, taking Ms. Ouimet's time, and causing constant interruptions. Ms. de Lisser was brought into the department to do mundane claims. Ms. Drake said that in mid-March when she took the work orders away from Ms. de Lisser and told her there would be no further training, Ms. de Lisser was very unhappy.

[78] Ms. Drake was asked if she didn't want Ms. de Lisser to be trained because she didn't intend to give her the position. Ms. Drake replied that Ms. de Lisser had already told her that she wasn't going to be able to fill the position. She clarified that when Ms. de Lisser said she was pregnant, Ms. Drake told her she needed someone full-time and that she was going to have to find someone. She wanted someone full-time right through the maternity leave and that was always a condition of the position.

[79] Ms. Favre was asked whether there were any discussions about whether Ms. de Lisser was still going to be taking over Ms. Ouimet's position. Ms. Favre said that Ms. Drake came to her later and said she was going to hire someone else. This was after Ms. Drake had waited for Ms. de Lisser's commitment and after Ms. de Lisser said she was pregnant. Ms. Drake said she needed someone full-time to replace Ms. Ouimet and she

hired somebody in April. Ms. Favre didn't know if Ms. Drake had talked to Ms. de Lisser and if Ms. de Lisser had confirmed she had full time day care available.

[80] Around March, Mr. Howes was surprised to learn that Ms. de Lisser was pregnant. A month before she was going to work for Traveland full-time for a year and then suddenly she was pregnant. Mr. Howes said they had no time to train someone in the summer and it would be a disaster to have to do so. The problem was not Ms. de Lisser's pregnancy but that she would be leaving in the summer. It would cost Traveland for training and would cost a significant amount in billings unless they could find someone who could just step in. That was a big "if". Ms. Drake said that Traveland couldn't train someone and then have to hire someone else and train them in the summer, and Mr. Howes agreed with her.

6. Termination of Employment

Ms. de Lisser

[81] Ms. de Lisser testified that a few weeks after she informed Traveland that she was pregnant, her position was terminated. It was called a layoff, but her job was gone. She was paid 28 hours as severance pay.

[82] Ms. de Lisser said she had a discussion with Ms. Favre who told her that she didn't have a job. Ms. de Lisser was not sure of her exact words, but knows she went into her office and left without a job. She was told that she was no longer needed at Traveland. Ms. de Lisser then asked if there was anything she could do and Ms. Favre said "What does your husband do. I'm sure he makes good money." Ms. de Lisser asked if there was anything else and Ms. Favre said she had already asked around and there was nothing for her to do.

[83] Ms. de Lisser apparently told Ms. Favre that Ms. Drake had been "put out" and Ms. de Lisser said that Ms. Favre agreed that Ms. Drake would have been because she was losing two workers (Ms. Ouimet and Ms. de Lisser).

[84] Ms. Ouimet testified that, within a day or two of Ms. de Lisser being let go, someone at Traveland told her about a newspaper ad regarding a job at Traveland. This employee told her because they knew Ms. de Lisser had been let go. Ms. Ouimet told Ms. de Lisser that there was an ad for a receptionist/greeter in the paper. Someone was hired for this position within a few weeks of the ad being placed.

[85] Ms. Drake explained her recollection of what happened on April 12. Ms. Drake had hired Ms. Ouimet's replacement the previous week. When she knew the date the replacement would be starting work, she told Ms. de Lisser that April 12 would be her last day, that she had hired someone for Ms. Ouimet's position, and that she had to lay her off. Ms. de Lisser went upstairs to see Ms. Favre, but Ms. Drake doesn't believe she sent Ms. de Lisser up to see her.

[86] Ms. Favre testified that, when Ms. de Lisser came to see her, she called Ms. Drake to find out what she and Ms. de Lisser had talked about. Ms. Drake told her that she had checked with other areas of the company to see if anybody could use Ms. de Lisser, but nothing was available. Ms. Drake said she even asked Ms. Favre if she had any work for Ms. de Lisser, explaining that she had a new person starting and that she could not keep Ms. de Lisser on and that the service department had hired their people and didn't require anyone else. Ms. Drake checked with other departments and she believed Ms. Favre did as well.

[87] Ms. Drake testified that she didn't believe she was aware of the ad for a receptionist/greeter. She didn't have much to do with the sales department and their staffing. However, she was generally aware that a person was often hired for reception in the summer months. In any event, by April 12, Ms. Drake didn't have any work for Ms. de Lisser to do. In February and March, the work they had Ms. de Lisser do was catch-up work. The new warranty clerk was more efficient and a lot faster, so they weren't going to need a part-time person. And, in the service department, they had hired the new service writer and so the service department was full.

