

**Canadian Human  
Rights Tribunal**



**Tribunal canadien des  
droits de la personne**

**BETWEEN:**

**FRANCINE DESORMEAUX**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**OTTAWA-CARLETON REGIONAL TRANSIT COMMISSION**

**Respondent**

**REASONS FOR DECISION**

**MEMBER:** Anne L. Mactavish

2003 CHRT 2  
2003/01/14

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[1] During her nearly nine years of employment as a bus operator with the Ottawa-Carleton Regional Transit Commission (OC Transpo), Francine Desormeaux was frequently absent from work. Her absences were caused by a variety of health problems including migraine headaches, kidney stones, gall bladder problems, ovarian cysts, viruses, a broken ankle, a back injury, bronchitis and stress. After numerous warnings from her employer, Ms. Desormeaux's employment with OC Transpo was terminated because of her chronic innocent absenteeism. Ms. Desormeaux alleges that this constitutes discrimination on the basis of disability, contrary to the provisions of section 7 of the *Canadian Human Rights Act*.

## **I. MS. DESORMEAUX'S EMPLOYMENT WITH OC TRANSPPO**

[2] After working for a number of years as a supervisor in a child care facility, Francine Desormeaux began work as a bus operator at OC Transpo in March of 1989. OC Transpo provides public transit in the National Capital Region.

[3] Ms. Desormeaux says that she went through a period of adjustment, as she became used to driving a bus for her employer. Working in public transit presents a number of challenges for new employees, as they become used to dealing with the public, navigating the city and operating large vehicles. As junior employees, new drivers also get the least attractive shifts, including split shifts, as well as night and weekend work.

[4] Despite these challenges, Ms. Desormeaux successfully completed an initial probationary period, and drove for OC Transpo for a number of years without any major incidents. It appears that apart from the issue of the frequency of her absences from work, Ms. Desormeaux was a good bus driver. She clearly enjoyed working with the public, and was generally a competent and reliable employee. Ms. Desormeaux's level of attendance was, however, a matter of concern to her employer, virtually from the day that she started working for OC Transpo.

### A. Ms. Desormeaux's Attendance History

[5] Ms. Desormeaux reviewed OC Transpo's records of her attendance, in conjunction with the diaries that she kept throughout the period of her employment. In so doing, she was able to identify the reasons for most of her absences from work. Her testimony in this regard is summarized in the following table:

	<b>Total Days Absent from Work</b>	<b>Migraine-related Absences</b>	<b>Significant Periods of Absence for Other Medical Reasons</b>
1989 (from March 28)	21 full days 2 part days	9 full days 2 part days	6 full days - bronchitis 6 full days - minor gynaecological surgery
1990	16 full days 4 part days	8 full days 1 part day	6 full days, 2 part days - bronchitis 2 full days - gall bladder
1991	34 full days 2 part days	2 full days	3 full days - bronchitis 16 full days - gall bladder 10 full days, 1 part day - surgery - wisdom teeth 3 full days, 1 part day - sprained ankle
1992	52 full days 1 part day	3 full days	41 full days - gall bladder 5 full days - stomach flu
1993	96 full days 1 part day	2 full days 1 part day	8 full days - bronchitis/flu 79 full days - back injury
1994	26 full days 1 part day	7 full days 1 part day <sup>1</sup>	12 full days - back injury
1995	52 full days 5 part days	3 full days 2 part days	12 full days, 1 part day - ovarian cyst 32 full days - broken ankle (injury on duty)
1996	24 full days 7 part days	6 full days 3 part days	15 full days - 1 part day - ovarian cyst
1997	41 full days 1 part days	14 full days 1 part day	21 full days - kidney stones
1998 (to Jan.30)	3 full days	3 full days	
<b>Total</b>	<b>365 full days 24 part days</b>	<b>57 full days 11 part days</b>	

<sup>1</sup> OC Transpo's records do not record Ms. Desormeaux being absent for part of October 29, 1994, whereas her diary entry for that day indicates that she was off of work in the afternoon because of a migraine headache. The October 29 absence has not been included here, as it would not have been considered by OC Transpo in its decision to terminate Ms. Desormeaux's employment.

[6] It is evident from Ms. Desormeaux's testimony that the above table does not reflect the full extent of her absenteeism. There were several occasions when Ms. Desormeaux was ill, and unable to work, where she entered into an informal arrangement with a co-worker to cover for her. Under this arrangement, the co-worker would report to work in Ms. Desormeaux's stead. Ms. Desormeaux then paid her co-worker directly for the day worked. Ms. Desormeaux estimates that this occurred on three or four occasions. It is common ground that this practice was contrary to the policies of OC Transpo.

#### **B. How Did OC Transpo Deal With Ms. Desormeaux's Absenteeism?**

[7] Having its employees attend work on a regular and reliable basis is clearly important to OC Transpo, which delivers time-sensitive public transport. In an effort to manage employee absenteeism, OC Transpo has had a number of attendance management policies over time.

[8] Ron Marcotte was Ms. Desormeaux's supervisor at the time that her employment with OC Transpo was terminated. He explained that during the early years of Ms. Desormeaux's employment with OC Transpo, excessive absenteeism was treated in the same way that other performance problems were dealt with: that is, as a disciplinary matter. Employees who were chronically absent from work were subject to progressive discipline, with sanctions ranging from reprimands up to and including dismissal. This view of chronic innocent absenteeism as a disciplinary matter is evident in the way in which Ms. Desormeaux's absenteeism was managed in the early stages of her career.

[9] As previously noted, Ms. Desormeaux's absenteeism was a matter of concern to OC Transpo from the time that she started working for the organization. Ms. Desormeaux met with Chris Walton, who was the Operations Relations Officer and Ms. Desormeaux's supervisor, for a probationary evaluation on October 27, 1989. The appraisal document indicates that there were no concerns with respect to Ms. Desormeaux's performance, apart from her absenteeism. As of October, 1989, Ms. Desormeaux had missed 20 full or part days of work. According to the document, Mr. Walton spoke to Ms. Desormeaux about her attendance during the course of her evaluation meeting.

[10] It appears from the documentation that Mr. Walton told Ms. Desormeaux on February 23, 1990 that serious consideration was being given to terminating her employment. In this and subsequent meetings, Ms. Desormeaux assured Mr. Walton that her attendance would improve.

[11] By April of 1990, Ms. Desormeaux had been absent from work on 13 occasions, for a total of 37 full and part days. Mr. Walton again met with Ms. Desormeaux to discuss her unsatisfactory level of attendance. At the time that Ms. Desormeaux was notified of the meeting, Mr. Walton advised her that “Due to the seriousness of this matter a decision on your future employment will be made.” Ms. Desormeaux testified that she discussed the difficulties that she was having in adjusting to working at OC Transpo. She also told Mr. Walton about her migraine headaches and other health problems. Despite OC Transpo’s concerns, Ms. Desormeaux successfully completed her probationary period, and was made a permanent employee. She was advised, however, that her attendance would be monitored on a regular basis.

[12] Three months later, Ms. Desormeaux was given a one day suspension because of her absenteeism, and because she was involved in a minor accident. This suspension was imposed after another meeting with Mr. Walton, in the course of which Ms. Desormeaux again referred to her migraines. Ms. Desormeaux also advised Mr. Walton about problems that she was experiencing with her gall bladder, which would likely require surgery in the future. Ms. Desormeaux grieved this suspension, claiming that the majority of her absences were illness-related. In the course of the first level grievance hearing, Ms. Desormeaux’s union argued that Ms. Desormeaux was experiencing severe migraine headaches, that she was receiving medical attention for the problem, and that she had scheduled all of her medical appointments outside of her working hours. An OC Transpo representative explained that Ms. Desormeaux’s frequent absences created difficulties, as there were not always enough staff available to replace her. Ron Marcotte, who was then the Assistant Superintendent of Operating Personnel, was also in attendance at the grievance meeting. His notes indicate that:

Ms. Desormeaux was advised that the situation was of her own doing. It was also noted that there were various options open to her at OC Transpo should she want to seek assistance. It was stressed that the Commission was not trying to terminate her but are trying to put her career on the right path.

It appears that the only option identified to Ms. Desormeaux with respect to the assistance available to her at OC Transpo was the Employee Assistance Program (EAP).

[13] This grievance was resolved on the basis that if Ms. Desormeaux was not absent from work on more than five occasions, or for more than 12 days over the next 12 months, and did not have another accident for which she was at fault, consideration would be given to reducing the suspension. Ms. Desormeaux testified that Mr. Walton told her that she would have to do whatever it took to get herself to work. It was recognized that Ms. Desormeaux might require surgery for her gallstones, and she was instructed to contact Mr. Walton in order to make arrangements for this absence.

[14] It should be noted that this was the only occasion during Ms. Desormeaux's employment with OC Transpo when she was given a specific attendance target. Ms. Desormeaux met this target, although she says that to do so, she reported to work on occasion while taking Tylenol 3. Tylenol 3 contains codeine, and driving while taking it is contraindicated.

