Court of Queen's Bench of Alberta

Citation: SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707, 2015 ABQB 162

Date: 20150310
Docket: 1303 16795
Registry: Edmonton

Between:

SMS Equipment Inc

Applicant

- and -

Communications, Energy and Paperworkers Union, Local 707 (currently operating as UNIFOR, Local 707-A)

Respondent

Reasons for Judgment of the Honourable Madam Justice J.M. Ross

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Introduction

[1] The Applicant, SMS Equipment Inc [SMS or Employer] has applied for judicial review of the Arbitration Award decision of a Sole Arbitrator, Lyle Kanee, dated October 29, 2013: *SMS Equipment Inc and CEP, Local 707 (Cahill-Saunders), Re* (2013), 238 LAC (4th) 371, 2013 CanLII 71716 (AB GAA) [Arbitrator's Decision]. The Arbitrator concluded that the Employer is obligated to accommodate Ms. Cahill-Saunders [Grievor] because the requirement for her to

work rotating night and days shifts discriminates against her on the basis of family status, as a single mother of two young children, who encounters childcare difficulties during night shifts.

[2] SMS supplies equipment and equipment service to customers in the construction, mining and petrochemical industries in the Fort McMurray area, on a "24 hour a day, 7 days a week" basis. The Communications, Energy and Paperworkers Union, Local 707 [Union] is the certified bargaining agent for employees at Fort McMurray locations, except office, clerical and sales personnel. SMS and the Union are parties to a Collective Agreement.

[3] The Union filed a grievance on behalf of the Grievor, who works as a first-year apprentice welder on a "seven days on followed by seven days off and [rotates] night and day shifts each seven-day tour of work." Based on the Employer's refusal to accommodate the Grievor's request to work exclusively day shifts, the Union claimed that the Employer violated the prohibition against discrimination on the basis of family status, pursuant to the Collective Agreement and the *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*AHRA*].

[4] The Employer denied the grievance and argued that it had no obligation to accommodate the Grievor as the requirement for her to work rotating night and days shifts does not discriminate on the basis of family status.

Background Facts

[5] Prior to moving to Fort McMurray, Alberta, the Grievor lived in Newfoundland, where her first child was born in 2007. There she completed a welding course. She moved to Fort McMurray to work, and commenced employment with the Employer on November 30, 2010, "as a labourer, working 14 days on and 14 days off, with rotating day and night shifts each 14-day tour of work": Arbitrator's Decision, para 7. Her son remained in Newfoundland with his grandmother for the first nine months after his mother's move to Fort McMurray, but later joined her. At some point, the son's father also moved to Fort McMurray. The couple did not cohabit, but the father provided some childcare while the Grievor worked.

[6] In February 2012, the Grievor gave birth to a second son, who has a different father. While she was on maternity leave, she saw the Employer's advertisement for a first-year welder apprentice position with shifts of "seven days on and seven days off with rotating tours of days and nights." The Grievor successfully applied for the position, and returned to work with the Employer "on October 11, 2012, several months prior to the expiry of her maternity leave": Arbitrator's Decision, para 8.

[7] On November 8, 2012, after her first night shift tour, the Grievor requested, through an e-mail to the Employer, that her shift be changed to straight day shifts as she was finding it "a bit difficult." The work schedule of her older son's father had changed and he was no longer providing any significant childcare; and the father of her younger son had no involvement with his child. The Grievor had to rely on third-party childcare for both children, as she had no extended family in Fort McMurray.

[8] The Employer refused her request on November 20, 2012. On December 21, 2012, the Union filed a grievance on her behalf. The Employer denied the grievance, stating that it could not accommodate the Grievor's request.

[9] In March 2013, the Grievor spoke to a human resources representative of the Employer. The Grievor explained that she had obtained childcare, but that when she worked nights, it was

too expensive to pay for childcare both during the nights while she worked and during the days while she slept. As a result, she looked after the children herself during those days, and got "very little sleep before her next night shift."

[10] In April, 2013, a meeting was scheduled between the Employer and the Grievor to discuss her accommodation request. The Grievor advised that she was "barely making it" with all of her childcare expenses and that, without childcare during the days that she worked nights, she was not getting sufficient sleep. Issues were discussed regarding the contributions, or lack thereof, by her sons' fathers to expenses and childcare.

[11] On May 9, 2013, the Union requested a shift modification for the Grievor and another welding apprentice, who was prepared to work a schedule of exclusive nights while the Grievor would work a schedule of exclusive days. The Employer denied the request.

[12] The Union's grievance proceeded to Arbitration which was heard on July 8 and 9, 2013.

[13] Relevant provisions of the collective agreement include:

> 3.01 The management and operation of the plant and the direction of the working force are vested exclusively in the Employer.
>
> 3.02 The Employer has and shall retain the right to select its Employees, to hire, classify, promote, demote or discipline and discharge Employees for just cause, provided that a claim of discrimination against an Employee in respect to any of these matters, or a claim of violations, of any Section or Article of this Agreement, may be subject of a grievance and be dealt with as hereinafter provided.
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> ...
>
> 4.01 Neither party shall discriminate against any employee on the basis of Union activity, race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or any other person. The parties will act in accordance with *Human Rights, Citizenship, and Multiculturalism Act* that the foregoing grounds are subject to the *bonafide* occupational requirements permitted in law.