[88] In cross-examination, Ms. Drake confirmed that, earlier, Mr. Habart had come to her and asked if she had work for Ms. de Lisser and she said she did. She didn't have any problem giving Ms. de Lisser work and Mr. Habart didn't have any concerns about Ms. de Lisser's work when he talked to Ms. Drake. Ms. Drake also had no problems with the hours Ms. de Lisser was keeping while in her department.

[89] Ms. Drake said it was her recollection, and understanding, that Ms. de Lisser was still working on the time tickets until the time she was let go, but that was the only work she was doing for the service department. In cross-examination, it was pointed out by Ms. de Lisser's counsel that even Mr. Habart testified that, after that point, he was still giving her work orders from their department. Ms. Drake said she did not recall when Ms. de Lisser

was only doing warranty work, except for the time tickets. When it was suggested that Mr. Habart was away on two occasions for personal reasons, Ms. Drake did not recall the first occasion. She recalled that Mr. Habart was away on the second occasion but she doesn't remember when it was. It was possible it was in that time period. She agreed that during these times, the service department wouldn't have had four service writers, they would have had three. Ms. Drake understood that one of the service writers started to do the time tickets after Ms. de Lisser was laid off.

[90] Ms. Favre described her role in the events of April 12, 2006. It started with a phone call from Ms. Drake saying she had just laid off Ms. de Lisser who was now coming upstairs to see Ms. Favre. Ms. Drake said "Maybe you have a job for her." Ms. de Lisser came in crying, saying she had just been laid off. Ms. Favre listened to her and calmed her down. Ms. Favre then said "Give me an hour and I will make inquiries." Ms. Favre called Ms. Drake and the service manager to see if there was any work for her. Ms. Drake said she had just hired a new warranty writer so had no more space and the service manager said the service department was fully staffed with service writers. Ms. Favre testified that she did not have anyone assisting her in her position and didn't need anybody in her department. Therefore, Ms. Favre called Ms. de Lisser back into her office and let her go.

[91] Ms. Favre said she had responsibility in some areas of the company for lay-offs. For example, she would prepare the Records of Employment ("ROE") and do the payroll. So, she would be the one to prepare Ms. de Lisser's ROE that showed that she was laid off for "lack of work".

[92] Ms. Favre was referred to Ms. de Lisser's testimony in which she said that Ms. Favre had said that Ms. Drake seemed to be "put out" by her pregnancy. Ms. Favre said that Ms. de Lisser said that Ms. Drake laid her off because she was pregnant. Ms. Favre disagreed with her saying it was not because of that; she had no more work for Ms. de Lisser and she had hired a new warranty clerk.

[93] Ms. Favre said she doesn't like to lay off people and asked Ms. de Lisser if her husband was working and could support them. Ms. Favre thinks that Ms. de Lisser said he was working.

[94] Ms. Favre was asked why the ROE had no return to work date. She said that Ms. de Lisser could have been recalled if Traveland needed her. Ms. de Lisser was paid severance

on top of vacation pay and, at the time, she viewed the termination as permanent. However, the service department hires their own employees, so they might have recalled Ms. de Lisser if they needed her.

[95] Mr. Howes said he found out in March that they had to let Ms. de Lisser go. He thought that was too bad because she was a nice kid. He asked everybody if there was somewhere the company could use her. The answer was no. He explained that he also thought when a person is only working at a dealership every other day and when she can come in, it's kind of inconvenient for the dealership. It's hard to know when they were going to give her something to do. For example, she knew how to do time tickets and would do it on her schedule. Then they would have to figure out what else they were going to give her to do. Mr. Howes knew that Mr. Habart was giving her time tickets when the other service reps should have been doing it.

[96] Mr. Howes testified that he was not involved in Ms. de Lisser's actual layoff on April 12. When he came in to work that day, he saw that Ms. de Lisser was upstairs and he thought that Ms. Favre might have her doing some clerical work. However, Ms. Favre later told him that Ms. de Lisser was very upset and crying. He felt sorry for her. He testified that the company was not there to destroy people's lives and he understood Ms. Favre's compassion. It's difficult to lay someone off. Mr. Howes could see that Ms. Favre was flustered about what was going on because Ms. de Lisser was so upset. Mr. Howes said he didn't understand what it was all about until Ms. de Lisser made a complaint to the Employment Standards Branch that Ms. de Lisser was short for her maternity leave benefits. Before that, he didn't understand why losing 12 hours of work per week was so upsetting, but then he realized she was 200 hours short to qualify for maternity leave benefits. Mr. Howes felt that was too bad but she had the option of working more hours in October and November.

