

IN THE MATTER OF a Complaint
Pursuant to section 9 of the *Human
Rights Code*, R.S.N.L. 1990, c. H-14

File No. 2639

BETWEEN:

BRENDA CHIDLEY

COMPLAINANT

AND:

CLOWE'S AMBULANCE SERVICE

RESPONDENT

Cillian D. Sheahan (Adjudicator)

Heard: July 2 – 4, 2008

Decision: November 15, 2010

Appearances:

On Behalf of the Complainant:

Appeared Personally

On Behalf of the Commission:

Helen Conway

On Behalf of the Respondent:

Kerry Hatfield

DECISION OF THE ADJUDICATOR

INTRODUCTION

This is the hearing of a complaint by Brenda Chidley (“Ms. Chidley”) wherein she alleges she was discriminated against by Clowe's Ambulance Service (“CAS”), a partnership, and its owners, Derrick Clowe and Margaret Clowe, when they failed to hire her for the position of ambulance driver because she was female contrary to section 9 of the *Human Rights Code*, RSNL 1990, c. H-14. Instead, it is alleged, CAS hired a less qualified male ambulance driver by the name of Joe Arsenault. CAS maintains that it did not discriminate against Ms. Chidley and that the reason Ms. Chidley was not hired was because she lived too far away from the ambulance base in Ferryland to satisfy the requisite response time for emergency call-ins.

EVIDENCE AT THE HEARING

The Commission's Case

Brenda Chidley:

Ms. Chidley testified that she first saw the job posting for the ambulance worker position with CAS on a bulletin board in a grocery store in Ferryland, NL, on or about June 5, 2005. She was interested in the position and when she returned home, she called Mr. Derrick Clowe, one of the owners, to indicate her intention to apply. She says she asked him if she should send in her resumé; however Mr. Clowe said it wasn't necessary to send in a resume because he was aware of her background. No more was said but Ms. Chidley assumed she had in essence applied for the position. One week later she heard from her mother and another employee of CAS, Mollie Meade, that the Clowes were looking for a male to fill the position. She then decided to submit a written application and did so by faxing it to CAS around June 9, 2005. Subsequently she was not contacted by anyone from CAS for an interview or otherwise.

Ms. Chidley states that she was fully qualified for the advertised position and that she held an EMR II classification together with a Class IV driver's license. This classification qualifies Ms. Chidley to both drive the ambulance and to act as an ambulance attendant to assist paramedics during the transport of a patient, while an EMR I classification, together with a Class IV driver's license, qualifies an individual to drive the ambulance.

Ms. Chidley testified she later heard around town that the CAS hired Joe Arsenault for the advertised position. She called down to CAS and spoke to Mrs. Margaret Clowe, the other owner and wife of Derrick Clowe. She said to Mrs. Clowe "I heard you were looking to hire a man" Mrs. Clowe replied "yes". She then asked Mrs. Clowe whether CAS had hired a man and Mrs. Clowe confirmed that they had hired Joe Arsenault. Ms. Chidley asked what qualifications he had to which Mrs. Clowe replied "He had none". Ms. Chidley inquired as to why they would hire Joe Arsenault over her when she had an EMR II qualification. Mrs. Clowe replied that they had 3 months to train Joe Arsenault before he had to have an EMR I level qualification.

Ms. Chidley testified that CAS had a practice of pairing a male ambulance attendant with a female attendant. When an ambulance attendant by the name of Justin Paul left his position with CAS, it created the opening she had applied for in June of 2005, which position was ultimately filled by the hiring of Joe Arsenault.

Ms. Chidley testified that since CAS hired Joe Arsenault, they have hired two more men, Charlie Dunne a year ago and Lee Dunne 5 or 6 months before that. She stated that Charlie Dunne was trained to drive on the job and she assumed he would now be an EMR

I while she understood Lee Dunne was an EMR II. She said she didn't think these jobs were posted because she had been looking out for job postings in the area.

Ms. Chidley testified that CAS is in Ferryland and that she lived in Renew, NL which is approximately a 15 minute drive from Ferryland. She also stated that her mother lived in Aquaforte which was a 4 minute drive from Ferryland. Joe Arsenault and Marjorie Maher, two employees of CAS, also lived in Aquaforte. Ms. Chidley indicated that she had discussed with her mother the possibility of staying with her in Aquaforte while on call if she was successful in her application for a job with CAS. This would have satisfied the requirement that she be close enough to the ambulance base to ensure an acceptable response time, a requirement Ms. Chidley said she was fully aware of given her training and past work experience as an ambulance worker.

Ms. Chidley testified that her work record is without complaints or reprimands. She stated she was subject to regular evaluations while working with Fewer's Ambulance Service and that she has never had any problems in that regard.

On cross examination, Ms. Chidley testified that she did her on-the-job training originally with Lawlor's Ambulance Service in Cappahayden, NL but lost that position when the service shut down in November of 2004. She said Cappahayden is about a 5 minute drive from Renew. She then went to work for Fewer's Ambulance Service which has its base in Clarendville but operated a sister base in Renew after Lawlor's shut down its Cappahayden operation. Fewer's Ambulance Service subsequently shut down their Renew operation, putting Ms. Chidley out of work again.