The Arbitrator's Decision

[14] On the issue of whether "family status" includes the duties and responsibilities of childcare, the Arbitrator held:

> [38] Alberta Human Rights Tribunals and labour arbitrators have previously interpreted "family status" in the *Act* to include family care responsibilities (see: *Rawleigh v. Canada Safeway Limited*, 2009 AHRC 6 ("Rawleigh"); *Rennie v. Peaches and Cream Skin Care Ltd.*, 2006 AHRC 13; *Alberta (Solicitor General) v. AUPE (Jungwirth Grievance)*, [2010] A.G.A.A. No. 24 (*"Jungwirth").*
> [39] I conclude that "family status" in the *Act* includes childcare responsibilities. To adopt the words of the [Federal] Court in [*Attorney General of Canada v Johnstone*, 2013 FC 113 (*Johnstone, 2013*)]: "It is within the scope of (the) ordinary meaning of the words; it is in accord with decisions in related human

> rights and labour forums; it is in keeping with the jurisprudence; and it is consistent with the objects of the *Act*."

[15] The Arbitrator's Decision regarding the test to establish a *prima facie* case of discrimination will be discussed in detail in a later portion of this decision. His conclusion on this point is summarized as follows:

> [73] In applying the facts of this case to section 7 of the [*AHRA*], I am mindful of the purposes of human rights legislation, which include the advancement of equity and fairness in the workplace and the alleviation of burdens, obstacles and disadvantages to participation in the workforce that are linked to childcare responsibilities. It is clear on the evidence that the additional burden of childcare responsibilities has been a factor in the relatively low participation rate of mothers in the building trades.
>
> [74] The Employer's rule requiring welders to work night shifts has the effect of imposing a burden on the Grievor due to her childcare responsibilities that is not imposed upon welders who do not share her status. As such, the Employer's rule limits the opportunities of the Grievor to fully participate in the workforce because of her childcare responsibilities.
>
> [76] Accordingly, for all of the reasons discussed above, I conclude that the Union has established a *prima facie* case of discrimination on the basis of family status.

[16] Finally, on the issue of whether the Employer established that its rule or policy is a "*bona fide* occupational requirement," the Arbitrator held:

> [79] The Employer called no evidence to justify the rule requiring the Grievor and other employees to work rotating night and day shifts or any evidence that accommodating the Grievor by permitting her to work exclusively nights [sic] would cause it undue hardship.
>
> [80] Accordingly, I conclude that [the] Employer has not established that its rule or policy is a *bona fide* occupational requirement and hence the Employer's rule requiring the Grievor to work rotating night and days shifts is discriminatory.

[17] The Arbitrator directed the Employer to forthwith accommodate the Grievor by permitting her to work a straight day shift: Arbitrator's Decision, at para 84.

Issues

[18] This application requires a review of the Arbitrator's decision in relation to the following issues:

1. whether "family status" includes the duties and responsibilities of childcare;
2. whether the Union has established a *prima facie* case of discrimination; and
3. whether the Employer has established that its rule or policy is a *bona fide* occupational requirement.

Standard of review

General Principles

[19] ***Dunsmuir v New Brunswick***, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [***Dunsmuir***] indicates that existing jurisprudence on the standard of review remains relevant. As summarized at para 62:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[20] The deferential standard of review – reasonableness – applies to questions of fact and "questions where the legal and factual issues are intertwined with and cannot be readily separated": ***Dunsmuir*** at para 53.

[21] In addition, reasonableness review usually applies "where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity...Adjudication in labour law remains a good example of the relevance of this approach": ***Dunsmuir*** at para 54. "[A]t an institutional level, adjudicators acting under [their enabling statute] can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions": ***Dunsmuir*** at para 68.

[22] The correctness standard of review applies to constitutional questions, questions of general law that are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" and true questions of jurisdiction: ***Dunsmuir*** at paras 55, 60.

Parties' Positions

[23] The parties agree that there are aspects of the Arbitrator's decision which are reviewable on the reasonableness standard: his factual findings and his determination that the Employer had not established that its rule or policy was a *bona fide* occupational requirement.

[24] The parties differ regarding the standard of review on the first two issues, the definition of "family status" under the *AHRA* and the test to establish a *prima facie* case of discrimination based on family status. The Employer submits that these are questions of general law of central importance to the legal system as a whole, and therefore reviewable on a standard of correctness. The Union submits that these questions, as presented in this case, are questions within the specialized expertise of the Arbitrator and thus properly reviewed on a standard of reasonableness.

Legal Decisions of Human Rights Tribunals

[25] Pre-***Dunsmuir*** the courts did not defer to legal decisions of human rights tribunals, even regarding interpretation of their constituent statutes: ***Canada (Attorney General) v Mossop***, [1993] 1 SCR 554, at para 45 [***Mossop***]. The issue in that case was the interpretation of the term "family status."

[26] Post-***Dunsmuir*** the Supreme Court returned to the issue of deference to legal decisions of human right tribunals in ***Canada (Canadian Human Right Commission) v Canada (Attorney General),*** 2011 SCC 53; [2011] 3 SCC 471 [***Mowat***]. The Court concluded that the reasonableness standard of review applied to the human rights tribunal's interpretation regarding whether legal costs might be included in a compensation order, holding that this was neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside of the tribunal's area of expertise. However, the Court cautioned that some questions of law entrusted to human rights tribunals may continue to be reviewable on a standard of correctness. The Court commented on the "degree of tension" in relation to the post-***Dunsmuir*** system of judicial review as applied to decisions of human rights tribunals at paras 22-23:

> 22 The nature of these tribunals lies at the root of these problems. On the one hand ... administrative tribunals are generally entitled to deference, in respect of the legal interpretation of their home statutes and law or legal rules closely connected to them. On the other hand, our Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. The nature of the "home statute" administered by a human rights tribunal makes the task of resolving this tension a particularly delicate one. A key part of any human rights legislation consists of principles and rules designed to combat discrimination.
>
> 23 There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized are of expertise. Proper distinctions ought to be drawn...