[97] In cross-examination, Mr. Howes said his discussions with Ms. Drake and Ms. Favre around the time of her layoff were in regard to Ms. de Lisser's emotional state. He didn't have any problem with Ms. Drake, Ms. Favre and Mr. Habart making decisions in their department, although they would consult with him.

7. Impact of the Alleged Discrimination on Ms. de Lisser

[98] Ms. de Lisser said her meetings with Ms. Drake and Ms. Favre were very upsetting. She had asked if there was anything for her to do, as the RV dealership was going into its busy season. Ms. Favre said she had asked other departments and there wasn't any work for her. They did not discuss the receptionist/greeter position, and Ms. de Lisser did not know about it. Ms. de Lisser was very upset because she was pregnant and needed her job and shouldn't have to worry about those things. Her family depended on her income to supplement her husband's income.

[99] About a week after being let go, someone told Ms. Ouimet about an ad for a receptionist/greeter at Traveland. It was run in three papers on the date Ms. de Lisser was let go and also in the issues before and after her layoff. Ms. de Lisser identified the newspaper ad, which stated:

RECEPTIONIST REQ'D P/T at busy Langley RV dealership. Requirements include excellent telephone manner and computer experience. An outgoing personality and previous experience an asset. Fax resume to or e-mail to ...

[100] After Ms. de Lisser had asked if there was any work she could do when Traveland was going into a busy season, it made her feel awful that they were advertising a job she could have filled. She would have been interested in the job. The hours would have been acceptable; Ms. de Lisser was flexible and could have arranged childcare.

[101] Ms. de Lisser also discussed her job search following her layoff. She worked a few days for a used book company and earned \$975 in total. In cross-examination, Ms. de Lisser said she worked at the used book company in May, June and July and the hours worked seemed to be the same as at Traveland. She agreed that she lost the Traveland job and picked up another one for the same amount of money, but it was not permanent and not predictable.

[102] Ms. de Lisser also babysat a family member's child one day a week and was paid \$25 a day. She also took résumés to prospective employers in May and June. She was looking for full or part-time work, anything she could get. Her pregnancy was evident in May and June and she assumes that was why she wasn't called by any of these employers.

[103] Ms. de Lisser did not provide any pay stubs regarding her work after she left Traveland. Her calculations show income from the used book company on her T-4 slip. She was paid cash for the babysitting. She didn't keep a list of where she looked for jobs.

[104] Ms. de Lisser said she did not receive Employment Insurance or maternity leave benefits after her layoff. She didn't apply because she was short of hours and would not qualify. Her husband did not take parental leave because they couldn't afford for him to be off work.

[105] In cross-examination, Ms. de Lisser was asked how she was going to work the hours of the receptionist job when she couldn't work those hours before. Ms. de Lisser said she could work the hours because her husband would be home at night.

[106] Ms. Ouimet testified that when she heard about the receptionist job, she didn't tell anyone at Traveland that she thought Ms. de Lisser could do the job. When asked why not, she said she was surprised there was an ad when she was told there was nothing available and that no one had mentioned it to her.

[107] Ms. Favre said that Traveland often hired a receptionist for the spring and summer months, because the sales department is busy and open to 8:00 p.m. and is open Saturdays and Sundays. Later hours commenced around the end of March or the beginning of April each year.

[108] Ms. Favre was responsible for hiring the receptionist. Ms. Favre was asked why she didn't tell Ms. de Lisser about the position and she said it was because she didn't think it would work for Ms. de Lisser who worked four hours a day in the morning and the receptionist position was in the evening (3:00 p.m. to 8:00 p.m.) and on weekends. However, she did agree that she could have asked her. Ms. Favre also never discussed the possibility of Ms. de Lisser being the receptionist with Ms. Drake or Mr. Howes.

[109] Ms. Favre was asked if there were any other seasonal employees hired in June, July or August during the busy season. She said there may have been work in the rental division, because Traveland has a rental fleet and needs people through the summer. Usually in June, it starts to be very busy. And, in the sales department, business picks up in early April.

IV ANALYSIS AND DECISION

[110] The relevant portion of s. 13 of the *Code* provides:

- (1) A person must not
 - (a) refuse to employ or refuse to continue to employ a person, or
 - (b) discriminate against a person regarding employment or any term or condition of employmentbecause of the ... sex ... of that person ...