Counsel for CAS asked Ms. Chidley about the importance of ambulance workers residing close to the ambulance base and Ms. Chidley confirmed the importance of this. She said it was "life and death". "Response time is very important." She said, however, that her living in Renew would not have been a problem if she had went to work for CAS because she could have stayed with her mother, Madeline Maher, in Aquaforte while she was on call. Aquaforte was a 4 minute drive from Ferryland. She said she did not get the opportunity to tell this to Derrick Clowe or Margaret Clowe prior to Joe Arsenault being hired. Had she been given an interview, she says she would have told them that she could easily reside with her mother in order to maintain a satisfactory response time.

Ms. Chidley was asked about a conversation she had with Mollie Meade, an employee of CAS, at Foodland around the time CAS advertised the position in question. She said she asked Mollie whether it was true that CAS wanted to hire a man and Mollie responded, "That's what I heard but I don't know". Upon further cross-examination, Ms. Chidley agreed that this was likely based on rumor around town or hearsay.

Ms. Chidley also testified on cross-examination that there were 5 people she knew of that applied for the position at CAS: herself, Helen Clowe, Joe Arsenault, Melvin Rossitter and Evan Burton.

Helen Clowe:

Helen Clowe's statement to the Commission's Investigator, Anna Dwyer, was entered as an exhibit with the consent of Counsel for the Respondent and was marked Consent #1.

Helen Clowe took the stand and testified that she has resided in Ferryland for the last 19 years. She is married to Brian Clowe, first cousin to Derrick Clowe. She too was interested in the advertised position. She called CAS in May or June 2005 to inquire about the advertised position. Initially speaking to Derrick Clowe's mother, she was told to call back to speak to Derrick or Margaret about the job posting. When she called back a couple of days later, she spoke to Margaret Clowe and asked if she should send in a resume. Margaret Clowe said, "No, I was just curious as to the number of people who were interested in the position and that I am not hiring at this time". Two weeks later, Helen Clowe spoke to Margaret Clowe at the Foodland in Ferryland, where Margaret Clowe said that she still didn't know if they were hiring and if they did they would be hiring a man. Helen Clowe also stated that she, like Joe Arsenault, who also lived in Ferryland, did not have any EMR training or a class IV drivers' license that would qualify her for a position with CAS.

Wayne Melendy:

Mr. Wayne Melendy is the general manager of Fewer's Ambulance Service which operates a number of ambulance services in various communities around Newfoundland, including Clarenville, Bonavista, Spaniard's Bay, New-Wes-Valley, Bonavista North, Baie Verte, and Burin to name a few. The group of ambulance services he manages has around 25 ambulances and employs approximately 80 to 85 ambulance personnel at any given time. He has worked for this company for the last 9 years and prior to that was employed by the coast guard. He gave evidence about the ambulance service industry in general and he said he previously hired Ms. Chidley in their Renew's location between April of 2005 to May 2006 when they closed that specific operation. He testified that Brenda Chidley still works for him from time to time on a casual basis.

Mr. Melendy spoke about his company's practice of hiring ambulance personnel. He indicated that they often have difficulty attracting qualified individuals for open positions. The Department of Health & Community Services requires the ambulance service companies to employ their best efforts to attract willing and suitable candidates. The process his company employs includes advertising in newspapers, on the radio and on the HRDC job bank. Once resumes are received, he separates the applicants into those with training and experience and those without. If experienced applicants are not available, which he testified is often the case, he would then contact the untrained applicants inviting them to attend an information session where he explains the requirements of the job in terms of training, hours of work and expectations. He stated that regardless of where the untrained applicant resides, he would still invite him or her to the information session. Those that remain interested may then take part in on-the-job training where they ride for two weeks or so as a third person on an ambulance while on

emergency calls in order to get a feel for the job. If they remain interested in pursuing this type of career, Mr. Melendy then starts training them for the job.

Mr. Melendy testified that in order to work as an ambulance attendant, you had to be an EMR I, EMR II or a paramedic. EMR is an acronym for Emergency Medical Responder. He said paramedics are hard to come by in this job market. A Department of Health & Community Services policy was entered into evidence through Mr. Melendy which outlined the Department's requirements in terms of qualifications for registration of ambulance personnel in the aforementioned three EMR categories. Mr. Melendy also testified that untrained individuals could be hired to work on an ambulance but before they could start working, they had to obtain their standard First Aid certificate, CPR certificate and a Class IV driver's license. With this level of training, they could work for a 90-day period until they successfully completed their EMR I training course. If they didn't complete this course within the 90-day period, their registration with the Department would be suspended and they could no longer work on the ambulance.

Mr. Melendy testified that hiring ambulance personnel was a large part of his job. He said he did not have a preference for hiring men or women. However, he also stated that ambulance personnel in the province are now predominately female, approximately 60 to 65%. He testified that the industry has changed somewhat in the last 10 years. In the past it was not uncommon to have patients request that the responding ambulance service not send a woman. This isn't the case any more but he said, "We had our struggles with that."