[27] Since ***Mowat*** the Supreme Court of Canada applied a reasonableness standard of review to a human rights tribunal decision in ***Saskatchewan (Human Rights Commission) v Whatcott***, 2013 SCC 11,[2013] 1 SCR 467 [***Whatcott***] , in relation to the interpretation and application of a hate speech provision. The Court held at para 168:

> [T]he decision was well within the expertise of the Tribunal, interpreting its home statute and applying it to the facts before it. The decision followed the *Taylor [(Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892)] precedent and otherwise did not involve questions of law that are of central importance to the legal system outside its expertise. The standard of review must be reasonableness.

[28] In Alberta the correctness standard of review was applied by the Court of Appeal to a human rights tribunal's interpretation of a hate speech provision: ***Lund v Boissoin***, 2012 ABCA 300 at para 40, 69 Alta LR (5th) 272). This case preceded ***Whatcott***. Recent decisions from this court have adopted different standards of review in relation to human rights tribunal decisions

regarding discrimination based on disability: see ***Bish v Elk Valley Coal Corp***, 2013 ABQB 756, at para 23 (correctness) and ***Lethbridge Industries Ltd v Alberta (Human Rights Commission)***, 2014 ABQB 496 at paras 76-79, 1 Alta LR (6th) 1 [***Lethbridge Industries***] (reasonableness).

[29] In a recent decision of the Federal Court of Appeal, the correctness standard was applied to a human rights tribunal's determination of the issues under consideration in this application: the meaning and scope of "family status" as a ground of discrimination and the test for a finding of *prima facie* discrimination on that ground: ***Johnstone v Canada (Border Services)***, 2014 FCA 110 at paras 44- 52, 459 NR 82 [***Johnstone* CA**].

Labour Arbitrators and Human Rights Law

[30] The present case does not involve a human rights tribunal, but a labour arbitrator. Does this make a difference?

[31] The Alberta Court of Appeal found no difference in ***Lethbridge Regional Police Service v Lethbridge Police Assn***, 2013 ABCA 47 at para 28, 355 DLR (4th) 484 [***Lethbridge Police***]:

> Labour arbitrators are sometimes required to consider human rights and discrimination issues, and in this case the human rights issues were specifically referred to the arbitrator. Human rights issues are unusual in that they may be decided by a number of tribunals: human rights commissions, labour arbitrators, professional disciplinary bodies, and the ordinary courts: *Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65 at paras. 27-8, 505 A.R. 115, 39 Alta. L.R. (5th) 104. Where a number of tribunals have concurrent jurisdiction over an issue, consistency requires that review be for correctness: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para. 15, 347 D.L.R. (4th) 235. Likewise, the nature of human rights issues are that they are questions of law of general importance to the legal system. In the circumstances, the appropriate standard of review is correctness (even when such issues are decided by human rights panels): *West Fraser Mills Ltd. (Skeena Sawmill Division) v. United Steelworkers of America*, 2012 BCCA 50 at paras. 25-6, 29 B.C.L.R. (5th) 133; *Irving Pulp & Paper Ltd. v. Communications Energy and Paperworkers Union*, 2011 NBCA 58 at paras. 22-3, 375 N.B.R. (2d) 92; *Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3 at para. 8, 493 A.R. 295, 39 Alta.L.R. (5th) 236; *Walsh v. Mobil Oil Canada*, 2008 ABCA 268 at para. 55, 94 Alta.L.R. (4th) 209. However, the underlying factual findings of the arbitrator are still entitled to deference.

[32] The comments regarding correctness review in ***Lethbridge Police*** were not essential to the decision, as the Court of Appeal applied a reasonableness standard of review in determining that the arbitrator's finding of bad faith was "not available on the facts and the law" (at para 67).

[33] With respect, I have concluded that the comments in ***Lethbridge Police*** should not be followed. First of all, the Court of Appeal placed significant reliance on ***Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada***, 2012 SCC 35 at para 15, 347 DLR (4th) 235 [***Rogers***] for the proposition that "where a number of tribunals have concurrent jurisdiction over an issue, consistency requires that review be for correctness." ***Rogers*** has subsequently been clarified as limited to the unique circumstances

where the tribunal and the court "may each have to consider the same legal question at first instance," which is *not* the case here: ***McLean v British Columbia (Securities Commission)***, 2013 SCC 67 at para 24, [2013] 3 SCR 895 [***McLean***]. Further, the Court of Appeal relied on ***Irving Pulp & Paper Ltd v Communications Energy and Paperworkers Union***, 2011 NBCA 58, 375 NBR (2d) 92, which was overturned by the Supreme Court of Canada (applying a reasonableness standard of review, rather than the correctness standard applied by the New Brunswick Court of Appeal): 2013 SCC 34, [2013] 2 SCR 458 [***Irving***]. Finally, the Court of Appeal did not consider ***Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals***, 2011 SCC 59, [2011] 3 SCR 616 [***Nor-Man***], which was followed in ***Irving***.

[34] In my view, the weight of authority clearly supports a reasonableness standard of review in relation to the decision of a labour arbitrator interpreting and applying human rights law in the context of a collective agreement.

[35] In ***Mossop***, the Supreme Court expressly differentiated between human rights tribunals and labour adjudicators, at para 45:

> [A] human rights tribunal does not appear to me to call for the same level of deference as a labour arbitrator. A labour arbitrator operates, under legislation, in a narrowly restricted field, and is selected by the parties to arbitrate a difference between them under a collective agreement the parties have voluntarily entered. As well, the arbitrator's jurisdiction under the statute extends to the determination of whether a matter is arbitrable. This is entirely different from the situation of a human rights tribunal, whose decision is imposed on the parties and has a direct influence on society at large in relation to basic social values.