[15] Ms. Desormeaux was interviewed regarding her attendance on December 9, 1992 and again on July 20, 1993. There is little information as to what was discussed in the course of these meetings.

[16] On June 19, 1994, OC Transpo's policy regarding the "Employment of Disabled Employees" came into effect. This policy, which reflects a shift away from the disciplinary treatment of health-related absences, established a protocol for the consideration of requests for accommodation. It is common ground that although this policy remained in effect for a couple of years, Ms. Desormeaux's situation was never addressed in accordance with the policy, as no one, including Ms. Desormeaux herself, considered her to be disabled.

[17] On July 11, 1994, Ms. Desormeaux met with Ron Marcotte, who had by this point replaced Mr. Walton as Ms. Desormeaux's supervisor. The purpose of this meeting was to discuss Ms. Desormeaux's "unacceptable level of attendance". The contemporaneous documentation indicates that Ms. Desormeaux advised Mr. Marcotte that her absences were primarily due to her migraine headaches and the personal problems that she was experiencing at the time. Ms. Desormeaux was again warned that more serious discipline could be imposed if her level of attendance did not improve, and was once again referred to the EAP for assistance.

[18] Mr. Marcotte met with Ms. Desormeaux again on December 6, 1995, to discuss her attendance. Rob Vye, Ms. Desormeaux's union representative, was also present at this meeting. Mr. Marcotte noted that if Ms. Desormeaux's absences for compensable injuries were excluded, her level of attendance had improved somewhat. Nevertheless, he advised Ms. Desormeaux that her attendance was still unacceptable, and cautioned her that if her level of attendance did not improve, the issue of her medical fitness to continue working would have to be addressed. A similar discussion took place between Ms. Desormeaux and Mr. Marcotte on August 29, 1996.

[19] In November of 1996, OC Transpo introduced a new attendance management policy. Amongst other things, the purpose of this policy was to reduce absenteeism, while "making every reasonable effort to provide assistance, accommodation, and rehabilitation" to employees, and to provide employees with "clear and fair communication of the employer's attendance expectations". In cases of illness or injury, the program required supervisors to ascertain from an independent medical consultant whether the employee in question suffered from a 'disability', within the meaning of the *Canadian Human Rights Act*, which required accommodation. The policy also advised supervisors to try to get employees to agree to a "defined reasonable level of attendance" for the future, suggesting that the plant average for absenteeism is a reasonable standard. Article 8 of the policy provides that, before terminating the employment of an individual for chronic innocent absenteeism, OC Transpo must be satisfied that, amongst other things, "... an honest effort has been made to accommodate the involved employee."

[20] This attendance management program contemplated a more pro-active approach to managing employee absenteeism than did its predecessor. In accordance with this approach, employees whose absenteeism rate put them in the top 25 percent of the OC Transpo workforce were contacted with respect to their absenteeism, and many were interviewed regarding the situation. In this context, in March of 1997, OC Transpo bus operators, including Ms. Desormeaux, were notified that the absenteeism rate for the first months of 1997 was up 30% over the same period in 1996. Drivers who had been absent in the first three months of 1997 were advised that excessive absenteeism was threatening to compromise OC Transpo's ability to meet its service requirements, and were reminded of the necessity of regular attendance.

[21] On September 29, 1997, Ms. Desormeaux and Mr. Vye met again with Mr. Marcotte. Although Mr. Marcotte did not question the legitimacy of Ms. Desormeaux's absences, he was concerned as to her medical fitness to work on a regular and reliable basis. Ms. Desormeaux testified that she asked Mr. Marcotte to tell her precisely how many days a year that she would be allowed to miss. It is common ground that Mr. Marcotte refused to do so, telling Ms. Desormeaux that her rate of attendance would simply have to improve.

[22] Because of his concerns with respect to Ms. Desormeaux's fitness for work, Mr. Marcotte invoked Article 15.3 of the collective agreement in force between OC Transpo and the Amalgamated Transit Union, of which Ms. Desormeaux was a member. This Article allows OC Transpo to request that an employee provide a certificate from her doctor attesting to her fitness for work, where the employer has reasonable grounds for believing that the employee may be medically unfit to work on a regular basis. The collective agreement further contemplates that the employer may not be satisfied with the medical certificate provided by an employee. In such circumstances, the employee can be asked to provide a further certificate from a physician selected by OC Transpo. Mr. Marcotte explained that he was not seeking information about Ms. Desormeaux's diagnosis, but rather about the prognosis for attendance at work in the future.

[23] In order to safeguard the confidentiality of employee medical information, requests of this nature are routed through OC Transpo's Occupational Health unit. On September 30, 1997, Louise Culham, an Occupational Nurse, wrote Ms. Desormeaux, asking her to provide a letter from her physician, giving an opinion as to Ms. Desormeaux's ability to perform work on a regular basis. Ms. Culham asked Ms. Desormeaux to have her doctor consider the following questions:

- Do you have a medical condition that could cause your attendance to be in excess of reasonableness?
- Is your problem of a temporary or chronic nature?
- What is the prognosis that you can perform your duties on a regular full-time basis?

[24] Ms. Desormeaux's family doctor, Dr. Anne Meehan, responded to OC Transpo's request by letter dated October 16, 1997. Dr. Meehan's letter states:

... during the past year [Ms. Desormeaux] has had a few problems which have necessitated an absence from work. The first problem

related to migraine headaches. Over time we have resolved that these are related to mechanical neck dysfunction. As a result, she has begun a program of regular neck exercises, as well as physiotherapy, which have significantly reduced both the severity and frequency of her headaches.

The other problem which arose this past year was one of a renal calculi. The problem has resolved and is not likely to become an ongoing problem. Finally, Ms. Desormeaux is being investigated for a possible mass on her ovary. She is under the care of Dr. Treehuba for the investigation and potential treatment. This ovarian abnormality is not causing her any problem at the present.

Hence, in response to your specific questions, the only problem among the above list which is possibly of a longer-term nature is that of migraines. In view of the definite improvement Ms. Desormeaux has experienced through her own efforts, and through physiotherapy, I do not anticipate that they will significantly interfere with her ability to perform her duties on a regular full-time basis. Both the renal calculi and the ovarian problem are isolated events and unlikely to become chronic or to recur ...

Dr. Meehan was not specifically asked whether Ms. Desormeaux suffered from a disability, and consequently, her letter did not address this issue. There is no indication in Dr. Meehan's letter that Ms. Desormeaux required any form of accommodation in the workplace.

[25] Louise Culham subsequently advised Mr. Marcotte that:

[Ms. Desormeaux] does possibly have a problem which "is of a longer-term nature". However, "in view of the definite improvement Ms. Desormeaux has experienced through her own efforts", her physician did not feel that this should "significantly interfere with her ability to perform her duties on a regular full-time basis".

Although Dr. Meehan's stated that Ms. Desormeaux suffered from a condition that could have longer-term implications, no one from OC Transpo followed up with Dr. Meehan, nor was any attempt made to obtain an independent medical assessment of Ms. Desormeaux.

[26] The evidence suggests that OC Transpo would handle an employee in Ms. Desormeaux's situation quite differently today. Lois Emberg was OC Transpo's Employment Equity Co-Ordinator at the time, and had responsibility for human rights and employment equity. According to Ms. Emberg, if

a letter such as the one from Dr. Meehan was received from an employee's doctor now, OC Transpo's staff physician would likely follow up on Dr. Meehan's letter, and an effort would be made to determine whether the employee suffered from a disability. Consideration would also be given to whether the employee needed accommodation, and what could be done in this regard.

[27] Ms. Desormeaux, Mr. Vye and Mr. Marcotte met again on November 6, 1997<sup>2</sup>, in order to discuss the results of the medical inquiry and Ms. Desormeaux's prognosis for regular and reliable attendance at work. Ms. Desormeaux testified that she told Mr. Marcotte that she was doing everything that she possibly could to attend work regularly. She says that she again asked Mr. Marcotte to specify how many days' absence could be tolerated, and that he declined to do so, telling her only that he wanted to see a substantial improvement in her attendance.

[28] Ms. Desormeaux testified that in the course of this meeting, Mr. Vye told Mr. Marcotte that Ms. Desormeaux's migraines could constitute a disability, and suggested that they look at ways in which Ms. Desormeaux could be accommodated. Mr. Marcotte agrees that the question of whether Ms. Desormeaux was disabled was raised by Mr. Vye at some point, although he was uncertain if the issue was raised at this meeting. Mr. Vye did not testify. There is no mention of any such discussion in the documentation prepared by Mr. Marcotte with respect to this meeting.

[29] I accept Ms. Desormeaux's testimony in this regard, and find that on November 6, 1997, OC Transpo was made aware that Ms. Desormeaux potentially suffered from a disability. Mr. Marcotte testified that he had between 300 and 350 employees under his supervision in 1998, and that over the course of his career at OC Transpo, he conducted somewhere between 700 and 800 performance-related employee interviews. It is therefore not surprising that he was unable to recall when the issue first arose. Given that her employment was in issue, this meeting was obviously of greater importance to Ms. Desormeaux than it was to Mr. Marcotte, and her recollection as to the timing of Mr. Vye's comments is thus more likely to be reliable. Ms. Desormeaux says that Mr. Marcotte was 'not hearing' what Mr. Vye was saying, and thus it is not surprising that the discussion was not mentioned in the

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<sup>2</sup> From the contemporaneous documentation, it appears that this meeting may have originally been scheduled for October 30.

documentation relating to this meeting. From Ms. Desormeaux's testimony it does not appear that the issue of accommodation was explored in the course of this meeting.

