Federal Court  Cour fédérale

Date: 20130131

Docket: T-1418-10

Citation: 2013 FC 113

Ottawa, Ontario, January 31, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FIONA ANN JOHNSTONE AND CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the Canadian Human Rights Tribunal August 6, 2010 decision allowing Ms. Fiona Johnstone's complaint of human rights discrimination, because of family status, by the employer.

[2] Ms. Johnstone filed her complaint under the provisions of the *Canadian Human Rights Act* RSC 1985 c H-6 [the *Act*] which prohibits discrimination on the basis of family status in matters relating to employment. She contended that her employer, the Canadian Border Services

Agency [CBSA], engaged in a discriminatory employment practice with respect to family status, specifically, in relation to her parental childcare obligations.

[3] Ms. Johnstone had been working as a border services officer on rotating shifts. She requested full-time employment working fixed day shifts that would allow her to arrange childcare for her young children. CBSA policy limited fixed day shifts as requested by Ms. Johnstone to part-time employment. Consequently, Ms. Johnstone was not eligible for benefits available to full time CBSA employees.

[4] The Tribunal found Ms. Johnstone had proven *prima facie* employment discrimination on the basis of family status contrary to the *Act* and decided the CBSA had not proven hardship for the employer necessary to exempt the CBSA from its obligation to accommodate for family status.

[5] The Applicant contests whether the term "family status" in the *Act* includes parental childcare obligations. It submits childcare is not included in the term "family status". The Applicant also challenges the Tribunal's legal test for finding *prima facie* discrimination based on family status. Finally, the Applicant contests several remedial orders of the Tribunal.

[6] On the central questions, I conclude the Tribunal reasonably found parental childcare obligations comes within the scope and meaning of "family status" in the *Act*. I also conclude the Tribunal applied the proper legal test for its finding of *prima facie* discrimination on the basis of family status. Finally, I am satisfied the Tribunal finding that the CBSA discriminated against

Ms. Johnstone on the basis of family status to be reasonable having regard to the evidence before the Tribunal.

[7] On the question of remedies, while I conclude the Tribunal did not err generally, I find the Tribunal erred in part by failing to justify the compensation award for the period when Ms. Johnstone elected unpaid leave to accompany her spouse on relocation to Ottawa.

[8] My reasons are set out following.

Background

[9] Ms. Johnstone began working as a part-time customs inspector in the Passenger Operations District of the CBSA at Pearson International Airport [Pearson] in April 1998. After five months her position, now described as a border services officer, was converted to full-time. Her employment became indeterminate in 2001.

[10] In January 2003, following the birth of her first child, Ms. Johnstone requested accommodation. Specifically, she requested she continue in full-time employment with a fixed daytime shift schedule that coincided with childcare available to her. She renewed this request in December 2005 after the birth of her second child.

The Work Environment

[11] The CBSA was created on December 12, 2003 and took over the customs functions that had been responsibility of the Canada Customs and Revenue Agency, the ports of entry of inland immigration that had been handled by the Department of Citizenship and Immigration, and the entry inspections of food, plants and animals previously performed by the Canadian Food Inspection Agency.

[12] The CBSA Greater Toronto Area [GTA] region has three main operational districts: Passenger Operations, Commercial Operations and Greater Toronto Enforcement Centre [GTEC]. Only Passenger Operations and Commercial Operations employ border services officers.

[13] Commercial Operations is responsible for processing cargo from commercial aircraft and for sufferance warehouses that are facilities for landing, storage, safekeeping, transfer, examination, delivery and forwarding of imported goods before release. The bulk of this work is done at Pearson on the other side of the airfield from the passenger terminals.

[14] Gateway was previously a separate district within the CBSA's GTA region. It was merged into the Commercial Operations district around 2005/2006. Border services officers at Gateway sort and examine mail, documents and parcels coming into Canada.

[15] In 2004 Passenger Operations was responsible for processing passengers in Pearson Terminals 1, 2 and 3 as well as at the East Hold where small aircraft arrive. All passengers were met and taken by bus to Terminal 2 for processing. In 2005 passengers arriving on private jets (fixed base operators) who had been processed through Passenger Operations were transferred to Commercial Operations. In January 2007 Terminal 2 was closed down and CBSA operations in that Terminal were shifted to Terminal 1. Currently, Air Canada's U.S. and international flights operate through Terminal 1 and most other airlines operate through Terminal 3.