[36] In ***Dunsmuir***, the Supreme Court referred to labour law adjudication as an example of a circumstance in which reasonableness review applies "where a tribunal is interpreting its own statute *or statutes closely connected to its function*" (at para 54, emphasis added).

[37] The authority of labour arbitrators to enforce rights and obligations under human rights legislation was affirmed in ***Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324 (OPSEU)***, 2003 SCC 42, [2003] 2 SCR 157. The Supreme Court contemplated in that decision that labour arbitrators would develop expertise in relation to human rights statutes as they dealt with these issues on a repeated basis: at para 53. Cases cited on this application demonstrate that human rights statutes have since become closely connected to the function of labour arbitrators and thus within their specialized area of expertise: ***Lethbridge Police***; ***Telecommunications Workers Union v Telus Communications Inc***, 2014 ABCA 154, [2014] 6 WWR 217 [***TWU***]; *Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungwirth Grievance)*, (2010) 192 LAC (4th) 97; *Manitoba Hydro v International Brotherhood of Electrical Workers, Local 2034*, [2013] MGAD No 14.

[38] In determining whether a question of general law is of central importance to the legal system as a whole, it is essential to consider the context in which the question arises. Questions of general law or of broad import in society have been held *not* to come within this category when they have occurred in the context of a labour arbitration.

[39] ***Nor-Man*** dealt with the application of the principle of estoppel in a labour arbitration. The Court of Appeal for Manitoba held that correctness review applied because the issue involved the equitable remedy of estoppel, a question of general law of central importance to the legal system and beyond the expertise of the arbitrator. The Supreme Court of Canada disagreed, holding that estoppel, when "imposed as a remedy by an arbitrator seized of a grievance in virtue of a collective agreement" does not fall within a category of questions subject to review for correctness: para 38. Labour arbitrators require flexibility to craft appropriate remedial doctrines, and to this end they may adapt common law and equitable doctrines. Reasonableness is the applicable standard of review.

[40] ***Irving*** related to an employer's mandatory random alcohol testing policy. The Court of Appeal for New Brunswick applied a correctness standard because of the importance to the public at large of the issue of balancing competing interests in privacy and workplace safety. The Supreme Court of Canada held that the prospect of wider public concern did not transform the legal question into a question of central importance to the legal system outside the arbitrator's expertise. The question remained one of management's authority under a collective agreement, a question that was "plainly part of labour arbitrators' bread and butter," reviewable on a reasonableness standard: at para 66 (per Rothstein and Moldaver JJ., dissenting, but in agreement with the majority on this point).

[41] The reasonableness standard of review was also applied in the recent decision of ***British Columbia Teachers' Federation v British Columbia Public School Employers' Association***, 2014 SCC 70, rev'g 2013 BCCA 405 (para 22), where the Supreme Court in a very brief decision held that the British Columbia Court of Appeal "erred in failing to give deference to the Arbitrator's interpretation of the collective agreement and in failing to recognize the different purposes of pregnancy benefits and parental benefits." The Court of Appeal had applied the correctness standard because the arbitrator was required to determine whether the collective agreement conformed to the provisions of human rights legislation.

[42] Legal principles pertaining to discrimination do have general application and are of broad social import. However, the issues in this case - whether the Employer's shift schedule as applied to the Grievor constitutes a *prima facie* case of discrimination based on family status - require an appreciation of how human rights principles apply in the unionized labour environment. The Employer and the Union agreed that these were arbitrable issues. These issues are within the specialized expertise of the Arbitrator, and in this context are not questions of central importance to the legal system as a whole.

[43] I conclude that reasonableness review applies to all aspects of the Arbitrator's decision.

Review for Reasonableness

[44] In ***Canada (Citizenship and Immigration) v Khosa***, 2009 SCC 12 at para 59, [2009] 1 SCR 339, the scope of review for reasonableness was summarized:

> [W]here the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" . . . There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and

> intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[45] In ***McLean*** at paras 40-41, the Supreme Court stated that:

> [U]nder reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist... Judicial deference in such instances is itself a principle of modern statutory interpretation.
> Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the [administrative decision maker's] interpretation is *unreasonable* ... And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation. [*Emphasis in Original*].

Issue 1 – Does the term "family status" include the duties and responsibilities of childcare?

[46] The Arbitrator concluded that "family status" in the *AHRA* includes childcare responsibilities because "[i]t is within the scope of the ordinary meaning of the words; it is in accord with decisions in related human rights and labour forums; it is in keeping with the jurisprudence; and it is consistent with the objects of the *Act*."

[47] SMS takes issue with the Arbitrator's reliance on decisions from other jurisdictions despite differences in the definitions and preambles of human rights laws, and submits that his definition of "family status" improperly incorporates a financial element to childcare obligations, as he found that childcare costs were captured by this ground of discrimination.

[48] There is no suggestion that the Arbitrator misconstrued the jurisprudence or the objects of the *AHRA*. Further, the definition of "family status" in section 44(f) of the *AHRA*, "the status of being related to another person by blood, marriage or adoption," is no way inconsistent with the Arbitrator's conclusion.

[49] Given the absence of clearly contradictory legislative language or jurisprudence on this point, the Arbitrator's interpretive approach was certainly reasonable. As to his consideration of childcare costs, it seems to me that it is practically impossible to avoid a financial aspect to obligations in general. To the extent that reasonable costs of childcare are implicated in the performance of childcare obligations, this financial component does not detract from the meaning of "family status."