[30] According to Ms. Desormeaux, Mr. Marcotte closed the meeting by saying "I don't want to have to call you back in here next September for another meeting." She understood from this that she had another year to try to improve her attendance.

[31] Mr. Marcotte's letter documenting this meeting refers to the assurances given by Ms. Desormeaux regarding the steps that she was taking to control her migraines, and states "Further, I am encouraged to hear that you realize that you can take actions on your own to assist in controlling your problems and that it is solely up to you."

[32] Although the disability issue was raised during the November 6 meeting, Mr. Marcotte did not follow the procedure set out in the Attendance Management Program. He did not send Ms. Desormeaux for an independent medical assessment in order to ascertain whether Ms. Desormeaux did indeed suffer from a 'disability' within the meaning of the *Canadian Human Rights Act*. Similarly, he did not ask that Dr. Meehan be consulted with respect to this question.

[33] Between November 6, 1997, and the termination of her employment on January 30, 1998, Ms. Desormeaux was absent from work on four separate occasions for a total of seven full days. Ms. Desormeaux says that all of these absences were attributable to migraine headaches. She explained that she was taking Norgesic Forte, a very powerful medication, for these headaches, and could not have safely driven a bus. Each of these absences was documented by an OC Transpo absence form, signed by Dr. Meehan, indicating the reason for the absence.

[34] Ms. Desormeaux was also late for work on two occasions in this period, as a result of having slept in.

### **C. The Termination of Ms. Desormeaux's Employment**

[35] On January 30, 1998, Ms. Desormeaux and Mr. Vye met with Mr. Marcotte and Mr. Walton, at which time Ms. Desormeaux was advised that her employment with OC Transpo was being terminated. Ms. Desormeaux stated that she was shocked, as she thought that she had another year to prove herself.

[36] Mr. Walton's contemporaneous notes of the meeting confirm that Ms. Desormeaux told Mr. Marcotte and Mr. Walton that all of her recent absences had been due to migraines. According to Ms. Desormeaux, Mr. Vye again suggested that her headaches constituted a disability and that OC Transpo should look at ways to accommodate her. Ms. Desormeaux says that Mr. Marcotte responded by saying that OC Transpo's decision would stand.

[37] Mr. Marcotte agrees that the issue of Ms. Desormeaux suffering from a disability that required accommodation was raised by Mr. Vye during this meeting. Mr. Walton's notes record Mr. Marcotte responding by stating that while some of Ms. Desormeaux's absences may have been due to migraines, she had also missed substantial periods of work for other reasons. Mr. Marcotte testified that he did not have any information from OC Transpo's health unit to indicate that there was a need to explore possible accommodative measures. Similarly, Mr. Marcotte says that he had no information suggesting that there was a need to obtain an independent medical assessment.

[38] Based upon the opinion provided by Dr. Meehan, Mr. Marcotte stated that in November of 1997, OC Transpo's expectation was that Ms. Desormeaux would be able to provide regular and reliable attendance in the future. According to Mr. Marcotte, Dr. Meehan's opinion indicated that there was no impediment to Ms. Desormeaux's attending work on a regular basis. In the weeks following the November 6 meeting, Ms. Desormeaux was absent from work on several occasions, totaling 7 full and 2 part days. This led the employer to conclude that the prognosis for reliable future attendance by Ms. Desormeaux was very poor. Thus the decision was made to terminate her employment for chronic innocent absenteeism.

## II. LEGAL FRAMEWORK

[39] Ms. Desormeaux's complaint is brought pursuant to section 7 of the *Canadian Human Rights Act*. Section 7 makes it a discriminatory practice to refuse to employ someone on a prohibited ground of discrimination. Section 3 of the *Act* designates disability as a prohibited ground of discrimination.

[40] Pursuant to section 15(1)(a) of the *Act*, it is not a discriminatory practice to treat an employee in a differential fashion, where the differential treatment is based upon a *bona fide* occupational requirement.

[41] Counsel for OC Transpo submits that the standard of proof in a human rights case is something higher than the ordinary civil standard of balance of probabilities, relying on the decision of the Alberta Court of Queen's Bench in *Berry v. Farm Meats Canada Ltd.*<sup>3</sup> as authority for this proposition. I disagree. At the federal level, the standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities.<sup>4</sup>

[42] OC Transpo further contends that arbitral jurisprudence affirms the right of an employer to receive its part of the employment bargain, that is, to have an employee provide work in exchange for compensation. While arbitrators do take human rights principles into consideration, counsel says, nevertheless, employment contracts may be frustrated through no fault of the individual employee.

[43] The interface between human rights and arbitral jurisprudence was discussed in the recent decision of this Tribunal in *Eyerley v. Seaspan International Ltd.*<sup>5</sup>, and I adopt the reasoning in that case. Labour relations concepts do not operate freely, but are constrained by human rights legislation.

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<sup>3</sup> [2000] A.J. No. 1179

<sup>4</sup> *Canada (Attorney General) v. Anvari*, [1993] F.C.J. No. 317 (F.C.A.)

<sup>5</sup> (2001), 42 C.H.R.R. D/342, at para 134. See also *Air B.C. and Canadian Airline Dispatchers Association*, (1995), 50 L.A.C. (4<sup>th</sup>) 93.

[44] The Supreme Court of Canada revisited the approach to be taken in human rights cases in its decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*<sup>6</sup> ('*Meiorin*') and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*<sup>7</sup> ('*Grismer*'). The historic distinction between direct and indirect discrimination has been replaced by a unified approach to the adjudication of human rights complaints. Under this approach, the initial onus is still on a complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.<sup>8</sup>

[45] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy is a *bona fide* occupational requirement. In order to establish this, the respondent must now prove that:

- i) it adopted the standard for a purpose that is rationally connected to the performance of the job;
- ii) it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of that legitimate work-related purpose; and
- iii) the standard is reasonably necessary 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 an individual employee sharing the characteristics of the claimant without imposing undue hardship on the employer.<sup>9</sup>

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<sup>6</sup> [1999] 3 S.C.R. 3

<sup>7</sup> [1999] 3 S.C.R. 868

<sup>8</sup> *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985], 2 S.C.R. 536 at 558.

<sup>9</sup> *Meiorin*, supra. at para. 54.

[46] The term 'undue hardship' is not defined in the *Act*, however, *Meiorin* and *Grismer* provide considerable guidance in determining whether or not an undue hardship defense has been made out. In *Meiorin*, the Supreme Court observed that the use of the word 'undue' implies that some hardship is acceptable - it is only 'undue' hardship that will satisfy the test.<sup>10</sup> The Supreme Court has further observed that in order to prove that a standard is reasonably necessary, a respondent always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship.<sup>11</sup> It is incumbent on the respondent to show that it has considered and reasonably rejected all viable forms of accommodation. The onus is on the respondent to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship.<sup>12</sup> In assessing the adequacy of the respondent's efforts to accommodate, regard may be had to the prospect of substantial interference with the rights of others.<sup>13</sup> The adoption of the respondent's standard has to be supported by convincing evidence. Impressionistic evidence will not generally suffice.<sup>14</sup> Finally, factors such as the financial cost of methods of accommodation should be applied with common sense and flexibility in the context of the factual situation under consideration.<sup>15</sup>

[47] It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient if the complainant's disability was *a factor* in the decision to terminate her employment.<sup>16</sup>

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<sup>10</sup> In this regard, the decision in *Meiorin* adopts the reasoning in *Central Okanagan School District v. Renaud*, [1992] 2 S.C.R. 984.

<sup>11</sup> *Grismer*, supra., at para. 32

<sup>12</sup> *Grismer*, supra., at para. 42

<sup>13</sup> *Meiorin*, supra., at para. 63

<sup>14</sup> *Grismer*, supra., at paras 41 and 42

<sup>15</sup> *Meiorin*, supra., at para. 63

<sup>16</sup> *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 (F.C.A.), at p. D/15

### III. ANALYSIS

#### A. Implications of the Adams Decision

[48] The Amalgamated Transit Union grieved the termination of Ms. Desormeaux's employment. The grievance proceeded through an expedited arbitration process, and was heard by the Hon. George Adams, Q.C. on July 27, 1998. On August 5, 1998, Mr. Adams rendered a decision wherein he concluded that OC Transpo had just cause to dismiss Ms. Desormeaux. Accordingly, the grievance was dismissed.

[49] Prior to the commencement of this hearing, the respondent brought a motion challenging the jurisdiction of the Tribunal on a number of bases. One of the respondent's arguments was that the doctrine of *res judicata* prohibited the Tribunal from taking jurisdiction over Ms. Desormeaux's complaint due to the application of issue estoppel.