[111] Discrimination on the basis of sex includes discrimination on the basis of pregnancy: *Brooks v. Canada Safeway Ltd.*, [1989], 1 S.C.R. 1219 (S.C.C.). The onus is on Ms. de Lisser to establish a *prima facie* case of discrimination. To do this, she must establish:

- She was pregnant;
- She was treated adversely in regard to her employment; and
- It is reasonable to infer from the evidence that her pregnancy was a factor in the adverse treatment. Her pregnancy need not be the sole factor in the adverse treatment.

[112] If Ms. de Lisser establishes a *prima facie* case of discrimination, then the burden shifts to the respondents to prove that their conduct was justified, that is, it was based on a *bona fide* occupational requirement (“BFOR”), including that they reasonably accommodated Ms. de Lisser to the point of undue hardship.

[113] In this case, there is no dispute that Ms. de Lisser was pregnant.

[114] There is also no dispute that Ms. de Lisser experienced three adverse effects in her employment. First, she lost her part-time job. Second, she was not given the maternity leave replacement job. Third, she was not informed of, or considered for, the receptionist position or other positions that may have come up, for example, in the rental division.

[115] I am satisfied that Ms. de Lisser’s pregnancy was a factor only with regard to the warranty clerk position. Ms. Drake was very clear that Ms. de Lisser was no longer considered for the position because she would not be available for entire period of her sister’s maternity leave. The reason Ms. de Lisser would not be available is that she would be on maternity leave herself, starting sometime in August 2006.

[116] However, I am not persuaded that Ms. de Lisser’s pregnancy was a factor in her losing her part-time job. I accept Mr. Habart’s and Ms. Drake’s evidence that Ms. de Lisser

was hired for certain tasks, for example, to fill in until the new service writer was hired and trained and to enter the new warranty manuals for Ms. Drake. I conclude that, had she not been promised the warranty clerk position, Ms. de Lisser would have been laid off, due to a shortage of work.

[117] In regard to the summer receptionist job, the fact that Ms. de Lisser was not considered for that job when she was pregnant is concerning. The respondents reached conclusions about her suitability for the position without speaking to her. However, although this may have been arbitrary and unfair, there is insufficient evidence to persuade me that Ms. de Lisser was not considered for this position because of her pregnancy.

[118] Ms. de Lisser has therefore established a *prima facie* case of discrimination with respect to the warranty clerk position. Therefore, I will consider whether the respondents have established a justification for their conduct. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“*Meiorin*”), the Supreme Court of Canada outlined a three-stage analysis for determining whether a standard of performance is a *bona fide* occupational requirement. The respondent must prove that:

1. the standard was adopted for a purpose or goal that is rationally connected to the function being performed;
2. the standard was adopted in good faith, in the belief that it is necessary to the fulfilment of the purpose or goal; and
3. the standard was reasonably necessary to accomplish its purpose or goals, in the sense that a respondent could not accommodate a complainant, and others adversely affected by the standard, without incurring undue hardship.

[119] The respondents’ standard with respect to the warranty clerk position, I believe, is that a maternity leave replacement be available to work for the entire period of Ms. Ouimet’s maternity leave. I am satisfied that the respondents have met the first two parts of the *Meiorin* test, that is, the standard was adopted for a purpose or goal rationally connected to the function being performed. From the standpoint of efficiency and hence profitability, the standard is rational and it is in the best interests of the business for there to be only one maternity leave replacement. The training time may well have been significant. Also, I am satisfied that the standard was adopted in good faith, in the belief that it was necessary to the fulfilment of the purpose or goal.

[120] The more difficult question is the third part of the test. Was the standard necessary, that is, was it impossible to keep Ms. de Lisser in the warranty clerk position until she went on maternity leave without incurring undue hardship?

[121] It is helpful to refer to the analysis by the Tribunal in *Mazuelos v. Clark*, 2000 BCHRT 1, where the respondent had hired the complainant as a live-in nanny. At the start of her employment, the employer learned that the nanny was pregnant. The respondent was concerned about how the complainant was going to handle the physical demands of the job and testified that the complainant had no real answer. The respondent said she wanted to discuss the matter with her husband before making a final decision. The respondent then decided that she would not continue with the employment of the complainant, and informed her of that the next day. Counsel for Ms. Mazuelos described this as a “knee jerk reaction” and the Tribunal agreed.

[122] In *Mazuelos*, the Tribunal recognized that what constitutes undue hardship can be different for various kinds of employers. In that case the Tribunal took into account the nature of the work: “a single individual, herself an employee, who employs a single individual to care for her children” (para. 41), a live-in arrangement, and the nature of the work necessitating a relationship with a high degree of trust.