Mr. Melendy also gave evidence on the issue of response time, which is the time it takes for an ambulance to leave the ambulance base after the call for an ambulance is received. He said that he understood there is an unwritten standard in the industry that the response time be no more than 10 minutes but he is not sure if that is a Departmental standard or not. In any event, he indicated that 10 minutes is too long a response time and the company he works for endeavors to achieve a 5, 6 or 7 minute response time in all of their locations. This led to the question of whether he considers the residence of the applicant when hiring. He said he did and that a satisfactory response time was a very important factor in operating an ambulance service because it can be a matter of life or death. He indicated that even if an applicant lived well outside the 10-minute response time radius from the ambulance base, he would still be interested in processing their application further because they may be willing to relocate, or depending on the ambulance service's needs, the company may be willing to provide accommodations to the individual. Mr. Melendy offered an example by saying that he was currently in discussions with a paramedic residing in Toronto who applied for a position with his service and was considering relocating to Newfoundland for a "one year stint". Mr. Melendy also testified that even if something could not be worked out with an applicant who resided outside the response time radius, if the applicant was a qualified candidate, his company might still be willing to employ the individual from time to time on a casual basis.

Ms. Chidley had the opportunity to ask Mr. Melendy whether he would ever hire an untrained individual over another who was more qualified. Mr. Melendy responded by saying "all things being equal, no".

Madeline Mahar

Brenda Chidley's mother testified that she lived in Aquaforte, just 5 to 7 minutes from the base for CAS in Ferryland. She confirmed that her daughter had discussed the issue of staying with her in Aquaforte if she was successful in obtaining a job with CAS. She testified this conversation took place shortly after Brenda telephoned Derrick Clowe to ask if he wanted her to submit a written application.

The Respondent's Case

Margaret Clowe

Margaret Clowe testified that she is the operator and owner of CAS together with her husband, Derrick Clowe. They have operated this business for 37 or 38 years. Margaret Clowe testified that she had eight employees, including herself and her husband. She gave evidence that in the past she and her husband hired whomever they wanted and usually sought individuals from the community. Unlike Wayne Melendy, she did not resort to advertising in the local newspapers, on the radio or holding presentations for those who might be interested. She said she always tried to find people from her community because of the importance of response time in her business. She said that in May or early June 2005, one of her employees, Bernie O'Brien, asked if he could post a job advertisement in the Foodland in Ferryland. She didn't see any harm in it so she told him he could. This was the posting subsequently seen by Brenda Chidley as Mrs. Clowe stated that she had not advertised for hiring either before or after this one occasion. She also testified that prior to this job posting, one of her former employees, Justin Paul, left his employment with CAS and moved to Alberta. He had worked for her for 7 or 8 months. When asked if anyone responded to the Foodland job posting in 2005, Mrs. Clowe said that a few people responded but that she did not pay a lot of attention to it. She just wanted to get someone who would best serve their needs. She stated that she did not get any applications from individuals from Ferryland and that Joe Arsenault didn't apply. Instead, Mrs. Clowe said she approached Mr. Arsenault, who was a resident of Ferryland. She also testified that she did not generally discuss hiring issues with her employees except to the extent of saying "we need to hire a new person". No more than that.

Mrs. Clowe testified that the primary reason she hired Joe Arsenault was because he lived in Ferryland. She said that he was ex-military and a very respectful and dependable man. Response time, she indicated again, was very important. She had to have someone close to her.

Mrs. Clowe said she did not see any application submitted by Brenda Chidley. Although Brenda Chidley may have sent one in, she did not look at it or any other applications. She

restated that she wanted someone from Ferryland. She also stated that she did not review any of the applications received but that she was aware that there were approximately 4 or 5 submitted.

Ms. Clowe testified that all of her current employees live in Ferryland except Marjorie Maher who resides in Aquaforte, just 5 minutes away from the CAS base.

Margaret Clowe testified that she did not speak to Helen Clowe over the phone before hiring Joe Arsenault but instead she said she spoke to her at the Foodland in Ferryland subsequent to hiring Mr. Arsenault. She denied telling her that she wanted to hire a man. Margaret Clowe also denied telling Brenda Chidley that she was looking for a man to hire. She stumbled through an explanation that suggested Ms. Chidley said "I heard you hired a man" contrary to Ms. Chidley's evidence that stated Ms. Chidley said, "I heard you were looking to hire a man". Margaret Clowe's response to Ms. Chidley's question was "yes".

Ms. Clowe confirmed Mr. Melendy's evidence that new employees had to have their basic First Aid, standard CPR and a Class IV driver's license in order to begin work with their ambulance service. Within 90 days of being hired and registered with their regional health authority, new employees had to attain their EMR I level of training. She said that most of her employees were initially hired without the requisite training and achieved their EMR I qualification within the 90 day time period. Two people would operate an ambulance on a call and she always scheduled the more qualified of the two to work in the back with the patient. She said there was no requirement at CAS that either of the two ambulance workers be male and that on occasion, she herself worked with another woman on shift.

Margaret Clowe testified that she does the scheduling for CAS and that currently she works with Lee Dunne, Mollie Mead works with Derek Clowe and Bernie O'Brien with Joe Arsenault.