[16] The border services officers perform work at Passenger Operations, Commercial Operations and Gateway. One universal job description applies for all border services officers and all positions are classified similarly.

[17] Mr. Norm Sheridan has been District Director of Passenger Operations since 1999. In 2004 he had three Chiefs, one at each terminal, reporting to him. Ms. Rhonda Ruby was the Passenger Operation Chief at Terminal 1. Each Chief had between nine to thirteen Superintendents reporting to them. The Superintendents were responsible for day to day management in their Terminals and for supervising the border services officers in their crews.

[18] On February 12, 2007 the CBSA management structure expanded to 10 Chiefs within Passenger Operations. Superintendents continued in the same job description. The Superintendents prepare the border services officers' shift schedules. Two Superintendents specifically manage accommodation requests by employees asking for relief from the shift schedules.

[19] Pearson is Canada's busiest airport. Passenger Operations screens and processes travellers seeking entry to Canada 24 hours a day, 7 days a week. In order to meet operational requirements at Pearson, border services officers in Passenger Operations work rotating and variable shifts under an agreement established with the local union in 1987, titled the Variable Shift Scheduling Agreement [VSSA].

[20] All full-time border services officers at Pearson work a 56 day schedule period with hours of work patterned on 5 days on, 3 days off with each working shift of 8.57 hours less a 30 minute meal break.

Childcare Availability

[21] Ms. Johnstone testified she intended to make her work as a border services officer her career. She worked full-time as a border services officer on rotating shifts under the VSSA schedule.

[22] Ms. Johnstone gave birth to her first child in January 2003 and took a year of maternity leave. Her second child was born in 2005. Ms. Johnstone has been the primary parent caring for their children. She could not arrange childcare which would allow her to return to full-time shift work as a border services officer at Pearson.

[23] Her husband, Mr. Jason Noble, also worked a rotating shift schedule in his position as a customs superintendent at the Pearson Passenger Operations District. His shift hours as a

supervisor were more onerous that Ms. Johnstone's. Their work schedules overlapped 60% of the time but were not coordinated. As a result, Ms. Johnstone's spouse could not take over or fill in the family childcare on a reliable basis.

[24] After the birth of her first child, Ms. Johnstone had been able to arrange childcare with family members. Her family members could provide childcare for the three days a week for fluctuating hours, including overnight.

Request for Accommodation

[25] Ms. Johnstone wanted to maintain her full-time employment status in order to access opportunities for training and advancement, pension, and other benefits available for full-time employees. Her concern was that she would lose both benefits and pension with long term consequences to her promotional opportunities and future retirement.

[26] Ms. Johnstone requested that she work full-time in static shifts over three days. She did not specify starting times or returning to the same duties she had performed. Full-time employment necessitated working a minimum of 37.5 hours per week.

[27] Ms. Johnstone contacted CBSA Management prior to her return to work in January 2004 asking to work full-time over three days with 13-hour shifts fixed per week. The 39-hour week could constitute full time employment. Ms. Johnstone approached Ms. Raby, the Terminal 1

Chief through her husband. Ms. Raby denied the request and instead offered Ms. Johnstone part-time work on a fixed schedule.

[28] Ms. Raby offered Ms. Johnstone a maximum of 10 hours a day for three days plus a further 4 hour shift on a fourth day for a total of 34 hours a week. While starting times might vary, the shifts would be on the same days of the week. The 34-hour week would constitute part-time employment. Ms. Raby had made it clear to Ms. Johnstone that CBSA policy, albeit unwritten, is that in order to get static shifts, the maximum hours of work allowed was 34 hours a week.

[29] Ms. Johnstone accepted the three 10-hour days but not the additional 4 hours because it would not achieve the full-time employment Ms. Johnstone wanted and the childcare expense for the fourth half-day negated the extra 4 hours of wages.