[50] I dealt with this motion in a preliminary ruling, wherein I found that issue estoppel did not arise in this case, as the issue before Mr. Adams was not the same as the issue before the Tribunal, nor were the parties to the two proceedings the same.

[51] The arbitration before Mr. Adams proceeded on the basis of an agreed statement of facts. In the course of the Tribunal hearing, counsel for the respondent contended that, in the event that there is an issue regarding any of these facts, I should apply the doctrine of issue estoppel, and take these facts as having been proven in the arbitration proceeding.

[52] It is not open to the respondent to try to re-litigate an issue that I have already dealt with in my preliminary ruling. I have already decided that I am not bound by the findings of Arbitrator Adams. However, having looked closely at the submissions of counsel for the respondent, it seems that what she is really arguing is that Ms. Desormeaux should not be permitted to resile from admissions made on her behalf at the arbitration.

[53] I do not find it necessary for me to address this argument, in light of the evidence adduced before me in this hearing, as it does not appear that either the Commission or Ms. Desormeaux take substantial issue with the facts agreed to before Mr. Adams.

**B. What is the Standard?**

[54] The employment standard in issue in this case is OC Transpo's requirement that its employees attend work on a regular and reliable basis.

**C. Is There a *Prima Facie* Case of Discrimination?**

[55] In considering this complaint, I must first determine if Ms. Desormeaux and the Commission have established a *prima facie* case of discrimination on the basis of a disability. The respondent contends that no *prima facie* case has been established here, as it has not been proven that Ms. Desormeaux suffered from a disability. OC Transpo submits that the evidence does not establish that Ms. Desormeaux suffers from migraine headaches, and that all of the other illnesses and injuries that she has suffered over the years are transitory ailments, and do not rise to the level of disabilities.

**(i) Was Ms. Desormeaux Disabled?**

[56] Ms. Desormeaux testified that she suffered from chronic headaches for many years prior to being hired by OC Transpo. According to Ms. Desormeaux, her headaches usually start during the night, and begin with neck pain. The pain gradually moves forward into one side of her head. If Ms. Desormeaux stands up while suffering from one of these headaches, she experiences nausea and vomiting. She also becomes very sensitive to light. The headaches have historically occurred once or twice a month, and typically lasted anywhere from one to three days. These headaches persisted throughout the time that Ms. Desormeaux worked for OC Transpo.

[57] Ms. Desormeaux has frequently sought medical assistance for her headaches. At the time that Ms. Desormeaux joined OC Transpo, she was being treated by her family physician, then Dr. Lyla Graham. In 1990, Dr. Graham referred Ms. Desormeaux to Dr. H. Rabinovitch, a neurologist, for further investigation. Dr. Rabinovitch examined Ms. Desormeaux on January 11, 1990, and subsequently reported his findings to Dr. Graham. Dr. Rabinovitch's report notes "I expect that she probably has mixed migraine, tension headaches .... I will arrange for an EEG and CAT scan but I think it is very doubtful that much else will be found ...". Ms. Desormeaux says that she underwent both the EEG and the CAT scan, but was never advised of the test results. Her understanding was that she would only be notified if something noteworthy was disclosed by the tests. There is no record of the findings of either test.

[58] In July of 1996, Ms. Desormeaux changed family doctors, and began seeing Dr. Meehan on a regular basis. Dr. Meehan testified in these proceedings, describing her observations with respect to Ms. Desormeaux's headache condition, as well as the various forms of treatment and types of medication that she prescribed for Ms. Desormeaux over the years.

[59] According to Dr. Meehan, the symptoms that Ms. Desormeaux described with respect to her headaches were consistent with those Ms. Desormeaux reported to Dr. Rabinovitch in 1990, and are classic symptoms of more severe migrainous-type headaches. Dr. Meehan explained that the cause of migraine headaches is not known, but certain 'triggers' can bring on headaches. Treatment for migraines consists of trying to identify and avoid these triggers, and can include prophylactic medication aimed at preventing recurrences. Various types of analgesic medications are also prescribed to reduce the level of pain quickly and effectively, with as few side effects as possible.

[60] The treatment of migraine headaches often involves an element of trial and error, according to Dr. Meehan. In Ms. Desormeaux's case, Dr. Meehan recommended that Ms. Desormeaux try physiotherapy to reduce muscle tension in her neck. Reducing neck tension can lessen the severity of migraine headaches. She also had Ms. Desormeaux try a variety of medications, in an effort to identify the most effective form of treatment for the headaches. Because fluctuations in female hormonal levels can often trigger migraine headaches, Dr. Meehan eventually started Ms. Desormeaux on a course of

Depo-Provera, medication that suppresses ovulation, and eliminates the menstrual cycles that often trigger migraines.<sup>17</sup>

[61] Dr. Meehan stated that she did not see any need to refer Ms. Desormeaux to a neurologist for further assessment. According to Dr. Meehan, Ms. Desormeaux had already been assessed by a neurologist, and did not exhibit any symptoms that would cause Dr. Meehan to question the accuracy of Dr. Rabinovitch's diagnosis.

[62] Since becoming Ms. Desormeaux's family doctor in 1996, Dr. Meehan also treated Ms. Desormeaux for kidney stones, ovarian cysts, a respiratory infection and viral gastroenteritis.

[63] By the Fall of 1997, when she was asked for an opinion regarding Ms. Desormeaux's fitness for work, Dr. Meehan says that all of Ms. Desormeaux's health problems, apart from the migraines, had resolved, and would not cause any ongoing problems. Insofar as Ms. Desormeaux's migraines were concerned, Dr. Meehan says that they were under better control, but that the nature of Ms. Desormeaux's condition was such that one could not predict when the headaches would occur. Ms. Desormeaux's headaches impaired her ability to perform her job. Further, many of the medications used to treat migraine headaches have side effects that would make driving a bus unsafe.

[64] The starting point for my determination of whether or not Ms. Desormeaux suffered from a disability must be the definition of 'disability' contained in section 25 of the *Canadian Human Rights Act*. Unfortunately, this section is of limited assistance in this case, in that the definition that it provides is somewhat circular: 'disability' is defined as - "any previous or existing mental or physical disability ..."

[65] The most recent judicial pronouncement as to what constitutes a disability is the decision of the Supreme Court of Canada in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la*

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<sup>17</sup> Dr. Meehan and Ms. Desormeaux testified as to the salutary effect that this treatment has had, as it relates to controlling both the frequency and the severity of Ms. Desormeaux's headaches. Given that Dr. Meehan only began treating Ms. Desormeaux's headaches with Depo-Provera injections *after* Ms. Desormeaux's employment with OC Transpo was terminated, I have not considered the post-termination improvement in Ms. Desormeaux's condition in my deliberations. See *Cie. minière Québec Cartier v. Québec*, [1995] 2 S.C.R. 1095, and *Canada (Attorney General) v. Beaulieu*, (1993), 103 D.L.R. (4<sup>th</sup>) 217 (F.C.A.).

*jeunesse*) v. *Boisbriand (City)*.<sup>18</sup> The Supreme Court determined that the term ‘handicap’, (which is used synonymously with ‘disability’ in the human rights context)<sup>19</sup>, “... must not be confined within a narrow definition that leaves no room for flexibility”.<sup>20</sup>

[66] Counsel for OC Transpo submits that Ms. Desormeaux did not suffer from a disability, contending that it has not been properly established that Ms. Desormeaux in fact suffers from migraine headaches. Counsel submits that diagnosing migraine headaches is beyond the expertise of Dr. Meehan as a family physician. In the absence of a diagnosis by a neurologist, counsel says, I cannot find that Ms. Desormeaux suffers from migraines.

[67] There are several reasons for rejecting counsel’s submission. I am satisfied that the diagnosis and treatment of migraine headaches is within the expertise of the reasonably competent family practitioner. Further, Ms. Desormeaux was assessed by a neurologist in 1990. Dr. Rabinovitch concluded that Ms. Desormeaux probably suffered from “mixed migraine, tension headaches”. Dr. Meehan testified that Ms. Desormeaux’s symptoms were classic symptoms of more severe migrainous-type headaches. There is no medical evidence before me that would lead me to question either Dr. Meehan’s opinion or Dr. Rabinovitch’s finding.

[68] Further, even if I were to accept counsel’s submission in this regard, I would still find that Ms. Desormeaux’s headaches constitute a ‘disability’ within the meaning of the *Canadian Human Rights Act*. It is undisputed that Ms. Desormeaux has suffered from chronic, debilitating headaches for many years. Whether these headaches are properly classified as migraines, or some other type of headache, is immaterial. Ms. Desormeaux’s description of the symptoms, and the effect that these symptoms, as well as the necessary medication, have on her ability to function has not been challenged. It is clear that she has long suffered from a chronic headache condition that periodically causes her to become significantly incapacitated, and interferes with her ability to do her job. This, in my view, constitutes a ‘disability’ within the meaning of the legislation.

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<sup>18</sup> [2000] 1 S.C.R. 665.