On cross examination, Mrs. Clowe admitted that the three main reasons why she hired Joe Arsenault were because he lived in Ferryland, he was of good character and CAS needed someone as soon as possible. Mrs. Clowe also admitted that at the time she hired Joe Arsenault, she was aware of Brenda Chidley's qualifications because she saw her working with Lawlor's Ambulance Service. She said the only reason why she didn't hire Brenda was because she lived in Renews.

Mrs. Clowe indicated that in 2005, CAS was operating with 6 employees on 3 shifts and that most of the time each shift had one man and one woman working. She also stated that when Justin Paul left CAS to go to Alberta, CAS could have hired a woman but, instead, chose to replace him with a male, Mr. Joe Arsenault. She said that CAS was a private ambulance service and she could hire whomever she wished. She stated that Joe Arsenault did not have EMR I or EMR II training at the time of his hiring, nor did he have his basic First Aid and standard CPR. Contrary to her testimony on direct and a letter she wrote to the Human Rights Specialist dated March 15, 2006 (Exhibit MC#1),

Margaret Clowe also stated under cross examination that Joe Arsenault did not have his class IV driver's license when he was initially hired.

Mrs. Clowe stated that she knew Brenda Chidley's mother lived 3 or 4 minutes away in Aquaforte but she didn't know Ms. Chidley was willing to stay with her mother while on call in the event Ms. Chidley had been hired by CAS. If she had known, she said she possibly would have hired Brenda Chidley but, even so, she probably would have hired whoever was closest, regardless of training. She said she had her mind made up and that is the way she had always done it.

Mrs. Clowe stated that she has hired two more individuals since Joe Arsenault, both male. She denied speaking to Helen Clowe over the phone prior to hiring Joe Arsenault and she said that Helen Clowe, the wife of her husband's first cousin, was lying in her testimony when she said that Mrs. Clowe said she need not send in a resume and that they were more interested in hiring a man. Mrs. Clowe said she only talked to Helen Clowe at the Foodland after hiring Joe Arsenault and that Helen Clowe said to her at the time that had she known CAS was looking for an ambulance worker, she would have applied.

Mollie Mead

Mollie Mead testified that she was hired by CAS in November of 2003. She did not submit an application or resume but simply called up and inquired about the availability of work. The Clowes invited her for an interview and she was hired-on even though she did not have the necessary training for the position. Over the next 90 days she attained the requisite qualifications, including the EMR I certificate. She testified that she worked with Bernie O'Brien for about a year and a half, followed by Justin Paul until he left for Alberta. Currently she is working on the ambulance with a male, Charlie Dunne. She said although she works the majority of the time with a male ambulance attendant, this still could not be considered the norm. She said that from time to time she also worked with another female ambulance attendant.

Mollie Mead stated that she may have told Brenda Chidley that CAS was looking to hire a man back in the spring of 2005 before Joe Arsenault was hired but she said that, if she did, it was based on her speculation and not from anything she heard from other employees of CAS or Derrick and Margaret Clowe. She said she could not remember clearly because it had happened over two years ago. However, if she did say that to Brenda, she was certain it was wholly based on her own speculation because she talked to nobody at CAS about hiring someone for the position vacated by Justin Paul.

Mollie Mead testified about a letter that she sent to CAS addressed to the attention of Margaret Clowe, sometime after Brenda Chidley's complaint had been filed with the Human Rights Commission. That letter was subsequently supplied to the Human Rights Specialist, Anna Dwyer, and a copy of it was entered as an exhibit through Mollie Mead (Exhibit MM#1). A direct quotation from the body of that letter follows:

“Dear Margaret Clowe:

I had no part of the discussions or hiring policies that took place with your service in June 2005.

Under no circumstances did I say to any person that Clowe’s Ambulance Service wanted to hire a male for the position.

Sincerely,
Mollie Meade”

Marjorie Maher

Marjorie Maher is a paramedic that has worked with CAS for 9 years. She was originally hired without the requisite qualifications but attained them within the 90-day time period subsequent to being hired. She lives in Aquaforte, NL which is approximately a 4 to 5 minute drive from Ferryland where the CAS base is located. Marjorie stated that she has worked with other woman on the ambulance over the years and she was not aware of a gender preference at CAS, nor a preference to have a mix of one male and one female on the ambulance at any given time. Marjorie’s husband is Brenda Chidley’s brother and Marjorie had telephone discussions with Brenda about the job at CAS in or about May or June 2005. However, she testified that she did not have any discussions about the job opening with anyone at CAS, nor did she hear from management or other employees of CAS that only a male was being sought for the position. After Joe Arsenault was hired, Brenda spoke to Marjorie about how disappointed she was that she didn’t get the job and that it was a male that was hired who was not as qualified as Brenda. She said she would have liked to have seen Brenda get the job.

Marjorie testified that she doesn’t get to see Brenda very often but the family usually gets together at Christmas and during the summer. Brenda’s mother’s house is usually where the family seems to gather. Marjorie said she visits Brenda’s mother approximately once or twice a week.

Marjorie stated that she knew Brenda would not have been permitted to live in Renewes while on call with CAS; however she did not talk about this issue with Brenda. She said that Brenda should have known this herself as Brenda would have been taught the importance of response time while doing her EMR II course.