[123] However, even with this limited flexibility the Tribunal recognized the necessity of making inquiries:

In sum, I accept that the standard of being physically and emotionally fit to care for two active young boys was an appropriate one in general. However, Ms. Clark made no serious effort to objectively establish that Ms. Mazuelos could not meet the standard, once her pregnancy and related circumstances were disclosed. Instead, Ms. Clark decided to terminate the employment based on her own assumptions about Ms. Mazuelos’ condition and circumstances. On the basis of a single conversation, she decided that Ms. Mazuelos’ emotional crisis would not resolve quickly and would distract her from her work, and that her nausea was so severe and uncontrollable that she could not handle the transportation routines and ensure the children’s well-being. The Respondent has not satisfied the third element of the test in *Meiorin*. Accordingly, I find that the complaint is justified. (para. 49)

[124] There are similarities in this case to *Mazuelos*, the most striking being Ms. Drake’s decision that Ms. de Lisser could not take over the warranty clerk job, it appears, without first consulting Traveland’s management or seriously considering whether it was still possible for Ms. de Lisser to take over the warranty clerk position. The third part of the

Meiorin test requires an employer to do more than have a ‘knee jerk’ reaction to the impact of an employee’s pregnancy on the company’s plans. In addition, the test is not inconvenience, it is undue hardship.

[125] As well, Traveland should not have jumped to conclusions about Ms. de Lisser’s flexibility regarding hours of work or her babysitting arrangements. As part of considering whether it would have been undue hardship to allow Ms. de Lisser to take over the warranty clerk job, she should have been asked if she was still interested in the warranty clerk position, in light of her pregnancy. Although some of the respondents alluded to difficulties with Ms. de Lisser’s babysitting arrangements, they provided scant evidence regarding these supposed difficulties. (A note of caution: ‘before the fact’ concerns about childcare arrangements, or absenteeism because of childcare concerns might also be considered discrimination based on family status: *Campbell v. Fereidown Shahrestani*, 2001 BCHRT 36. However, given that discrimination in regard to family status was not raised in this complaint, I have not addressed this issue here.)

[126] In addition, Traveland complained that it would only have Ms. de Lisser until sometime in August and then would have to find someone else as warranty clerk until Ms. Ouimet returned the following April (assuming a one-year maternity leave). However, they were able to hire a good, experienced replacement in April 2006. They provided no evidence that they could not have found a similarly qualified person in August of that year.

[127] In regard to the respondents’ submissions about the increased cost to it from having to train Ms. de Lisser and then find and train someone else in the busy summer season, it is important to note the Supreme Court of Canada’s comments in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (“*Grismer*”):

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. ... 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... (at para. 41)

[128] Although the *Grismer* decision was in the context of a government service provider’s duties to accommodating persons with disabilities, the Court’s comments with respect to

costs and the evidence necessary to establish undue hardship are equally applicable in this case.

[129] Some of the respondents' arguments have an 'after the fact' flavour to them. By all accounts Ms. de Lisser was a valuable employee. Much was made of Ms. de Lisser's failure to work Saturdays, but there is no evidence that she was clearly told she was required to do so and Mr. Habart admitted that she could do the required work on Mondays. As well, Mr. Habart's efforts to find Ms. de Lisser extra work with Ms. Drake belied a serious concern about her attendance. I also note that Mr. Howes was complimentary of Ms. de Lisser and that Ms. Drake had no complaints about her performance.

[130] As well, much was made of the fact that Ms. de Lisser was not qualified to do the warranty clerk job. This evidence is hard to accept, given that prior to knowing about her pregnancy, Ms. Drake, Ms. Favre, and Mr. Howes all agreed that Ms. de Lisser would be her sister's maternity leave replacement. At that time, Ms. Drake's only concern was that she wanted to be certain that Ms. de Lisser had satisfactory day care arrangements such that she could work full-time. She also testified that she required written confirmation of this from Ms. de Lisser. I accept that this requirement was made before Ms. de Lisser's pregnancy was known, so it could not have been part of the discrimination alleged regarding sex (pregnancy).

[131] In all of the circumstances, I have concluded that Traveland has not shown it would have been undue hardship to allow Ms. de Lisser to take over the warranty clerk position until she went on maternity leave.

[132] As the respondents have not satisfied the third part of the test in *Meiorin*, I conclude that the complaint is justified.

[133] As far as Traveland is concerned, it is liable for the actions of its employees pursuant to s. 44(2) of the *Code*, which provides:

- (2) An act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person.