<sup>19</sup> *Ibid.*, at paras. 46-47, and see Michael Lynk, “Disability and the Duty to Accommodate: An Arbitrator’s Perspective” in K. Whitaker, J. Sack, M. Gunderson and R. Filion, eds., *Labour Arbitration Yearbook 2001-2002*, Vol. I (Toronto: Lancaster House, 2002) 51 at p. 61.

<sup>20</sup> *City of Montréal*, *supra.*, at para. 76

[69] For reasons that will be set out further on in this decision, I find it unnecessary to determine whether the other illnesses and injuries that Ms. Desormeaux has suffered over the years are transitory ailments or disabilities.

**(ii) Was Ms. Desormeaux's Disability a Factor in the Decision to Terminate her Employment?**

[70] Having found that Ms. Desormeaux was disabled, it remains to be determined whether her disability was a factor in OC Transpo's decision to terminate her employment.

[71] OC Transpo contends that Ms. Desormeaux was not dismissed because of a disability. Based upon Ms. Desormeaux's track record, and the medical information available to it, OC Transpo says that it came to the conclusion that Ms. Desormeaux would not be able to attend work on a regular and reliable basis in the future. Moreover, from Dr. Meehan's report, OC Transpo was satisfied that Ms. Desormeaux's continued absences from work were not due to a disability.

[72] I do not accept OC Transpo's submissions in this regard. It is clear that the decision to terminate Ms. Desormeaux's employment was predicated upon the employer's assessment of Ms. Desormeaux's future prospects for regular attendance, based, in part, on her past attendance record. Regardless of whether one considers the absences caused by her other ailments to be disability-related, a significant portion of Ms. Desormeaux's absences were headache-related. As I have previously noted, it is not necessary that discriminatory considerations be the only reason for the actions in issue for a complaint to succeed. Taking disability-related absences into account in deciding to terminate an individual's employment for excessive absenteeism is *prima facie* discriminatory.<sup>21</sup>

[73] It must also be recalled that the culminating incidents giving rise to Ms. Desormeaux's dismissal were the absences between November of 1997 and January 30, 1998. It is uncontradicted that all of

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<sup>21</sup> *Re Ontario Human Rights Commission et al. v. Gaines Pet Foods Corp. et al.*, 16 O.R. (3d) 290 Ont. Div. Ct.).

these absences (other than the two mornings that she was late for work as a result of having slept in) resulted from Ms. Desormeaux being ill with headaches.

[74] In these circumstances, I am satisfied that the Commission and Ms. Desormeaux have established a *prima facie* case of discrimination on the basis of disability.

#### **D. Has OC Transpo Discharged its Burden?**

[75] Having found a *prima facie* case of discrimination on the basis of disability, the onus is on OC Transpo to establish that attending work on a regular and reliable basis is a *bona fide* occupational requirement for a bus operator. There are three elements which must be established in order to demonstrate the existence of a *bona fide* occupational requirement. Each of these elements will be considered in turn.

##### **(i) Rational Connection**

[76] OC Transpo must first establish that it adopted its standard of regular and reliable attendance for a purpose or goal that is rationally connected to the performance of the job. The focus at this stage is not on the validity of the standard in issue, but rather on the validity of its more general purpose.<sup>22</sup>

[77] There is no dispute in this case that the requirement that bus operators attend work on a regular and reliable basis is rationally connected to the delivery of timely public transit.

##### **(ii) Good Faith**

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<sup>22</sup> *Meiorin*, supra., at para. 59

[78] The second element that must be established by OC Transpo is that it adopted its standard of regular and reliable attendance in good faith, in the belief that it is necessary for the delivery of timely public transit.

[79] In his final submissions, counsel for the Commission stated that the Commission was not suggesting that OC Transpo acted other than in good faith. Nevertheless, throughout the hearing, the Commission challenged the actions of OC Transpo in utilizing a standard of 'regular and reliable attendance', and not providing Ms. Desormeaux with a specified number of days for which she could be absent from work. The only time that this was done was in 1990, when Ms. Desormeaux was told that she could not be away from work on more than five occasions, or for more than 12 days over 12 months. According to the Commission, fairness required that employees be provided with a numerical target for their attendance. The plant average for absenteeism was suggested as one possible defined standard.

[80] Ron Marcotte explained that there is no permissible maximum number of days that OC Transpo employees can be away from work. Employees are expected to attend work as required, although OC Transpo recognizes that individuals will be unable to report to work from time to time for health-related reasons. OC Transpo's concern with providing employees with a specific number of days that they can miss is that this will create an expectation in the workforce that everyone can miss that many days, without consequence. Instead, the standard of 'regular and reliable attendance' provides flexibility, allowing the employer to tailor its response to the particular circumstances of each individual's situation. By way of example, Mr. Marcotte testified that there were employees whose attendance records may have been worse than Ms. Desormeaux's was in 1997-8, but who were at an earlier stage in the attendance management program. The employment of these individuals would not have been terminated, as they would have been provided with further opportunities to achieve regular and reliable attendance.

[81] In closing argument, counsel for OC Transpo submitted that the facts of this case graphically illustrate the problems that can arise when an employee is given a fixed maximum number of days that they can be off of work. Ms. Desormeaux herself testified that on the one occasion that she was provided with a numerical target, she drove a bus with Tylenol 3 in her system, in order to meet the target set for her.

[82] I do not accept the submissions of the Commission as to the need for a fixed number of days of permissible absence. The Supreme Court of Canada has indicated that employment standards must not be arbitrary, and should provide for individual accommodation.<sup>23</sup> Imposing the arbitrary requirement that a disabled employee's absenteeism not exceed a plant average, a condition not imposed on other employees, would clearly be discriminatory.<sup>24</sup> As a result, I find that OC Transpo has satisfied the good faith component of the *Meiorin* test.

**(iii) Did OC Transpo Accommodate Ms. Desormeaux to the Point of Undue Hardship?**

[83] The final issue to be determined is whether OC Transpo has established that its standard of regular and reliable attendance is reasonably necessary for delivery of timely public transit. To show that the standard is reasonably necessary, it must be demonstrated that it would have been impossible to accommodate Ms. Desormeaux without imposing undue hardship on her employer.

[84] The starting point for my analysis must be an assessment of Ms. Desormeaux's health status at the time that OC Transpo made the decision to terminate her employment. Ms. Desormeaux suffered from a litany of health problems over the years, and also suffered also a number of injuries. There is nothing in the evidence before me, however, to suggest that there is a relationship between the various conditions giving rise to her high level of absenteeism, or a single root cause for her inability to attend work on a regular basis. Rather, it appears that Ms. Desormeaux has simply been very unlucky over the years, having experienced a number of different, unrelated illnesses and injuries. Most of these conditions appear to have been self-limiting, and the evidence indicates that by the Fall of 1997, the only condition that was likely to cause long term problems for Ms. Desormeaux was her migraine headaches. In other words, there is nothing in the medical evidence before me to suggest that Ms. Desormeaux was any more likely to suffer from health problems (apart from those related to her headache condition) than was any other OC Transpo employee.

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<sup>23</sup> *Meiorin*, supra., at para. 68.

[85] Lois Emberg testified that Dr. Meehan's comment that Ms. Desormeaux's migraines were potentially of a longer-term nature should have triggered a concern that Ms. Desormeaux may have been suffering from a disability. In such a case, Ms. Emberg says, no decision should have been made to terminate Ms. Desormeaux's employment until such time as the disability issue had been properly explored. Instead, what happened was that OC Transpo gave Ms. Desormeaux three more months to establish a pattern of regular and reliable attendance. When she could not do so because of her headaches, her employment was terminated.

[86] In considering whether accommodation would have been possible, I must examine the implications that Ms. Desormeaux's migraine condition would likely have had for her ability to attend work on a regular and reliable basis after January of 1998. One way of predicting future absenteeism would be to look at Ms. Desormeaux's past history. As of January of 1998, Ms. Desormeaux had been employed by OC Transpo for approximately 8.75 years. In that time, she had missed 57 full days and 11 part days due to headaches. This translates to an average of 6.5 full days and 1.25 part days each year that Ms. Desormeaux was unable to attend work because of her migraine condition. Some minor upward adjustment to this number may be necessary to take into account the fact that Ms. Desormeaux did miss periods of time for other reasons, for example as a result of her back injury, when she was off of work for 79 days. During these absences, Ms. Desormeaux may well have suffered migraines, and been otherwise unable to work. Similarly, it is possible that a further upward adjustment might have to be made, in order to take into account the effect that Ms. Desormeaux's unrecorded absences would have on her rate of absenteeism. It is not clear, however, from the evidence if any of these unrecorded absences were migraine-related.

[87] On the other hand, there is some suggestion that Ms. Desormeaux's past attendance history, insofar as her migraine-related absences are concerned, might not be an accurate predictor for her future attendance, and that some improvement in this regard could reasonably have been anticipated. The uncontradicted medical evidence before OC Transpo at the time that the decision was made to terminate Ms. Desormeaux's employment was that progress had been made in identifying one of the causes of her headaches. Dr. Meehan's October, 1997 report advised OC Transpo that steps were being taken to address the problem of Ms. Desormeaux's mechanical neck dysfunction, and that a definite

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<sup>24</sup> *Canadian Union of Postal Workers v. Canada Post Corp.* [2001] B.C.J. No. 680, at para. 16 (B.C.C.A.). See also *Gaines Pet Foods*, *supra*, *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services)*,

improvement in her condition had been noted. While Ms. Desormeaux had repeatedly assured Mr. Marcotte that her migraines were being brought under control, here, for the first time, OC Transpo had medical evidence to suggest that an improvement in Ms. Desormeaux's ability to attend work on a regular basis could be anticipated.