[50] I conclude that the Arbitrator's determination, that the term "family status" in the *AHRA* includes childcare responsibilities, clearly falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, and his written reasons demonstrate the existence of justification, transparency and intelligibility within the decision-making process. I am not sure that SMS has even reached the point of establishing that its competing interpretation of family status is reasonable; I have no doubt that SMS has not demonstrated that the Arbitrator's interpretation was unreasonable.

Issue 2 – Did the Union establish a prima facie case of discrimination?

[51] As reviewed by the Arbitrator and by the parties on this application, competing approaches have developed in the jurisprudence regarding the test to establish a *prima facie* case of discrimination based on family status.

[52] One approach applies the test from Supreme Court of Canada cases involving adverse-effect discrimination based on other prohibited grounds. The Arbitrator referred to this as the *Hoyt* test (*Hoyt and Canadian National Railway*, 2006 CHRT 33) under which "a *prima facie* case of discrimination has been established if the complainant has been adversely affected or disadvantaged based upon her family status by an employer rule or policy": Arbitrator's Decision, para 54.

[53] Under this test, it is clear that a *prima facie* case of discrimination against the Grievor was established. "The adverse effects upon the Grievor, going sleepless or spending additional sums of money for childcare while she sleeps, are directly the result of the Employer's rule requiring her to work night shifts and her responsibilities as a single mother to care for her children": Arbitrator's Decision, para 57.

[54] The second approach arises from a concern that an "open-ended" approach "would have the potential to cause disruption and great mischief in the workplace": ***Health Sciences Assn of British Columbia v Campbell River and North Island Transition Society***, 2004 BCCA 260 at para 38, 240 DLR (4th) 479 [***Campbell River***]. As a result, a higher standard of proof has been applied. This standard has been variously expressed. A *prima facie* case may require "a serious interference with a substantial parental or other family duty or obligation": ***Campbell River***, at para 39, or "extraordinary" circumstances: *Evans v University of British Columbia*, [2007] BCHRTD No 348, at para 32; cited in Arbitrator's Decision, para 54. Further, some decisions have required employees to prove they have taken all reasonable steps to "self-accommodate" before a *prima facie* case of discrimination may be established: see *International Brotherhood of Electrical Workers, Local 636 v Power Stream Inc (Bender Grievance)*, [2009] OLAA No 447; *Alberta (Solicitor General) v AUPE (Jungwirth Grievance)*, [2010] AGAA No 24; and ***Attorney General of Canada v Johnstone***, 2013 FC 113, cited in Arbitrator's Decision, at paras 64-68.

[55] The Arbitrator reviewed the case law and held that he preferred the *Hoyt* approach and considered it to be in line with the requirement to give human rights legislation an "large and liberal interpretation": Arbitrator's Decision, para 59.

[56] However, the Arbitrator did not stop at applying the *Hoyt* approach. He held that it was not necessary for him to "resolve the debate" regarding a higher standard of proof, as it was clear that the Grievor's parenting responsibilities were "extraordinary" and that the adverse impact on her of the Employer's rule was "serious" and her obligation to support her family was "significant": Arbitrator's Decision, paras 62-63.

[57] Regarding self-accommodation, the Arbitrator expressed the view that self-accommodation is not properly considered in determining whether a *prima facie* case of discrimination is established, although it is clearly relevant in determining what reasonable accommodation an employer is required to provide: Arbitrator's Decision, para 69.

[58] However, again, the Arbitrator did not stop at this point. He held that he did not have to "definitively decide this in this case, as this is not a case about self-accommodation" (Arbitrator's Decision, para 70). He went on to explain at paras 70-71:

> The Grievor has two choices. She can pay for additional childcare while she sleeps during the days or she can care for them herself and not be properly rested to fulfill either her work or parenting responsibilities. She has chosen the latter, but it is clearly not a viable choice. With regard to acquiring additional childcare while she is at home sleeping before her next shift, the point is not that she may have other available sources of income or that she could find ways to reduce her expenses. It is that the Employer's policy that requires her to work rotating shifts requires her to spend additional income to pay for childcare while she is not working, in addition to paying for childcare while she is at work ...It is clear that the Grievor is experiencing financial difficulty. She is already spending over 75% of her net income on rent and childcare. But whatever choices she made, if the fathers of her children financially contributed to their care or she drove a less expensive vehicle or she was able to access government subsidies, she would still be required to spend additional amounts of money to pay for childcare while she is not at work and that is an adverse effect of the Employer's rule that is directly linked to her unique family status.
>
> It is not possible to look at the effort the Grievor has undertaken to provide adequate financial and emotional support and to care for the safety and well-being of her children and conclude that she has not "tried to reconcile (her) family obligations with (her) work obligations", before seeking accommodation from the Employer. Furthermore, in an effort to reconcile these competing obligations, the Grievor or her union, found another apprentice welder on the opposite shift willing to work straight nights so as to permit her to work straight days.

[59] The Arbitrator found, therefore, that the Union had established a *prima facie* case of discrimination on the basis of family status.

[60] There is no suggestion that the Arbitrator did not appreciate the range in the case law of the tests to establish a *prima facie* case of discrimination based on family status. In this application, SMS relies on a subsequent statement of the test by the Federal Court of Appeal in ***Johnstone CA*** at para 93:

> [In] order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

[61] Assuming that this is the correct test, it does not change in substance the law reviewed by the Arbitrator.