[134] I am satisfied that the complaint against Ms. Drake is justified. She made the decision to terminate Ms. de Lisser because she was pregnant without considering whether it

was possible for Ms. de Lisser to take over the warranty clerk position without Traveland incurring undue hardship.

[135] In regard to Ms. Favre, she was not responsible for Ms. Drake's decision not to place Ms. de Lisser for the warranty clerk position. I am also not satisfied, on the whole of the evidence, that Ms. Favre's failure to consider Ms. de Lisser for the receptionist/greeter position was related to Ms. de Lisser's pregnancy. Therefore, I conclude that the complaint against Ms. Favre is not justified.

[136] Mr. Howes, as president of the company, was consulted about the decisions made about Ms. de Lisser. For example, he testified that he knew in March that she was pregnant and that he knew in March that she would be laid off. It doesn't appear that he questioned Ms. Drake about Traveland's duty to place Ms. de Lisser in the warranty clerk position, unless it would cause them undue hardship. After reviewing all of the evidence, I conclude that the complaint against Mr. Howes is justified.

[137] Therefore, I conclude that the complaints against Traveland, Ms. Drake, and Mr. Howes are justified and the complaint against Ms. Favre is not justified. Traveland, Ms. Drake, and Mr. Howes will be jointly and severally liable for any remedies ordered in this decision.

V REMEDY

[138] Having found the complaint to be justified, I turn to the remedies provided under s. 37(2) of the *Code*:

- (2) If the member or panel determines that the complaint is justified, the member or panel
 - (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
 - (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,
 - (c) may order the person that contravened this Code to do one or both of the following:
 - (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
 - (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged

individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and

- (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
 - (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;
 - (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
 - (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

1. Remedy Sought

[139] Ms. de Lisser is seeking wage loss based on the assumption that she would have worked until August 20, 2006. In regard to the warranty clerk position, she would have worked 40 hours a week at \$14 an hour. She agrees that it is appropriate to deduct certain amounts from her wage loss. First, she earned \$975.16 in her relief position at the used book business. Since this income was not limited to the time period before her leave Ms. de Lisser submits that half this amount should be deducted from her wage loss award. Second, Ms. de Lisser earned money from babysitting one day a week for \$25 dollars a day. It was not clear from the evidence when Ms. de Lisser started doing this babysitting, and she submitted that a deduction based on \$25 a week for approximately 10 weeks (\$250) would be appropriate. Third, Ms. de Lisser received severance pay of \$392 (28 hours at \$14.00/hour) and this can be deducted from her wage loss.

[140] In regard to her maternity and parental leave benefits, Ms. de Lisser testified that, but for her termination, she intended to work until August 20. Her maternity benefits would have been 50 paid weeks from August 20, 2006 and would have been 55% of her average weekly income based on her last 26 weeks of employment.

[141] Ms. de Lisser also submitted that there should be no deduction for her failure to apply to EI for maternity benefits. Her evidence was that she did not have enough hours. Her counsel says that when one consults the information provided by the Canada Service

Centre Website, it says 600 hours are required. At the time, she did not have these hours and therefore should not have been required to have applied in order to claim compensation for lost maternity benefits.

[142] I have reviewed Ms. de Lisser's time sheets and, including statutory holiday pay and severance, she worked approximately 397 hours during her employment with Traveland. Even assuming 85 hours in the used book business and 80 hours babysitting (10 days at 8 hours), she would not have reached the required 600 hours. See Table 2 attached to this decision.

[143] Ms. de Lisser also seeks \$5,500 as an award for compensation for injury to her dignity, feelings and self-respect. Ms. de Lisser submitted that the effects of the discrimination on her were particularly severe, in that she lost a full-time job opportunity that had been promised, and also her part-time job. She already had a young child at home and with another on the way, her wages were important to her family and she no longer qualified for maternity benefits at all. As well, it was particularly insulting to Ms. de Lisser to be terminated from her part-time job due to a shortage of work at a time that Traveland was advertising for a part-time receptionist because their busy season was about to begin.

[144] Ms. de Lisser also requested a tax gross-up, seeking an amount sufficient to cover the extra taxes she will have to pay as a result of receiving her wages in a lump-sum payment. Finally, Ms. de Lisser requests pre-judgment and post-judgment interest on compensation for wage loss and maternity leave benefits.

2. Section 37(2)(a) Cease the Contravention

[145] I order the respondents to cease their contravention of the *Code* and to refrain from committing the same or a similar contravention.