A letter written by Marjorie Maher to Margaret Clowe dated March 13, 2006 was entered as Exhibit MCM#1. This letter was then provided to the Human Rights Specialist and counsel for the Commission and CAS agreed that this letter is normally part of the Investigator’s Report. Marjorie said she wrote the letter at the request of Mrs. Clowe because Brenda was saying that CAS was only looking to hire a man. She said that although she was asked to write it because of the Commission’s investigation, she did not feel any pressure to do so.

When asked if she saw the job advertisement at Foodland, Marjorie stated that she had heard a rumour about it but she hadn't seen it. Marjorie also testified that after Joe Arsenault was hired, there were two more men hired. Their names were Charlie Dunne and Lee Dunne. She stated that the two men came on staff unqualified however, similar to Joe Arsenault, obtained the requisite qualifications within 90 days of being hired.

Joe Arsenault

Mr. Arsenault testified that he has now worked for CAS for the last 3 years. When hired he lived in Ferryland with his wife but he has now moved to Aquaforte which is a 3 or 4 minute drive to Ferryland. Back in mid to late June 2005 he was informed by his wife about the job opening at CAS. Mrs. Clowe originally approached Joe's wife to see if he was interested. He then met with Mrs. Clowe in the café and gift shop owned by the Arsenaults in Ferryland. There they spoke about the job, including requisite training, pay and scheduling. A couple of days later he delivered his resume to CAS but cannot recall whether he was told he had the job in the café when he originally spoke to Mrs. Clowe or upon delivering the resumé. Joe stated that he was a retired Naval Weapons Technician with the Canadian Forces where he had worked for 24 years. While in the military he had done the standard first aid course on 5 occasions but upon being hired by CAS, he discovered that his prior first aid training was no longer valid. As a result, upon being told by Mrs. Clowe that he had the job he set about arranging to obtain his standard first aid and CPR training, which he did by way of a two-day course. Then he wrote his class IV driver's license test and within a day or two, completed his road test. He said he failed the road test on the first attempt but passed it on his second try the following day. Once he had his standard first aid, CPR and Class IV driver's license, he started driving an ambulance for CAS. His first day on the job was July 11, 2005 and on that day he started driving the ambulance. He said he obtained his EMR I qualification within 90 days of being hired.

On direct examination, a number of forms were entered into evidence through Mr. Arsenault that were collectively labeled Exhibit JA#1. The primary form in this package of documents was the Department of Health & Community Services Registration form for Ambulance Service personnel. On this form it indicates that Mr. Arsenault was not issued his CPR certificate until July 22, 2005 and that he did not sign his Confidentiality Oath Statement and Declaration of Conduct until July 26, 2005, sometime after his start date of July 11th, 2005.

Joe Arsenault testified that there are 8 employees at CAS and that he currently works on shift with Bernie O'Brien who is a paramedic. He said that he was not aware of any rule that puts one man with one woman on the ambulance but that it is usually based on a less qualified individual being paired with someone more qualified. However, he also stated that sometimes there is difficult lifting involved in the job. For example, he said that if you have someone 250 to 300 lbs and you have to move them down stairs, it can take a lot of strength, especially in older homes which have staircases that do not allow the stretcher to be used. He also said that Marjorie Maher is a slight woman and sometimes

had difficulty lifting patients. He said that because of this, Marjorie is usually paired with a man. He has never seen Marjorie on shift with another woman during his 3 years of working with CAS.

Derrick Clowe

Derrick Clowe testified that he has operated CAS with his wife for the last 38 years. They started with 4 employees. In 2005 they had 6 employees as compared to the 8 employees that CAS employed as of the date of the hearing. He said that CAS always hired people within their community. The only exception to this was the hiring of Marjorie Maher who lived in Aquaforte, just 3 to 5 minutes away from the ambulance base. He said sometimes they approached potential employees in the community or, on some occasions, they would receive inquiries from community residents about job openings. In most cases, the people they would hire would need to attain the requisite level of training to perform the job. Mr. Clowe confirmed prior testimony that new employees could drive the ambulance with standard first aid, CPR and a Class IV driver's license for a 90 day time period after which they must have attained their EMR I qualification to maintain their registration with the Department of Health & Community Services.

Mr. Clowe testified that he has never had a requirement that a female should be paired with a male on the ambulance at any time. He said he has scheduled woman together in the past, especially for rotational runs where CAS is transporting a patient from one hospital in the Province to another.

Mr. Clowe said that back in May or June of 2005, CAS was operating short staffed after the departure of Justin Paul to Alberta. At the time they had a shift schedule of 2 weeks on and one week off. During the weeks that you were working, you had to be ready to go at a moments notice 24 hours a day, 7 days a week. After Justin Paul left, employees were being asked to work an extra half-week in order to cover the vacancy. This proved stressful on the employees, especially those employees who had children. Bernie O'Brien, one of his more senior employees called and said that this interim schedule had been hard. He asked if he could place a job advertisement in the local Foodland or hardware store in Ferryland given the difficulty in finding potential employees in the community. Derrick Clowe said he did not review the ad prior to the posting but Bernie O'Brien did discuss it with him and he said it was okay. He also testified that there aren't many locations to post a job advertisement in his community. For example, he said, they were not allowed to post one at the post office.