[30] Shortly after returning to work, Ms. Johnstone asked if she could remain on full-time status and characterize the hours not worked as leave without pay which would mean her income would still be pensionable. This request was denied. She asked if she could top up the difference to keep the equivalent of full-time pension benefits but this was also denied.

[31] After her second child was born, she asked in December 2005 to be allowed to work full-time hours over three days but was again refused. Ms. Johnstone then further reduced her hours of part-time work after the birth of her second child from the 30 hours of work she had been working.

Human Rights Complaint

[32] Ms. Johnstone filed her human rights complaint on April 23, 2004. She claimed the CBSA has engaged in a discriminatory practice on the ground of family status in an employment matter. Her complaint was brought pursuant to subsections 7(b) and 10(a) and (b) of the *Act*.

History of Proceedings

[33] After Ms. Johnstone filed her human rights complaint, the Canadian Human Rights Commission (the Commission) appointed an Investigator. The Investigator found that the CBSA differentiated between employees seeking relief from rotating shift schedules for medical reasons and those seeking the same relief for reasons of childcare. For employees of the first class, the CBSA allowed full-time work on fixed shifts, but required the latter to work fixed shifts part-time.

[34] The Investigator also found the evidence for operational concerns was an impressionistic assumption and concluded the CBSA failed to provide a justification for this policy. The Investigator recommended the Commission refer the complaint to the Tribunal.

The Commission

[35] On receipt of the Investigator's report and recommendation, the Commission invited submissions from Ms. Johnstone and the CBSA. The Commission decided, at this screening stage, to dismiss Ms. Johnstone's complaint. Its reasons were:

a. The CBSA accommodated Ms. Johnstone's request for a fixed shift to meet her childcare obligations;
b. Ms. Johnstone accepted the part-time scheduling arrangement and did not request full-time hours; and
c. It was not satisfied the effect of the CBSA policy, which permits employees to be relieved of rotating shifts for 37.5 hours, constituted a serious interference with Ms. Johnstone's duty as a parent or that it constituted discrimination on the basis of family status.

[36] Ms. Johnstone applied for judicial review of the Commission's decision in the Federal Court.

[37] In *Johnstone v Canada (Attorney General)*, 2007 FC 36 [*Johnstone* FC] Justice Barnes allowed Ms. Johnstone's application and returned the matter back to the Commission for redetermination. The Federal Court of Appeal dismissed the Attorney General's appeal of the Federal Court judicial review. *Canada (Attorney General) v Johnstone*, 2008 FCA 101 [*Johnstone* FCA].

[38] Ms. Johnstone's human rights complaint subsequently proceeded to a hearing before the Tribunal.

The Tribunal

[39] Both the Applicant and the Respondent presented their evidence and expert evidence in a full hearing by the Tribunal. Ms. Johnstone testified and called three witnesses, Mr. Murray Star, another CBSA employee, and two expert witnesses, Dr. Linda Duxbury and Ms. Martha Friendly. The Respondent called Mr. Sheridan, the District Director of Passenger Operations, Ms. Raby, the Terminal 1 Chief, and one expert witness, Dr. Moore-Ede.

[40] On August 6, 2010, the Tribunal rendered its decision, allowing Ms. Johnstone's complaint of discrimination based on family status.

[41] The Attorney General now applies for judicial review of the Tribunal's decision.

Other Matters

[42] At the time of the Tribunal hearing Ms. Johnstone was on unpaid Care & Nurturing Leave covered by the VSSA. Before that, when her husband was transferred to Ottawa as a trainer, she went on a one year Relocation of Spouse Leave without pay. Ms. Johnstone's intention was to return to full-time work when her children reached school age.

Decision Under Review

[43] The Tribunal allowed Ms. Johnstone's human rights complaint on August 6, 2010. It described Ms. Johnstone's complaint as:

> The Complainant (Ms. Johnstone) alleges that the Respondent (CBSA) has engaged in a discriminatory practice on the ground of family status in a matter related to employment. The relevant prohibited ground of "family status" is enumerated in Section 3(1) of the *Act*.