3. Section 37(2)(d)(ii) Compensation

[146] The intent of this section is to place Ms. de Lisser, in regard to her finances, in the same position as if the contravention had not occurred. Because the respondents did not sufficiently explore ways in which they could accommodate Ms. de Lisser, determining the wages and parental leave benefits lost to her is difficult and requires making some assumptions. After reviewing all of the circumstances in this case, I find that Ms. de Lisser

would have started the warranty clerk position on April 17, 2006 and she would have worked in this position until August 20, 2006.

[147] I have done a calculation of lost wages based on a number of assumptions: See Table 3 attached to this decision. I have assumed a \$14 an hour wage rate throughout and a 40-hour work week. I find that Ms. de Lisser was owed \$10,483.20 in lost wages, including 4% vacation pay, which she would have been entitled to under the *Employment Standards Act*, if she had continued to work until August 20, 2006.

[148] In regard to mitigation, I find that Ms. de Lisser, given her circumstances, made appropriate efforts to find alternate employment, but I find that all of her earnings from this time period should be deducted from her lost wages. Therefore, in addition to severance pay, I have deducted her earnings from the used book business and babysitting. The total amount owing to Ms. de Lisser for lost wages is therefore \$8,865.04.

[149] I have also found that Ms. de Lisser is entitled to the parental leave benefits she lost due to the discrimination. I accept Ms. de Lisser's evidence that she had not achieved the requisite hours to entitle her to maternity leave and parental leave benefits and that, but for the respondents' discriminatory conduct, she would have been entitled to them. This loss is therefore directly related to the discrimination and flows from it. It is necessary to order it paid by the respondents to make Ms. de Lisser whole. In particular, I accept the evidence that, if Ms. de Lisser had accumulated over 600 hours of work within a one year period, she would receive 55% of her wages, based on an average of earnings in her last 26 weeks of employment before going on leave. I find that Ms. de Lisser is entitled to \$12,142.31 in lost parental leave benefits: see Table 3 for calculations.

[150] Based on the set of assumptions explained above, and after deducting her severance pay and earnings, I find that Ms. de Lisser is entitled, in total, to \$21,007.35 in lost wages and maternity and parental leave benefits.

[151] Ms. de Lisser has requested that the respondents be required to pay an amount to compensate her for any additional income tax liability she incurs as a result of receiving a lump sum payment for loss of income. In all of the circumstances, I am of the view that a tax gross-up is appropriate in order to ensure that the *Code's* remedial purposes are satisfied, and accordingly order the respondents to pay Ms. de Lisser an amount sufficient to offset

any additional income tax liability she may incur as a result of receiving compensation for her lost salary and maternity and parental leave benefits in a lump sum.

4. Section 37(2)(d)(iii) Injury to Dignity, Feelings and Self-Respect

[152] Ms. de Lisser did not lead any evidence showing that she required medical treatment for any physical or mental difficulties caused by the discrimination. However, I refer to what was said in the Tribunal in *Stackhouse v. Stack Trucking and Craft (No. 2)*, 2007 BCHRT 161:

Ms. Stackhouse did not provide any medical evidence as to her state of mind after her dismissal. However, I am satisfied from her evidence, and that of her husband, that she was deeply distressed as a result of her termination.

In *Parry v. Vanwest College*, 2005 BCHRT 31, which was also a case of discrimination in employment on the basis of sex (pregnancy) the Tribunal awarded the complainant \$5,000 as compensation for injury to her dignity, feelings and self-respect. In *Young v. 633785 B.C. Ltd. dba Clean House and Matthews*, 2004 BCHRT 135, and *Descoteau v. Pare and Wakeside Restaurant*, 2005 BCHRT 19, the Tribunal awarded the complainant \$4,000 in this regard.

In the latter two cases, the Tribunal noted that the impact of being dismissed while one is pregnant (and, at least in part, because one is pregnant) is magnified because it comes at a particularly vulnerable time in a woman's life. I agree with this finding, and in my view it is an appropriate factor to take into account in determining an appropriate award for injury to dignity, feelings and self-respect.

On all of the circumstances of this case, I find that it is appropriate to award Ms. Stackhouse \$5,000 for injury to her dignity, feelings and self-respect.

[153] Ms. de Lisser was in a very vulnerable position. It proved to be very hard for her to find new employment when she was pregnant. Her income was important to her family and she had expected that her income would increase because she would be working full-time hours until she went on maternity and parental leave. As well, I find her family relied on her being able to receive EI maternity and parental leave benefits. I accept that this caused Ms. de Lisser a great deal of worry. Although I did not find Ms. Favre's failure to consider Ms. de Lisser for the receptionist/greeter due to her pregnancy, I accept that it was humiliating for her to then see an advertisement in the paper for the receptionist position. After

considering all of these circumstances, I find that an appropriate award for injury to dignity, feelings and self-respect is \$5,000.