Derrick Clowe stated there were a few responses to the Foodland advertisement. He remembers receiving an application from Brenda Chidley and Melvin Rossitter. He also had a call from a girl in Labrador. How she became aware of the job advertisement in the Ferryland Foodland was not discussed in evidence. He said he scanned through the resumes but that was all. He said Melvin Rossitter lived a half kilometer or so further away than Brenda Chidley. He said he could not take anyone from Renew's because response time was too important. He had a business to run and if he hired someone who lived that far away, the Department of Health & Community Services would come in and

rip his license off the wall. At the suggestion of Mr. Clowe's daughter, they decided to approach Joe Arsenault and it was Mrs. Clowe that handled everything thereafter with the hiring of Mr. Arsenault.

Derrick Clowe testified that he remembers speaking to Brenda Chidley over the phone back around the time of hiring of Joe Arsenault, but he does not remember if it was before or after Mr. Arsenault was hired. He said he only knew Brenda Chidley from hearing her name while visiting Marjorie Maher's home. He also saw her on one occasion when she was dropping off Mollie Meade in front of the CAS base in Ferryland. Apart from that, he said "I wouldn't know her if she fell in my face". However, later in his testimony he said that he knew Brenda Chidley did her EMR II course with Mollie Meade and that Brenda, together with her husband and children, lived in Ferryland.

Derrick Clowe stated that upon receiving Brenda Chidley's resume, he laid it aside for reason that the response time was too long from Renews. His expectation for response time is 3 to 5 minutes. He said that if Brenda Chidley lived within an acceptable response time distance from the CAS base in Ferryland, they would have hired her in a "snap of a finger". That was not the case, so he saw no need to speak with her about the job and the issue of response time.

On cross examination, Derrick Clowe admitted that it was possible that Brenda Chidley telephoned him prior to CAS hiring Joe Arsenault and that he told her not to send in a resume because he knew her background. He also admitted that she had called him twice and his wife once. When Brenda Chidley called him a second time, he said she was like a "sassy dog" accusing him of hiring an unqualified male in a position for which she was qualified. He did not discuss with Brenda the issue of her community of residence and response time. He said he never really considered Brenda for the position because she lived too far away from the CAS base.

Mr. Clowe also testified on cross-examination that in 2005 the general shift schedule was such that one man was paired with one woman. This could change from time to time for a variety of scheduling reasons. He also stated that in 2006, which was after the filing of Brenda Chidley's complaint, Marjorie Maher and Mollie Mead were scheduled to work together for about a year. The current general schedule, at the date of the hearing, also put a man and a woman together on the ambulance.

Mr. Clowe further stated on cross examination that it was important to adhere to the rules of the Department of Health & Community Services and that if he didn't, he would lose his ambulance service license. This led counsel for the Commission to refer to Exhibit JA#1, which was the registration particulars and qualifications filed with the Department of Health & Community Services for Mr. Joe Arsenault. Mr. Clowe stated that these papers had to be submitted in order to get a registration number for Joe Arsenault so that he could work on the ambulance and CAS could receive payment in relation this employee. Counsel for the Commission pointed out to Mr. Clowe that the filing date of these papers was August 21st, 2005 yet Joe Arsenault testified that his first day on the job was July 11th, 2005. Additionally, if Mr. Arsenault required his Class IV driver's license

together with his standard first aid and CPR to commence work, why was his CPR certificate issued with the date of July 22, 2005? Mr. Clowe's response to this was that Mr. Arsenault must have been wrong on his start date.

Positions of the Parties

Commission

Counsel for the Commission argued that Brenda Chidley was qualified for the advertised position at CAS back in the spring of 2005 and that despite Brenda Chidley's qualifications, she was not hired while a less qualified person was hired. The Commission further argued that the primary reason for Ms. Chidley not being hired was the fact that she was a female in contravention of the *Human Rights Code* and that the employer's explanation that it did not hire Brenda Chidley for reason of her community of residence not permitting a quick enough response time is not supported by the evidence.

CAS

Counsel for CAS argues that while Brenda Chidley was more qualified for the position than Joe Arsenault, the fact that Ms. Chidley lived in Renew, 15 to 20 minutes away from the CAS base, is a reasonable explanation for not hiring her since she could not respond to emergency calls within the 5 or 6 minute response time requirement. In addition counsel argues that when the evidence is considered on the balance of probabilities, the complainant and the Commission have failed to prove that CAS discriminated against Brenda Chidley by not hiring her for reason that she was a woman.

Decision

The relevant section of the *Human Rights Code* is section 9, which states as follows:

Discrimination in employment

9. (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of
 - (a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability; or
 - (b) that person's age, if that person has reached the age of 19 years,

but this subsection does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

It is alleged that CAS violated section 9 of the *Human Rights Code, supra* when CAS did not hire Brenda Chidley on the basis of her gender. Instead, it is alleged that CAS hired a male, Joe Arsenault, who was considerably less qualified for the position at the time of hiring.

In *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, 7 C.H.R.R. D/3102, Justice McIntyre of the Supreme Court of Canada stated at para. 24782:

“The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this contest is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer.”