[88] However, between the November 6, 1997 meeting and the termination of her employment on January 30, 1998, Ms. Desormeaux was absent from work on four separate occasions, for a total of seven days, because of migraine headaches. In addition, she was late for work on two occasions, having slept in. With respect to these latter two absences, suffice it to say that it does not reflect well on Ms. Desormeaux's work ethic that she would sleep in, and twice be late for work, during a period where her job was clearly on the line.

[89] Insofar as the migraine-related absences are concerned, the frequency of Ms. Desormeaux's absences during the three-month period leading up to the termination of her employment could reasonably have caused OC Transpo to question the accuracy of Dr. Meehan's prognosis. Although Mr. Marcotte was made aware of the reason for Ms. Desormeaux's absences in this time frame, no effort was made to obtain clarification of Dr. Meehan's findings. No attempt was made to ask Dr. Meehan whether there was a specific reason why Ms. Desormeaux was experiencing so many migraine-related absences during this period, and whether these absences changed Dr. Meehan's opinion as to Ms. Desormeaux's prognosis for future attendance. Similarly, no attempt was made to obtain an independent medical assessment of Ms. Desormeaux's condition, notwithstanding that such an assessment was expressly contemplated by OC Transpo's attendance management program.

[90] Thus, by January of 1998, there was some uncertainty surrounding Ms. Desormeaux's prognosis. In all of the circumstances, I am satisfied that the most reliable predictor for Ms. Desormeaux's future attendance was her long-term attendance history with OC Transpo.

[91] The next issue to consider is whether OC Transpo could have accommodated an employee with Ms. Desormeaux's rate of migraine-related absenteeism. OC Transpo's contention that it could not accommodate Ms. Desormeaux's continued sporadic absences from work is founded primarily on operational considerations. In this regard, I note that the termination of Ms. Desormeaux's employment

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[1996] O.J. No. 608, (Ont. Div.Ct.) and Lynk, supra., at p. 95.

occurred prior to the Bill S-5 amendments to the *Canadian Human Rights Act*. Section 15 (2) of the amended *Act* states that the factors that can be considered in relation to the issue of accommodation are health, safety and cost.<sup>25</sup> As a consequence, my consideration of the accommodation issue in this case is governed by the principles articulated by the Supreme Court of Canada in *Alberta (Human Rights Commission) v. Central Alberta Dairy Pool*<sup>26</sup>, and subsequent cases.

[92] In *Dairy Pool*, the Supreme Court provided a non-exhaustive list of the types of factors that could create an undue hardship, including operational considerations such as the size of the employer's operation and the interchangeability of the workforce. Logistical difficulties in replacing absent workers have recently been found by the Ontario Divisional Court to constitute an undue hardship.<sup>27</sup>

[93] Mr. Marcotte explained that bus companies run on predetermined schedules. Customers rely upon buses arriving and departing on time, in order to conduct their business and make their connections. If too many operators fail to report to work on any given day, there may not be enough drivers to get all of the buses on the road. This causes interruptions in service, and problems for the citizens of the National Capital Region, who rely on OC Transpo for transportation. Unlike long-term absences, which OC Transpo can anticipate and provide for, intermittent, last minute absences are particularly challenging to address.

[94] OC Transpo bus operators bid on routes and schedules in seventeen-week blocks, in accordance with the order of seniority. In each booking period, a certain number of drivers will be assigned to a "spare board". The spare board is a pool of 75-100 bus operators who do not have a specific route assigned to them. Rather, the responsibility of the operators on the spare board is to fill in for absent operators, on an as-needed basis.

[95] From time to time, there are not enough drivers on the spare board to fill in for all of the operators who are absent from work. In such circumstances, overtime will be offered to operators

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<sup>25</sup> See section 15 (2) of the *Act*, introduced into the legislation by *An Act to Amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, S.C. 1998, c. 9

<sup>26</sup> [1990] 2 S.C.R. 489, at pp. 520-521.

<sup>27</sup> *Ontario (Human Rights Commission) v. Roosma*, [2002] O.J. No. 3688

driving regularly scheduled routes. If there are not enough operators willing to work overtime to pick up the slack, buses may simply not go out, creating gaps in service.

[96] Through Mr. Marcotte, OC Transpo introduced a record from January of 2001 regarding service coverage for the week of January 21 to 27. This document indicates that in the course of this week, 626 trips out of a weekly total of 37,445 did not go out on time. There were a number of reasons why these trips were cancelled. Some did not take place because of mechanical problems with the buses, depot delays or accidents. In 106 cases, buses did not leave the depot for reasons that could include the unavailability of operators.

[97] Of the 626 cancelled trips, it appears in 395 cases, the buses ultimately did get out. Mr. Marcotte explained that these trips were filled with “extras”. It is unclear whether he meant employees from the spare board or other employees. This meant that 231 trips out of 37,445 never took place. The utility of these statistics is, however, diminished somewhat as it is not clear how many, if any, of these 231 trips were cancelled as a result of insufficient staff availability, rather than mechanical problems or other reasons.

[98] Paul MacDonnell, the former President of the Amalgamated Transit Union, Local 279, suggested that the January, 2001 sample may not reflect typical cancellation rates. According to Mr. MacDonnell, being mid-winter, January is the worst time of year for cancelled trips, because of the high incidence of mechanical problems for the buses. Mr. Marcotte did not address Mr. MacDonnell’s comment with respect to the increased level of mechanical problems in the winter months, but suggested that inclement winter weather did not create significant problems with respect to service delivery as Ottawa “has great street cleaners”. Mr. Marcotte did concede that problems could arise if there was a big snowstorm. He was unable to state whether there was a storm during the week of January 21 to 27, 2001.

[99] Mr. Marcotte could not provide comparable information regarding service coverage for the period surrounding the termination of Ms. Desormeaux’s employment, although he did say that it was not uncommon for the spare board to be exhausted by employee absences. In such a situation, resort would have to be had to overtime, in order to have the buses run on time. According to Mr. Marcotte, there were “even days where we couldn't provide overtime”, which presumably meant days when trips had to be cancelled. He did not, however, give any indication of the frequency with which this occurred.

[100] OC Transpo is a large employer. Mr. MacDonnell testified that there were anywhere from 1200 to 1500 bus operators working at OC Transpo at any one time. The annual budget for the organization was \$150 million. When he was asked why OC Transpo did not simply hire more bus operators, in order to guarantee service coverage, Mr. MacDonnell indicated that OC Transpo had gone through hiring freezes and downsizing. He also stated that it was cheaper for OC Transpo to rely on overtime than to hire more operators.

[101] Against this backdrop, I must then determine whether retaining an employee in Ms. Desormeaux's position would create an undue hardship for OC Transpo, as a result of her intermittent absenteeism. In examining this question, reference should be had to the testimony of Ron Marcotte in relation to OC Transpo's attendance management program. According to Mr. Marcotte, in 1995-6, employees coming under the attendance management program were those with an absenteeism rate of 18 days or more each year. By 1997-8, the rate had dropped somewhat. Mr. Marcotte suggested that the threshold for inclusion in the plan might have been 13 days per year, although he did not seem at all sure of this. I have found that a realistic prognosis for Ms. Desormeaux's future migraine-related absences was somewhere in the area of 6.5 full days and 1.25 part days each year - well below the absenteeism rate for 25% of OC Transpo bus operators. Even allowing for a few additional days of absence each year due to transient illnesses such as colds and the flu, I cannot conclude that as of January, 1998, Ms. Desormeaux's future absenteeism rate was likely to be at a level beyond that of a significant portion of OC Transpo's workforce.<sup>28</sup>

[102] I accept that intermittent absenteeism could potentially create an undue hardship for an employer where, for example, a small workplace was involved, and the individual in question provided unique services to her employer. In this case however, OC Transpo employs a large workforce, and bus operator duties are largely inter-changeable. OC Transpo recognizes that on any given day a certain number of its bus operators will be unable to attend work. Because of the time-sensitive nature of the service that it delivers, OC Transpo makes provision for these absences through the use of the spare board system, a system that appears to generally work quite well. On the evidence before me, I am not

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<sup>28</sup> In a post-discharge grievance hearing, Ms. Desormeaux's union representative suggested that 20 days per year was a reasonable estimate of her likely future absenteeism rate. Even if this is a realistic estimate of Ms. Desormeaux's likely future absenteeism rate, it must be viewed in light of Mr. Marcotte's testimony that a number of employees at OC Transpo may have had worse attendance than did Ms. Desormeaux.

persuaded that Ms. Desormeaux would cause an excessive drain on the spare board system in the future. Accordingly, I am not satisfied that OC Transpo has established that it would have suffered undue hardship if it had continued to employ Ms. Desormeaux.