[62] Thus, the Arbitrator held that regardless of which test was used, a *prima facie* case of discrimination was established. His review of the law is transparent and intelligible; indeed it is

not criticized. Any issue with his decision is not an issue in terms of his statement of the possibly applicable tests; it is an issue with regard to his application of the facts to the tests. This is a question of mixed fact and law, regarding which deference is clearly mandated.

[63] SMS's submission that the Arbitrator's Decision is unreasonable focuses on his statement that "this is not a case about self-accommodation." SMS submits that this statement amounted to a rejection of self-accommodation as an aspect of the *prima facie* test, and that in the wake of the Federal Court of Appeal's decision in ***Johnstone CA***, that is not within a range of acceptable legal outcomes. SMS argues that, while the Arbitrator later makes findings that the Grievor did take such steps, his finding that "this is not a case about self-accommodation" demonstrates that he in fact failed to apply this part of the *prima facie* test.

[64] I reject this submission, which in my view is based on taking the phrase "this is not a case about self-accommodation" completely out of context and misinterpreting the Arbitrator's reasons. Considered in context, it is clear that the Arbitrator was making precisely the same point about self-accommodation as an aspect of the *prima facie* test that he had previously made about requirements to demonstrate a "substantial interference" or "extraordinary circumstances." He was stating that he did not need to decide whether any of these elements were properly included in the *prima facie* test, because all of them were clearly made out on the facts of the case. His view is made absolutely clear in the immediately following paragraph, where he states: "It is not possible to look at the effort the Grievor has undertaken to provide adequate financial and emotional support and to care for the safety and well-being of her children and conclude that she has not "tried to reconcile (her) family obligations with (her) work obligations," before seeking accommodation from the Employer." This is a quote from the Federal Court decision in ***Johnstone*** previously cited by the Arbitrator as one of the decisions calling for a consideration of self-accommodation in the context of the *prima facie* case: Arbitrator's Decision, at para 68.

[65] SMS further submits that the Arbitrator's Decision was unreasonable because he did not consider the Grievor's lack of self-accommodation efforts, "notwithstanding his express factual findings that she did not ask the boys' fathers to assist with childcare, financially or otherwise, that she did not apply for child support, and that she did not apply for available childcare subsidies."

[66] Again, I reject this submission. It is clear that the Arbitrator did consider these findings, and found that they did not detract from the Grievor's reasonable self-accommodation efforts. He noted the Grievor's financial difficulty; he noted that there were steps she could take in this regard, but held that "whatever choices she made, if the fathers of her children financially contributed to their care or she drove a less expensive vehicle or she was able to access government subsidies, she would still be required to spend additional amounts of money to pay for childcare while she is not at work and that is an adverse effect of the Employer's rule." In other words, the proposed self-accommodation would not prevent the adverse effect.

[67] The Arbitrator is entitled to deference in his assessment of the reasonableness of self-accommodation efforts. No legal error is shown. The Employer has not pointed to a self-accommodation case that has held that a single parent must seek government benefits (that she was in any event not entitled to) or commence legal proceedings against biological parents of her children before seeking a workplace accommodation.

[68] I conclude that the Arbitrator's determination that the Union had established a *prima facie* case of discrimination was reasonable.

Alternative Correctness Review on Issues 1 and 2

[69] In the event that I may have erred in my conclusion that I am not bound by ***Lethbridge Police***, such that correctness review applies regarding Issues 1 and 2, I conclude that, applying the correct interpretation of "family status," and the correct *prima facie* test of discrimination, I would reach the same conclusion reached by the Arbitrator.

[70] I find that the Arbitrator's decision that "family status" under the *AHRA* includes childcare obligations is not only reasonable, but correct, for the reasons provided by the Arbitrator. In addition to the Arbitrator's review of the law, I note that the Federal Court of Appeal came to the same conclusion in ***Johnstone CA*** at paras 59, 66, that "judges and adjudicators have been almost unanimous in finding that family status incorporates parental obligations such as childcare obligations" and that "[t]here is no basis for the assertion that requiring accommodation for childcare obligations overshoots the purpose of including family status as a prohibited ground of discrimination." The Employer's narrow interpretation of "family status" would limit this ground of discrimination to direct discrimination only. There is nothing in the *AHRA* to support such restrictive treatment of this prohibited ground of discrimination.

[71] As to the test to establish a *prima facie* case of discrimination, it is my view that the test that applies to other prohibited grounds of discrimination under the *AHRA* also applies to discrimination based on family status. The Arbitrator conducted an extensive review of Supreme Court of Canada cases, and derived the following principles, with which I agree:

- Section 7 of the [*AHRA*] is to be given a broad and liberal interpretation that is consistent with the purposes of human rights legislation, which include the advancement of equity and fairness in the workplace and the alleviation of burdens, obstacles and disadvantages to participation in the workforce that are linked to the protected grounds, in this case, family status.
- No degree of discrimination is to be tolerated. There is no threshold of discrimination that parents must accept before seeking accommodation from their employers.
- My focus is not to be on the motive or intentions of the Employer but on the effect upon the Grievor. Does the Employer's rule requiring welders to work night shifts have the effect of imposing a burden on the Grievor due to her family status that is not imposed upon welders who do not share her status?
- It is in the interests of society to share the burden of family responsibilities to the extent that the burdens are borne disproportionately by working parents in a way that impedes their full participation in the workforce. Does the Employer's rule limit opportunities for the Grievor to fully participate in the workforce due to her family status?
- It is reasonable to expect employers to design their workplace and develop rules and policies that will further these purposes, including reasonable individual accommodation. Has the Employer designed a rule that reflects the differences of individuals in the workforce due to their family status?