In *Shakes v. Rex Pak Ltd.* (1981), 3 C.H.R.R. D/1001, the Ontario Board of Inquiry stated that three elements make out a *prima facie* case of discrimination in employment [at § 8918]:

- (a) ... the complainant was qualified for the particular employment;
- (b) ... the complainant was not hired; and
- (c) ... someone no better qualified but lacking the distinguishing feature which is the graveman of the human rights complaint ... subsequently obtained the position.

After having reviewed all of the evidence before me, I conclude that the Commission has established a *prima facie* case of discrimination on the basis of gender. I find that Brenda Chidley was qualified for the advertised position of ambulance worker, possessing an EMR II qualification with applicable work experience in the field. Brenda Chidley, a woman, was not hired by CAS while, Joe Arsenault, a man who was less qualified for the position, was hired.

Given that I have found that the Commission has established a *prima facie* case of discrimination, the burden of proof shifts to CAS to provide credible, non-discriminatory reasons for the failure to hire. CAS argues that they did not hire Brenda Chidley because she was unable to respond to emergency calls within the required response time due to her community of residence, some 15 to 20 minutes away by car from the CAS Ambulance Base in Ferryland. Upon review of all of the evidence presented at the hearing and for the reasons that will follow, I am unable to conclude that CAS has discharged this burden.

In her evidence, Margaret Clowe denied telling Brenda Chidley that she was looking for a man to hire for the position in question. She stumbled through an explanation that suggested Ms. Chidley said to her “I heard you hired a man” instead of what Ms. Chidley

said in her evidence that "I heard you were looking to hire a man". Margaret Clowe's response to Ms. Chidley's question was "yes". I find Brenda Chidley's evidence clear on this point while Margaret Clowe's testimony was awkward and unconvincing. I also find Helen Clowe's testimony with respect Margaret Clowe saying to her she was looking to hire a man credible and it corroborates Ms. Chidley's evidence that Margaret Clowe was looking to hire a man.

Ms. Clowe testified that she did not review any of the applications submitted in response to the Foodland advertisement in June of 2005, including that of Ms. Chidley's. It is peculiar that she and her husband would permit Mr. O'Brien to post an advertisement on behalf of her Ambulance Service seeking an ambulance worker and then not review any of the applications submitted. She testified that, at the time, she was "focusing on finding someone for the position." Would not employers who found themselves in this predicament at least review the applications submitted in hopes of identifying possible candidates? Additionally, if CAS needed someone as soon as possible, as Margaret Clowe testified, would not a person already trained achieve the time sensitive objective of getting someone to work right away instead of having to train somebody for 3 months? Ms. Clowe's testimony does not accord with normal, rational human behavior. I do not accept Ms. Clowe's testimony in this regard as credible.

Ms. Clowe also testified that she had to hire someone from Ferryland for the reason of maintaining an acceptable response time. She testified that she did not speak to Helen Clowe, a relative of her husband by marriage and a resident of Ferryland, prior to hiring Joe Arsenault; however, she was very foggy on the point. This is contrary to the pointed testimony of Helen Clowe in the Commission's case. Helen Clowe said she talked to Margaret Clowe over the phone about the job and Ms. Clowe said she was not hiring at that time; however, shortly after, Margaret Clowe hired Joe Arsenault. Additionally, Brenda Chidley's complaint to the Human Rights Commission was filed on July 5, 2005. CAS provided a written response on January 9, 2006 which response was contained in the Investigator's Report that was entered as a Consent Exhibit during this hearing; however, no mention of response time was given by CAS as a reason for not hiring Brenda Chidley in the Respondent's written response. It wasn't until Mrs. Clowe had telephone conversations with the Human Rights Specialist on July 31st and August 8th, 2006, over a year later, that the "response time" issue as a reason for not hiring Brenda Chidley was presented to the investigator as recorded in the Investigation Report filed by Anna Dwyer, Human Rights Specialist. As a result, I do not accept Margaret Clowe's testimony that finding someone who resided in Ferryland for response time reasons was her primary focus.

I do not find Mollie Meade's testimony credible. She said that she may have told Brenda Chidley that CAS was looking to hire a male but that her statement was "based on her speculation". She repeated this statement a number of times both on direct and cross-examination. What is notable here is that that statement directly contradicts the letter she wrote to Margaret Clowe that was then forwarded to the Commission's Human Rights Specialist (Exhibit MM#1), wherein she states "Under no circumstances did I say to any person that Clowe's Ambulance Service wanted to hire a male for the position." Ms.

Meade was generally evasive in her responses to cross-examination questions from counsel for the Commission. Ms. Meade eventually admitted, after being referred to specific examples, that the majority of the time she worked on the ambulance with men during her time at CAS; however, she still refused to say that it was the “norm”. I do not find her testimony credible due to the aforementioned direct contradiction on a crucial point but also because of her poor memory of the relevant period and her generally evasive responses.

It is clear that Mr. Arsenault was not as qualified as Brenda Chidley to work as an ambulance attendant at the time of hiring. Although I accept he obtained his EMR I qualification within the requisite 90 day time period, Exhibit JA#1 contradicts his evidence and that of Mrs. Clowe with respect to the testimony that he had the minimum level of training required to drive the ambulance during that initial 90 day time period. On July 11th, 2005, his first day of work, he did not have his CPR certificate as it was not issued until July 22nd, 2005.