[103] Further, the evidence suggests that it may be possible to reduce Ms. Desormeaux's level of absenteeism somewhat, through the provision of modified duties. From Ms. Desormeaux's testimony, it appears that she is totally disabled in the early phases of a migraine attack, but that as the headache resolves, she is able to function to a certain extent. While she is unable to drive a bus safely, because of the medication in her system, she is able to perform other useful work for OC Transpo. According to Mr. MacDonnell, non-driving jobs are available to bus operators requiring accommodation.

[104] Similarly, Mr. MacDonnell testified that there are ways in which OC Transpo could lessen the impact that Ms. Desormeaux's intermittent absences would have on service delivery. By way of example, he suggested that Ms. Desormeaux could be assigned to work on the spare board. Drivers assigned to the spare board are not always called upon to drive, and thus an absent spare board driver is less likely to cause a disruption in bus service.

[105] None of these alternatives were explored, prior to the termination of Ms. Desormeaux's employment, as Mr. Marcotte clearly viewed the responsibility for improving the situation as resting solely on Ms. Desormeaux's shoulders.

[106] Before leaving the question of accommodation, there are several other issues that bear comment. Although there was testimony as to the cost of providing sick leave benefits, there was insufficient evidence before me regarding the financial condition of OC Transpo for me to conclude that requiring OC Transpo to continue to provide such benefits to Ms. Desormeaux would constitute an undue hardship.<sup>29</sup>

[107] OC Transpo led evidence through Lois Emberg, and the filing of its annual employment equity reports, as to the significant number of disabled individuals employed by OC Transpo. While I have considered this evidence, I have found it to be of limited assistance in assessing what happened in the

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<sup>29</sup> In this regard, Mr. MacDonnell testified that the annual cost of providing 20 days of sick benefits would be in the vicinity of \$2,000. It will be recalled that OC Transpo's annual budget is \$150 million.

case of Francine Desormeaux. Similarly, there was testimony regarding the Disabled Employees' Review Committee, a joint labour/management committee set up to review accommodative measures for OC Transpo employees. This evidence must be viewed in light of Ms. Emberg's testimony that the Committee only became involved when an employee was going to require accommodation for more than four weeks at a time. As a consequence, Ms. Emberg says, the Committee would not be involved in a case such as that of Ms. Desormeaux, where the issue was intermittent, short-term absences.

[108] OC Transpo contends that Ms. Desormeaux never said what she needed by way of accommodation, nor did she provide medical documentation to support such a request. Rather, Ms. Desormeaux repeatedly assured Mr. Marcotte that she would meet the standard of regular and reliable attendance in the future. As a consequence, OC Transpo says, Ms. Desormeaux did not satisfy the obligation on her to facilitate the search for accommodation.

[109] It is common ground that Ms. Desormeaux was always very candid with her employer regarding her health problems. It is also true that over the years, she would try to assure her employer that she would do better in the future. However, as the termination of her employment approached, the question of accommodation did surface. I have found that during the November 6, 1997 meeting, Mr. Vye questioned whether Ms. Desormeaux's migraines constituted a disability, and suggested that they look at ways in which Ms. Desormeaux could be accommodated. I have accepted Ms. Desormeaux's testimony that Mr. Marcotte was "not hearing" what Mr. Vye was saying, and that no substantive discussion regarding accommodation took place. Mr. Vye again raised the issue of accommodation during the January 30, 1998 termination meeting. It is clear that despite being in possession of a medical report indicating that Ms. Desormeaux suffered from a health condition with possible long-term ramifications, which condition was continuing to cause Ms. Desormeaux to miss work, Mr. Marcotte was unwilling to explore what could be done in order to accommodate Ms. Desormeaux's needs.

[110] The law regarding the duties of employer and employee in relation to accommodation is clear: it is the responsibility of the disabled employee to bring the facts relating to the discrimination to her employer's attention. Through the efforts of Mr. Vye, Ms. Desormeaux did this. It is not up to the

employee to originate a solution - that is the responsibility of the employer.<sup>30</sup> In these circumstances, I am satisfied that Ms. Desormeaux fulfilled her duty to facilitate the search for accommodation.

[111] The final issue for me to consider is the question of the liability of the Amalgamated Transit Union. In this regard, counsel for OC Transpo argues that if it is found to have discriminated against Ms. Desormeaux, the Union “breached its duty to accommodate by failing to apprise the employer from the inception of the Attendance Management Program that Ms. Desormeaux's migraines required excessive days off.”

[112] It should be noted that the Union is not a party to Ms. Desormeaux’s complaint. A motion was brought by OC Transpo at the commencement of the hearing to add the Union as a respondent. For reasons given at the time, this motion was dismissed. It is not clear from counsel’s submissions whether she is now seeking to have an order made against the Union. Having dismissed the request to add the Union as a respondent, even if I were disposed to do so, I do not see how I could make an order against the non-party Union.

[113] In any event, on the basis of the evidence before me, I do not see a basis for liability on the Union on either of the theories for union liability set out in the *Renaud* case. The fact that the Union may have been consulted with respect to OC Transpo’s attendance management policy does not make the policy a joint union/management policy. Further, the problem that I have identified in this case originates not in OC Transpo’s policy, but in the way Ms. Desormeaux’s case was handled by her employer. Similarly, there is nothing before me to suggest that at any time prior to January 30, 1998, the Union did anything to impede efforts to accommodate Ms. Desormeaux.

[114] For the above reasons, Ms. Desormeaux’s complaint is sustained.

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<sup>30</sup> *Renaud*, supra., at p. 994

#### **IV. REMEDY**

##### **A. Reinstatement**

[115] Where a complaint of discrimination is found to be substantiated, it is the duty of a human rights tribunal to attempt to restore the complainant to the position that she would have been in, but for the discrimination. In this case, that duty is best discharged by reinstating Ms. Desormeaux to her position as a bus operator with OC Transpo. Ms. Desormeaux should receive the seniority and benefits, including pension benefits, that she would have had, had she been continuously employed by OC Transpo. She should, as well, receive any training necessary to update her skills and re-familiarize her with workplace policies and procedures.

[116] In reinstating Ms. Desormeaux to the position of bus operator, I leave it to OC Transpo, in consultation with Ms. Desormeaux and her union, to identify a position for Ms. Desormeaux which will minimize the impact that Ms. Desormeaux's intermittent absences will have on service delivery. I further direct OC Transpo to consult with Ms. Desormeaux and her union, as well as with Dr. Meehan, if necessary, in order to determine what steps can safely be taken in order to minimize Ms. Desormeaux's absences from work, without her having to resort to driving while under the influence of medication. In this regard, I note that the Amalgamated Transit Union has undertaken to fully co-operate in the implementation of any order that the Tribunal may make against OC Transpo with respect to Ms. Desormeaux's return to the workplace.

[117] Finally, Ms. Desormeaux has asked that she not be required to explain or justify each absence from work. With respect, I do not think that Ms. Desormeaux can expect to be able to miss work with impunity. Her employer is entitled to satisfy itself that there is a legitimate explanation for her absences. Ms. Desormeaux should have the same obligations with respect to the provision of medical certificates and other information regarding her absences as do other OC Transpo bus operators.

## **B. Wage Loss**

[118] Consistent with the principle that human rights tribunals should attempt, insofar as may be possible, to make whole victims of discriminatory practices, Ms. Desormeaux should receive the wages that she has lost as a consequence of the termination of her employment with OC Transpo. OC Transpo says that any such award made to Ms. Desormeaux should be reduced, as she failed to take appropriate steps to mitigate her losses.

[119] Following the termination of her employment, Ms. Desormeaux immediately began looking for work, and quickly found part-time employment as a child-care worker and school bus driver. She also drove a school taxi. Ms. Desormeaux was interviewed for a position with a tour bus company, but was not offered a position after explaining the circumstances of her departure from OC Transpo. After numerous other unsuccessful applications, the Employment Insurance office referred Ms. Desormeaux to a consultant in order to assist her in the preparation of a more professional resumé. Ms. Desormeaux also explored the possibility of establishing her own business - a taxi service to drive children to appointments. She did not pursue this venture, however, when she realized that the General Manager of OC Transpo was involved in the licencing process.

[120] In February of 1999, Ms. Desormeaux decided to enroll at Mican Business College. She explained that by this point, she had been unsuccessful at arbitration, and had been unable to earn a salary comparable to that she had received while working at OC Transpo, without upgrading her skills. She took computer courses at Mican, to assist her in obtaining an administrative assistant position. She continued to drive a school taxi part-time.

[121] After completing the program at Mican in July of 1999, Ms. Desormeaux registered with an office temp agency before obtaining a full-time position with the Gloucester Public Library. She worked there until January of 2000, when she began working as an examiner for the Ontario Ministry of Transport. Ms. Desormeaux was working at the Ministry of Transport at the time of the hearing.