- The "choice" to become a working parent, or in this case, a single working parent, and to fulfill the duties and responsibilities of both work and parenthood, do not negate a claim of discrimination.

[72] In addition to the cases reviewed by the Arbitrator, the Supreme Court of Canada again reaffirmed the test to demonstrate *prima facie* discrimination in ***Moore v British Columbia (Education)***, 2012 SCC 61 at para 33, [2012] 3 SCR 360 [***Moore***]. As recently restated by the Alberta Court of Appeal in ***TWU*** at paras 27-28, establishing a *prima facie* case of adverse effect discrimination involves a three-part test. It must be shown that:

1. The complainant has a characteristic that is protected from discrimination;
2. The complainant has experienced an adverse impact; and
3. The complainant must show that the protected characteristic was a factor in the adverse impact.

[73] This test has been applied to discrimination based on disability (***Moore***), religion (***Commission scolaire régionale de Chambly v Bergevin***, [1994] 2 SCR 525, 169 NR 281 [***Bergevin***]), and gender (***British Columbia (Public Service Employee Relations Commission*** ***v BCGSEU (Meiorin Grievance)*** [***Meiorin***]), [1999] 3 SCR 3, 244 NR 145. Why would it not apply to family status? As the Arbitrator noted, the *AHRA* "does not provide for a hierarchy of rights – it makes no distinction on the listed protected grounds": Arbitrator's Decision, para 59.

[74] The Federal Court of Appeal commented on this point in ***Johnstone CA***, agreeing that "the test that should apply to a finding of *prima facie* discrimination on the prohibited ground of family status should be substantially the same as that which applies to the other enumerated grounds of discrimination." However, the Court of Appeal observed that the test was necessarily "flexible and contextual": ***Johnstone CA*** at para 81. For example, a complainant in a religious discrimination case must demonstrate a sincerely held religious belief or practice, and an interference that is more than trivial or insubstantial: ***Johnstone CA*** at para 85, citing ***Syndicat Northcrest v Amselem***, 2004 SCC 47 at paras 56-62, [2004] 2 SCR 551 [***Amselem***].

[75] ***Amselem*** was a case interpreting the protection of freedom of religion under the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*, as opposed to a claim of adverse effect discrimination, and care must be taken in applying its principles out of context. For example, ***Bergevin***, which was a case of adverse effect discrimination, rejected the application of a *de minimus* test to the evaluation of the existence of *prima facie* discrimination: ***Bergevin*** at paras 22-24, cited in Arbitrator's Decision, para 48.

[76] Nevertheless, accepting that the *prima facie* test of discrimination should be applied flexibly and contextually, this means only that the ***Moore*** test should be applied flexibly and contextually. A flexible and contextual application of the requirement to demonstrate that the protected characteristic of family status is a factor in the adverse impact of a workplace schedule requires a demonstration of the first two factors in the test adopted by the Federal Court of Appeal in ***Johnstone CA***. A claimant must show "that a child is under his or her care and supervision' and "that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice." This follows from the determination that "family status" includes "childcare obligations," not personal choices.

[77] A flexible and contextual application of the ***Moore*** test does not justify the application of an entirely different test of *prima facie* discrimination, and particularly does not justify including

within that test a self-accommodation element that is not required with respect to other prohibited grounds of discrimination. This is unnecessary and contrary to the objects of human rights law. It is unnecessary because a finding of discrimination does not automatically follow once a *prima facie* case is established. It is only when the complainant establishes a *prima facie* case and the respondent fails to justify the rule or conduct that discrimination will be found. It is contrary to the objects of human rights law because it imposes one-sided and intrusive inquiries on complainants in family status discrimination cases. Complainants are not only required to prove that a workplace rule has a discriminatory impact on them, but that they were unable to avoid that impact. Thus the Grievor was subjected to an examination regarding her relationship or lack thereof with the biological fathers of her children, her choice of caregivers for her children and her personal financial circumstances. She had to undergo this examination before the Employer would even consider a request for an accommodation in the form of a shift exchange that she had arranged with another willing employee. The search for accommodation is intended to be "a multi-party inquiry," involving the employer, the union and the complainant: ***Central Okanagan School District No 23 v Renaud***, [1992] 2 SCR 970 at 994, 141 NR 185 [***Central Okanagan***], cited in Arbitrator's Decision at para 69. Converting this multi-party inquiry into a one-sided investigation could certainly deter complainants from pursuing claims for discrimination based on family status, and thus detract from the policy goal of removing discriminatory barriers to full participation in the workforce.

[78] As discussed by the Arbitrator, proponents of a restrictive test for *prima facie* discrimination based on family status raised concerns regarding a potential flood of requests for workplace accommodation on the basis of family status. I agree with the Arbitrator's comments regarding this argument (Arbitrator's Decision at para 61):

> … I am of the opinion that "floodgate" arguments have no place in the analysis of whether discrimination exists. If an employer rule expressly prohibited the hiring of mothers as welders, we would not be reluctant to find the prohibition to be discriminatory for fear that employers would now be flooded with application by mothers. To the extent that a flood of requests for accommodations imposes an excessive burden upon an employer, the place for considering that is in the assessment of undue hardship. In this case, there is no evidence that the Employer has received any other requests for accommodation on the basis of family status. More broadly, family status was added to the [*AHRA*] as a prohibited ground of discrimination in 1996. There are fewer than one dozen reported human rights tribunal or arbitration cases in Alberta dealing with family status employment discrimination in the past 17 years. This does not suggest to me that Alberta employees are routinely demanding that their employers accommodated every conflict between a work and a parental obligation.

