

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES  
DROITS DE LA PERSONNE**

**KASHA A. WHYTE**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**CANADIAN NATIONAL RAILWAY**

**Respondent**

**AND:**

**CINDY RICHARDS**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**CANADIAN NATIONAL RAILWAY**

**Respondent**

**RULING**

MEMBER: Michel Doucet 2009 CHRT 33  
2009/10/23

[1] On October 9, 2009, the Tribunal issued the following direction:

"Should the Respondent decide to raise any questions relating to costs in its arguments relating to the issue of undue hardship in the matters of *K. Whyte and C. Richards v. CN* it will provide all and any further particulars concerning this matter to the Tribunal, the Commission and the Complainants' Counsel by October 13, 2009.

[2] On October 14, 2009, the Tribunal received a letter from CN's counsel purporting to clarify CN's Amended Statement of Particulars. The letter stated:

"CN will show that for the Complainants not to have relocated to Vancouver created undue hardship, by affecting its ability to palliate the shortage of running trades personnel occurring there in 2005 and 2006. CN will therefore rely on documents indicative of the severity of the shortage, and in particular showing the extend of the delays in the departure times of trains from CN's Vancouver terminal. This type of work could have been performed had the Complainants reported to Vancouver to cover the shortage there. These delays in turn involved costs, some of which CN would not have had to incur had the Complainants reported to Vancouver."

[3] Counsel for the Canadian Human Rights Commission, in a letter dated October 16, 2009, objected to this purported clarification by CN. Counsel argued that this "clarification" was a new argument bearing on the legal issue of undue hardship and that it had not been set forth in the Respondent's particulars. Referring to the Respondent's Amended Statements of Particulars, counsel for the Commission pointed out that the only reference to undue hardship was stated as follows:

"Granting the relief sought by the Complainant would constitute undue hardship for the Company by effectively granting all employees who are parents an equivalent to "super seniority" under the Collective Agreement solely on the basis of their status as parents."

(Paras. 77 and 79 of CN Amended Statements of Particulars in, respectively, the Whyte and Richards matter)

[4] Although in CN's Amended Particulars there was a discussion of the Vancouver shortage and that, at para. 41 of the same document, it is mentioned that CN was required to have work performed on overtime shifts, counsel for the Commission argues that the allegations contained in the October 14, 2009, letter go well beyond alleging a shortage in Vancouver. In her words "these new allegations attempt to place all the effects of the Vancouver shortage on the shoulders of the Complainants."

[5] Ultimately, the Commission states that it does not oppose the raising of this issue "in interest of expediency", but it adds that if leave is granted to the Respondent, then it will request leave to file with the Tribunal the Financial Statements of CN for the years 2005 and 2006.

[6] For her part, counsel for the Complainants objects vigorously to the introduction of what she describes as "new particulars and new issue". She also submits, as did counsel for the Commission, that the Tribunal should follow Rule 9(3) of the Tribunal Rules of Procedure and require CN to bring a motion for leave to pursue this new issue.

[7] Counsel for the Complainants also submits that it is "far too late" for CN to raise this new issue. She argues that the "new particulars" are so vague and broad that to properly address them could add several days to the hearing and that this would amount to considerable prejudice for the Complainants. Finally, she submits that these new particulars have never been part of CN's position and that they did not form part of any accommodation process.

[8] The Tribunal has reviewed the Respondent's Statements of Particulars and its Amended Statements of Particulars. In the Statements of Particulars, the issue of undue hardship is addressed as follows:

"The Complainant's situation does not qualify as one requiring extended accommodation on the basis of family status. A requirement for the employer to provide indefinite relief from reporting to Vancouver, through "super seniority", would constitute undue hardship in the circumstances."

(Para 47 in CN's Statement of Particulars in the Kasha Whyte matter),

[9] At paragraph 77 of its Amended Statement of Particulars, the Respondent states in regards to undue hardship:

"Granting the relief sought by the Complainant would constitute undue hardship for the Company by effectively granting all employees who are parents an equivalent to "super seniority" under the Collective Agreement solely on the basis of their status as parents."

[10] Nowhere in the Statements of Particulars, nor in the Amended Statement of Particulars does the Respondent mention that the fact that the Complainants did not relocate to Vancouver to cover the shortage created undue hardship as it is understood under the *Canadian Human Rights Act*. The intention of the directive given by the Tribunal on October 9, 2009, should not be understood as a general leave given to the Respondent to introduce new issues or submit new particulars which were not addressed before.

[11] The Tribunal is of the opinion that it would be unjust and prejudicial for the other parties to allow CN to take advantage of this directive to raise completely new issue and particulars.

[12] The Tribunal would like to remind the parties that if they are seeking leave to raise new issues not addressed in their Statements of Particulars or in its Amended Statement of Particular they can only do so by seeking leave or authorization from the Tribunal under rule 9(3) of the Tribunal Rules of Procedure. Any party seeking such authorization will have to show how their request is not prejudicial to the other parties and to the Tribunal's process. It will also have to demonstrate that there was some valid justification for this late request.

[13] For all these reasons, I accept the Complainants objections to CN counsel's letter of October 14, 2009, and find that the matters raised in this letter is not a clarification of CN's Amended Statement of Particulars and that it raises new issues for which no leave was requested or granted.

*"Signed by"*

Michel Doucet

OTTAWA, Ontario  
October 23, 2009

*PARTIES OF RECORD*

TRIBUNAL FILE:	T1354/8408 and T1356/8608
STYLE OF CAUSE:	Kasha A. Whyte v. Canadian National Railway and Cindy Richards v. Canadian National Railway

RULING OF THE TRIBUNAL DATED:	October 23, 2009 (Oral ruling rendered from the bench on October 22, 2009)
APPEARANCES:	
Leanne Chahley	For the Complainants
Sheila Osborne-Brown	For the Canadian Human Rights Commission
Simon-Pierre Paquette	For the Respondent