[122] OC Transpo points to the numerous driving jobs advertised during the period following the termination of Ms. Desormeaux's employment, submitting that Ms. Desormeaux made a personal

decision to go back to school instead of applying for work. As a consequence, OC Transpo says, it should not be responsible for any wages Ms. Desormeaux may have lost between January and July of 1999. I do not agree.

[123] At the time that Ms. Desormeaux was fired by OC Transpo, she had been working there for nearly nine years. Her entire career in commercial driving had been with OC Transpo, when she suddenly found herself unemployed, without a positive reference to assist her in finding new employment. Ms. Desormeaux diligently sought work. After being unsuccessful in finding full-time work for a year after the termination of her employment, her decision to upgrade her skills strikes me as entirely reasonable in the circumstances. As a result, I am satisfied that Ms. Desormeaux took reasonable steps to mitigate her losses, and that no adjustment should be made to the award for lost wages in this regard.

[124] Ms. Desormeaux should thus be fully compensated for the wages that she lost between January 30, 1998, and the date of reinstatement. The parties are in agreement as to the wages that Ms. Desormeaux would have earned, had she continued working at OC Transpo. From this should be deducted the income that she earned from alternate sources. Ms. Desormeaux is responsible for ensuring that the Employment Insurance authority is reimbursed for any benefits that she received during this period, in accordance with the provisions of the Employment Insurance legislation.

[125] In the event that the parties are unable to come to an agreement with respect to the monies owing to Ms. Desormeaux under the terms of this decision, I may be spoken to.

### **C. Gross-up**

[126] Ms. Desormeaux will now be entitled to a lump sum payment on account of lost wages. This may well result in negative income tax consequences for her. In my view, it would unfairly penalize Ms. Desormeaux if she were to suffer a more onerous income tax burden, by receiving a lump sum payment now, than she would have incurred had the monies been paid to her as salary on an on-going basis between January of 1998 and the date of payment. This would be inconsistent with the remedial goal of making Ms. Desormeaux whole. Accordingly, OC Transpo shall pay Ms. Desormeaux an

additional amount sufficient to cover any additional income tax liability that she may incur as a consequence of receiving payment in this fashion.

[127] The Commission has also asked for an order requiring OC Transpo to pay for any actuarial costs associated with calculating the interest and gross-up in this case. I am not persuaded that either of these items should be particularly complicated, so as to require the services of an actuary. If the parties are unable to agree as to the appropriate figures in this regard, further submissions may be made to the Tribunal.

#### **D. Special Compensation**

[128] Section 53 (3) of the *Act*, as it stood in January of 1998, provided for awards of “Special Compensation” for reckless or wilful conduct, as well as for injuries to feelings or self-respect, to a maximum of \$5,000. There will be a range of cases warranting awards of special compensation under the *Canadian Human Rights Act*, and the \$5,000 maximum award must be reserved for the very worst cases.<sup>31</sup>

[129] OC Transpo submits that it did not act recklessly or wilfully in terminating Ms. Desormeaux’s employment, and that its staff was ‘on a learning curve’ in relation to its obligations to its disabled employees. Be that as it may, it is clear that Ms. Desormeaux was very shaken by the loss of her employment. The stress that she suffered as a result of being dismissed was compounded by the financial pressures that she suffered. As a single person, Ms. Desormeaux was very concerned about her ability to meet her obligations, in the absence of any income, and was forced to deplete her savings in order to live. She still becomes emotional when discussing the impact that the events surrounding the termination of her employment have had on her.

[130] In all of the circumstances, I award Ms. Desormeaux \$4,000 as special compensation.

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<sup>31</sup> *Premakumar v. Air Canada*, (2002) 42 C.H.R.R. D/63. See also *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401. (F.C.A.)

**E. Interest**

[131] Interest is payable on awards of special compensation as well as on lost wages.<sup>32</sup> I order that interest be paid on the monies awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest on the award for lost wages should start to run from January 30, 1998, and be calculated as the wages would have become payable to Ms. Desormeaux. Interest on the special compensation shall run from January 30, 1998. In no case, however, should the total amount payable on account of special compensation, including interest, exceed \$5,000.<sup>33</sup>

**F. Apology**

[132] Ms. Desormeaux seeks an apology for the treatment that she encountered in the course of her employment. She initially requested that the apology come from Mr. Marcotte, but later indicated that she wanted the apology from OC Transpo.

[133] OC Transpo contends that I should decline to make the order requested, as it had not received proper notice of the request, in accordance with the Tribunal's Interim Rules of Procedure. Having reviewed the Commission's disclosure, it is clear that OC Transpo was made aware that an apology was being sought, although the Commission did not specify who would be asked to provide the apology. There is no indication that OC Transpo would have done anything different in the presentation of its case, had it had specific notice that the apology was being sought from the organization, or that it was prejudiced in any way. As a consequence, I am satisfied that the apology should not be denied on the basis that there was insufficient notice that the remedy was being requested.

[134] More importantly, OC Transpo also contends that the Tribunal does not have the jurisdiction to make such an order, as forcing it to express views that it does not hold would violate OC Transpo's freedom of expression, contrary to the *Canadian Charter of Rights and Freedoms*.

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<sup>32</sup> *Morgan*, supra.

<sup>33</sup> See *Hebert v. Canada (Canadian Armed Forces)*, (1993), 23 C.H.R.R. D/ 107 (F.C.T.D.)

[135] Since receiving the parties' written submissions on this question, it has come to my attention that the constitutional issue is currently before the Federal Court in *Stevenson v. Canadian Security Intelligence Service*.<sup>34</sup> Any decision that I make in this regard will therefore likely be superseded by the Court's decision. As a result, I propose to defer my decision regarding the apology issue until such time as the parties may have the benefit of the Court's decision in *Stevenson*, and the opportunity to make submissions regarding its effect.

[136] If any party requires an immediate decision from the Tribunal, the Tribunal should be notified, and I will deal with the issue.

#### **G. Lost Wages for Attendance at the Hearing**

[137] The Commission and Ms. Desormeaux ask that she be compensated for the wages that she has lost by reason of her attendance at the hearing. Given that I have already awarded Ms. Desormeaux her lost wages to the date of reinstatement, I am not prepared to make the order requested, as it would result in Ms. Desormeaux recovering twice for the period in question.

#### **H. Consultation with the Canadian Human Rights Commission**

[138] The Commission asks that OC Transpo be ordered to consult with the Commission with respect to its accommodation policy. There are several reasons why I do not think that such a remedy is appropriate, in the circumstances of this case.

[139] First, the problem that I have identified in the treatment of Ms. Desormeaux's disability stems not from the wording of OC Transpo's policy so much as from the failure to apply the policy in Ms. Desormeaux's case. Further, the passage of time between the termination of Ms. Desormeaux's employment and the hearing also means that events have largely overtaken things - not only is the

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<sup>34</sup> File no. T-9-02. The judicial review application is scheduled to be heard on January 16, 2003.

attendance management policy that was in effect in January of 1998 no longer in place at OC Transpo - OC Transpo itself no longer exists, having become part of the City of Ottawa, with municipal amalgamation.<sup>35</sup> Accordingly, I decline to order consultation.

## **I. Retention of Jurisdiction**

[140] I will retain jurisdiction in the event that the parties are unable to agree with respect to the quantification or implementation of any of the remedies awarded under this decision.

## **V. ORDER**

[141] For the foregoing reasons, I declare that Ms. Desormeaux's rights under the *Canadian Human Rights Act* have been contravened by OC Transpo, and order that:

- i) Ms. Desormeaux be reinstated in her position as a bus operator at the first reasonable opportunity, in accordance with the provisions of this decision;
- ii) Ms. Desormeaux shall be awarded compensation for lost wages, calculated in accordance with this decision;
- iii) OC Transpo shall pay to Ms. Desormeaux an amount sufficient to cover any additional income tax liability that she may incur as a consequence of receiving the monies referred to above in this fashion;
- iv) OC Transpo shall pay \$4,000 to Ms. Desormeaux as special compensation;

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<sup>35</sup> Despite the fact the OC Transpo no longer exists, I was not asked to add the City of Ottawa as a party.

- v) Interest shall be paid on the lost wages and special compensation awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest on the lost wages shall run from January 30, 1998, calculated as the wages would have become payable to Ms. Desormeaux. Interest on the special compensation shall run from January 30, 1998; and
  
- vi) Subject to any of the parties requesting an immediate decision, the parties may make further submissions with respect to the apology issue after receipt of the decision of the Federal Court in *Stevenson v. Canadian Security Intelligence Service*.



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Anne L. Mactavish

OTTAWA, Ontario  
January 14, 2003

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**COUNSEL OF RECORD**

TRIBUNAL FILE NO.: T701/0602

STYLE OF CAUSE: Francine Desormeaux v. Ottawa-Carleton Regional  
Transit Commission

PLACE OF HEARING: Ottawa, Ontario  
(October 2-3, 2002; October 15-18, 2002;  
October 28-30, 2002)

DECISION OF THE TRIBUNAL DATED: January 14, 2003

APPEARANCES:

Francine Desormeaux On her own behalf

Mark McDonald For the Canadian Human Rights Commission

Marion Breen For the Respondent