5. Interest

[154] Ms. de Lisser sought both pre-judgment and post-judgment interest on her unpaid wages and maternity leave benefits. Prejudgment interest will be payable on these amounts. Post-judgment interest will be payable on all compensation ordered. Interest is to be calculated at the bankers' prime rate published by the British Columbia Supreme Court Registry, in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, calculated at six month intervals. Interest on the lost wages portion of the award is payable from August 20, 2006. Interest on the first six months of Ms. de Lisser's EI maternity/parental leave benefits is payable from February 20, 2007 and interest on the last six months of these benefits is payable from August 20, 2007.

VI CONCLUSION

[155] In conclusion, I make the following orders:

- (a) Pursuant to s. 37(1)(a) of the *Code*, Traveland, Ms. Drake and Mr. Howes are to cease and desist the contravention of s. 13 of the *Code*;
- (b) Pursuant to s. 37(2)(d)(ii), Traveland, Ms. Drake and Mr. Howes are to:
 - (i) pay Ms. de Lisser \$10,483.20 for lost wages, less mitigation deductions of \$976.16 for her wages from the used book company, \$250 for her babysitting income, and \$393 for severance pay, for net lost wages of \$8,865.04;
 - (ii) pay Ms. de Lisser \$12,142.31 in respect of lost EI maternity and parental leave benefits; and
 - (iii) pay an amount sufficient to offset any additional income tax liability Ms. de Lisser may incur as a result of receiving compensation for lost salary in a lump sum;

- (c) Pursuant to s. 37(2)(d)(iii), Traveland, Ms. Drake and Mr. Howes are to pay Ms. de Lisser \$5,000 in respect of injury to her dignity, feelings and self respect;
- (d) Pursuant to the *Court Order Interest Act*, pay Ms. de Lisser pre-judgment and post-judgement interest in the amounts outlined in (b)(i) and (b)(iii), as described in paragraph 160 above, and post-judgement interest on the amount outlined in (c) above.

Diane H. MacLean, Tribunal Member

Table 1: Ms. de Lisser's Hours of Work

* includes statutory holiday pay

Pay Period Ending	Hours Worked*	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.
31-Aug	12.0			1	1		1
15-Sep	24.8	2		1	3		1
30-Sep	19.5		2	1	1		1
15-Oct	20.7	1	2	2			
31-Oct	38.5	2		2		2	2
15-Nov	13.0	1		1		2	
30-Nov	32.7	2		2	1	1	1
15-Dec	33.2		2	1	1	2	1
31-Dec	25.9	1		1		1	1
15-Jan	20.3	1		2		1	1
31-Jan	31.8	3		2		2	1
15-Feb	8.0	1		1			
28-Feb	16.0	2		1		1	
05-Mar	28.2	2		3		2	
31-Mar	28.5	2		2		3	
15-Apr	15.7	2		2			
Severance	28.0						
Total Hours:	396.81	22	6	25	7	17	10
Average Hrs/ Week	12						

Table 2: Ms. de Lisser's EI Eligibility

Assumptions:

Worked until August 20

Statutory holiday pay and severance are part of insurable hours

	Current Total	Aug. 20	Total Hours
At part-time job:	392.83	225	617.83
As a warranty clerk:	392.83	665	1057.8

**Table 3: Calculation of Average Wage Loss and EI Maternity Leave Benefits
Wage Loss**

Week Beginning	Hours	Weekly Wage
17-Apr	40	\$560.00
24-Apr	40	\$560.00
01-May	40	\$560.00
08-May	40	\$560.00
15-May	40	\$560.00
22-May	40	\$560.00
29-May	40	\$560.00
05-Jun	40	\$560.00
12-Jun	40	\$560.00
19-Jun	40	\$560.00
26-Jun	40	\$560.00
03-Jul	40	\$560.00
10-Jul	40	\$560.00
17-Jul	40	\$560.00
24-Jul	40	\$560.00
31-Jul	40	\$560.00
07-Aug	40	\$560.00
14-Aug	40	\$560.00
4% vacation pay		\$10,080.00
		\$ 403.20
Wage loss		\$10,483.20
EI Benefits		
Average weekly wage:		\$ 441.54
55% of weekly wage:		\$ 242.85
50 weeks		\$12,142.31
Total Compensation:		\$22,625.51
Less: mitigation		
Used book position:		\$ 976.16
Babysitting:		\$ 250.00
Severance pay:		\$ 392.00
Net compensation owing:		\$21,007.35