Mr. Clowe testified that Government would not allow him to hire someone from Renew's because of response time. There was no evidence to support this and evidence from Mr. Melendy contradicts it. Where you live is not important. It is where you stay while you are on call. Of note here is the fact that Mr. Melendy indicated that response time was very, very important, but the fact that someone lived outside the response time radius did not lead to the determination that an applicant should not be considered. Who knows? The applicant may be willing to relocate or if the need for a qualified individual was great, the ambulance service itself might be willing to provide accommodation. An employer could not know the employee's intentions if the employer did not ask. If response time was such a critical issue to Mr. and Mrs. Clowe, together with the stated urgent need to find a replacement for Justin Paul as soon as possible, a reasonable person would have raised the perceived response time issue with Brenda Chidley. Yet, in this case, it was not raised until a year after the human rights complaint was filed by Ms. Chidley.

Joe Arsenault was very clear on his start date at CAS in his testimony. He said it was July 11th, 2005. Additionally, the papers filed with the Department of Health & Community Services to obtain Mr. Arsenault's registration number are clear in that they indicate he did not have the minimum CPR qualification until at least July 22, 2005 and that the full registration form was not filed with the Department of Health & Community Services until August 21, 2005, meaning that Joe Arsenault was working on the ambulance without the requisite qualifications and registration number for a substantial period of time. From all of the evidence I have heard in this case, this is contrary to the rules and standards of the Department of Health & Community Services. I do not accept Derrick Clowe's statement that he considers it important to adhere to the rules of the Department of Health and Community Services. To the contrary, it is evident that he is quite prepared to violate them for his own convenience. This undermines his credibility.

After reviewing the totality of the evidence in this case, I do not accept the Respondent's argument that CAS did not hire Brenda Chidley for reason that she was unable to respond

to emergency calls within the required response time given her community of residence and not because of her female gender. As a result, CAS has failed to discharge its burden of proof in response to a *prima facie* case of discrimination established by the Commission.

Even if I am wrong in that “response time” was a factor in the Clowe’s decision not to hire Brenda Chidley such that the burden of proof returns to the Commission, it would not change the end result of my decision.

Brenda Chidley’s evidence of Margaret Clowe saying she wanted to hire a man which was corroborated by similar evidence from Helen Clowe (a resident of Ferryland and relative of Derrick Clow by marriage), is very persuasive. That combined with my review of the totality of the evidence, both direct and circumstantial, and the credibility of the various witnesses satisfies me on the balance of probabilities that discrimination on the basis of gender was an influencing factor in the Clowe’s decision not to hire Brenda Chidley. It is not incumbent on me to determine that it was the sole or primary reason for that decision [see *Almeida v. Chubb Fire Security Division* (1984), 5 C.H.R.R. D/2104 at para. 17840-17841]:

“...it is sufficient for a complainant to establish that the prohibited ground of discrimination constituted only one among a number of factors leading to the decisions which are the subject matter of the complaint...

although the prohibited ground of decision making must have some causal role or influence in the decision made, it need not be the exclusive cause of or influence on the decision. Indeed, as is suggested in *Bushnell* itself, it is not necessary to establish that the prohibited ground was the main reason for the decision in question.”

Accordingly, Brenda Chidley’s complaint to the Commission is well founded and I find that she was discriminated against by the partnership known as Clowe's Ambulance Service, owned and operated by Derrick Clowe and Margaret Clowe, when they failed to hire her for the position of ambulance driver based significantly upon, if not only, the fact that she was a woman contrary to section 9 of the *Human Rights Code*.

Damages

The Commission has sought that the Respondent be ordered to cease contravention of the *Human Rights Code*, refrain from discrimination against persons on the basis of their gender, pay general damages for pain and suffering in the total amount of \$10,000 and pay further compensation for all expenses and costs which the Board deems appropriate. I note that no evidence supporting a claim for expenses or costs was led during the hearing nor did the Commission seek compensation for lost wages.

I am cognizant that the intent of human rights legislation is to compensate for the effects of discrimination rather than to penalize those responsible for it. At the same time, I also recognize that it is appropriate in human rights cases of this kind to award general

damages for injury to dignity, feelings and self respect. Taking all of this into account, including the authority I am granted pursuant to section 28 of the *Human Rights Code*, I find it appropriate to award the following remedies in this case:

- a. the Respondent shall cease its contravention of the *Human Rights Code* and shall refrain from all further discrimination against persons on the basis of their gender;
- b. the Respondent shall pay general damages to the Complainant in the amount of \$7,000 plus pre-judgement and post-judgement interest in accordance with the *Judgement Interest Act*, RSNL 1990, c. J-2 calculated from the date Joe Arsenault was hired, that being July 11th, 2005;
- c. the Respondent shall pay costs to the Commission in accordance with the Scale of Costs (Rule 55 of the *Rules of the Supreme Court, 1986*);

A handwritten signature in black ink, appearing to read 'Cillian D. Sheahan', with a long horizontal flourish extending to the right.

CILLIAN D. SHEAHAN
Adjudicator