[79] I conclude that the correct test to establish a *prima facie* case of adverse effect discrimination based on family status is the ***Moore*** test. Applying that test in three parts, as summarized by the Alberta Court of Appeal in ***TWU*** leads me to the following analysis:

i. Has the complainant a characteristic that is protected from discrimination?

[80] I reiterate my conclusion that "family status" under the *AHRA* includes childcare obligations. I rely on the factual findings of the Arbitrator, which deserve deference, notwithstanding the legal test applied.

[81] The Arbitrator found:

> [56] The Grievor is a single parent of two children under the age of six. The fathers of her children provide virtually no childcare and she has no other family residing in Fort McMurray.
>
> [62] [She] is a single mother of two children under the age of six, with no childcare support from the children's fathers or any other family members…[B]eing a single working parent, which is the Grievor's status, brings unique challenges to parenting...

[82] I am satisfied that the Grievor, as a single mother of two children under the age of six who require childcare, has a characteristic that is protected from discrimination. She is solely responsible for the care of her children. She does not share her childcare obligations with a partner or with the biological fathers of her children. Considered contextually, in other words in relation to her particular status and circumstances, her claim clearly relates to childcare obligations, and not to personal choices.

ii. Has the complainant experienced an adverse impact?

[83] The Arbitrator found:

> [56] [T]he Grievor [on] the weeks she is required to work nights, [must] either look after her children herself and sleep only a few hours each day or spend hundreds of dollars per month for additional childcare while she sleeps.
> [57] The adverse effects upon the Grievor [include] going sleepless or spending additional sums of money for childcare while she sleeps...
> [63]... Even if the Grievor could secure the services of a babysitter to watch her children in her home for six hours during the day while she slept, (an option proposed by the Employer to her in cross-examination), she would spend over $5000 per year.
> [70] [The] Grievor has two choices. She can pay for additional childcare while she sleeps during the days or she can care for them herself and not be properly rested to fulfill either her work or parenting responsibilities. She has chosen the latter, but it is clearly not a viable choice ... It is clear that the Grievor is experiencing financial difficulty. She is already spending over 75% of her net income on rent and childcare.

[84] In my view, these factual findings demonstrate that the Grievor has experienced an adverse effect from the Employer's requirement that she work night shifts.

iii. Has the complainant demonstrated that the protected characteristic was a factor in the adverse impact?

[85] The Federal Court of Appeal in ***Johnstone CA*** at para 73, describes the connection between the protected characteristic of "family status," childcare obligations and adverse impact:

> [P]rotection from discrimination for childcare obligations flows from family status in the same manner that protection against discrimination on the basis of pregnancy flows from the sex of the individual. In both cases, the individual would not require accommodation were it not for the underlying ground (family status or sex) on which they were adversely affected.

[86] Again, I accept and defer to the factual finding of the Arbitrator in his Decision that:

> [57] The adverse effects upon the Grievor, going sleepless or spending additional sums of money for childcare while she sleeps, are directly the result of the Employer's rule requiring her to work night shifts and her responsibilities as a single mother to care for her children.
> [63] Further, the adverse impact upon the Grievor of the Employer's rule requiring her to work night shifts is serious and [significant] ...

[87] I conclude that the third element of the ***Moore*** test, which requires a demonstration that the protected characteristic was a factor in the adverse impact, has been met, and that a *prima facie* case of discrimination has therefore been established.

Issue 3 – Did the Employer justify its rule or policy as a *bona fide* occupational requirement?

[88] The Arbitrator applied the three-part test established by the Supreme Court of Canada in ***Meiorin***, for determining whether the *prima facie* discriminatory rule or policy was justified as a *bona fide* occupational requirement (***Meiorin***, at para 54 cited in Arbitrator's Decision, at para 78):

> … An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably 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 individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[89] There is no dispute that this is the correct legal test and that the reasonableness standard applies regarding the Arbitrator's application of the test.

[90] As the Employer called no evidence to justify the requirement that all employees work rotating night and day shifts, and no evidence that accommodating the Grievor would cause it undue hardship, the Arbitrator concluded that the Employer's rule was discriminatory.

[91] SMS contends, that the Arbitrator failed to consider the Grievor's "self-accommodation efforts, or lack thereof," again basing this submission on the Arbitrator's statement that "this is not a case about self-accommodation." I have already observed that this submission is based on a reading of this phrase out of context, and that the Arbitrator did consider the Grievor's self-accommodation efforts in concluding that a *prima facie* case of discrimination had been established.

[92] The Arbitrator acknowledged that self-accommodation is relevant in determining what reasonable accommodation an employer is required to provide, as a part of a "multi-party" search for accommodation: Arbitrator's Decision, at para 69, citing ***Central Okanagan*** at 994. The extent of the Grievor's self-accommodation efforts might have been found insufficient had the Employer provided some evidence in support of its rule, or some evidence of undue hardship, but there was no such evidence from the Employer. Further, there was evidence that the Grievor had found another employee in the same classification who was prepared to work exclusively night shifts; and that the Employer had previously permitted other employees to work exclusively night shifts. The Employer provided no reasons for rejecting her request for accommodation: Arbitrator's Decision, para 56.

[93] The Arbitrator's Decision on this issue, and globally, meets the reasonableness review standard.

Conclusion

[94] The application for judicial review of the Arbitration Award Decision of Sole Arbitrator, Lyle Kanee, dated October 29, 2013, is dismissed.

[95] The parties may speak to costs if they are unable to agree.

Heard on the 10th day of October, 2014.
Dated at the City of Edmonton, Alberta this 10th day of March, 2015.

J.M. Ross
J.C.Q.B.A.

Appearances:

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