[44] The Tribunal described the practices Ms. Johnstone complained of as a failure to accommodate by the employer and adverse differential treatment based on family status relating to the raising of two children. It noted, pursuant to *Moore v Canada Post Corporation*, 2007 CHRT 31 [*Moore*], at paragraph 86, "failure to accommodate" is not a discriminatory practice under the *Act*, as "there is no free-standing right to accommodation under the CHRA". The Tribunal proceeded on adverse differential treatment based on family status relating to the raising of two children. The Tribunal identified the relevant time for the complaint as beginning April 23, 2004 to present times.

[45] After describing the CBSA structure and operations, the Tribunal reviewed the history of the CBSA and its predecessors on the issue of family status relating to employment. The Tribunal considered this history helpful as a framework to the present complaint.

[46] The Tribunal took specific note of the 1993 Tribunal decision, *Brown v Canada (Department of National Revenue, Customs & Excise)*, [1993] CHRD No 7 [*Brown*], which involved the CBSA's predecessor, the National Revenue Agency – Customs and Excise. That case also involved a CBSA employee who was a customs inspector who asked to work dayshift after her child was born.

[47] In *Brown* the Tribunal set out the requirements for establishing a *prima facie* case of discrimination based on family status. The Tribunal observed that *Brown* found parents are under an obligation to seek accommodation from their employer in order that they may meet their duties and obligations within the family.

[48] The Tribunal in *Johnstone* noted that the respondent was ordered "to prevent similar events from reoccurring through recognition and policies that would acknowledge family status to be interpreted as involving 'a parent's rights and duty to strike a balance [between work obligations and child rearing] coupled with a clear duty on the part of any employer to facilitate and accommodate that balance.'"

[49] The Tribunal concluded that these recommendations were not implemented, as witnesses from both parties testified that there has never been full implementation of the orders in *Brown*.

The Evidence

[50] The Tribunal accepted Ms. Johnstone's evidence was that she could no longer work the VSSA schedule when she became a mother. Ordinary daycare hours were limited to 7 a.m. to 6 p.m. Monday to Friday. Unlicensed daycare and private daycare would not provide daycare for unpredictable and fluctuating hours and not on weekends or overnight. Ms. Johnstone's family members could provide daycare for three days a week including overnight.

[51] Ms. Johnstone gave evidence that she requested full time work with 13-hour days on Fridays, Saturdays and Mondays. She testified she was told she could only work part-time for a maximum of 34 hours at 10 hours a day over 3 days with an additional 4 hours on the fourth day. She also testified she asked whether she could remain on full-time status with the hours not worked as leave without pay or top up the difference to keep the equivalent about full-time status but she was refused. A live-in nanny was not a financially feasible option for Ms. Johnstone because of the expense and the requirement to move into a larger house to accommodate a live-in adult nanny.

[52] The Tribunal accepted that had Ms. Johnstone been allowed to work full-time over the three days she requested, she would have found a way to handle her childcare responsibilities.

[53] The Tribunal heard testimony from Murray Star who worked variable shifts with the CBSA. Mr. Star had obtained accommodation on religious grounds and was not required to work on the Sabbath and other holy days of religious observance.

[54] The Tribunal considered the evidence of Ms. Johnstone's witness, Dr. Duxbury, who was accepted as an expert in human resources management including labour force demographics, managing change, and the impact of work-life balance issues on workers. Dr. Duxbury's report related to accommodation needs of workers with childcare responsibilities and the impact of employers' responses to accommodating those needs.

[55] The Tribunal also considered the evidence of Ms. Friendly, the Executive Director of the Toronto's Childcare Resource and Research Unit, who filed a report on the extent childcare was accessible for parents working non-standard, rotating, unpredictable hours. The Tribunal accepted her as an expert on childcare policy in Canada. The Tribunal accepted as reliable Ms. Friendly's conclusions on the difficulties faced by parents finding third party childcare when working in workplaces that require rotational fluctuating shifts. The Tribunal found that Ms. Friendly's evidence supported Ms. Johnstone in that the type of childcare she needed was not easily available, if at all. The Tribunal also accepted there were relatively few workers who required such childcare assistance.

Prima Facie *Case*

[56] The Tribunal considered whether or not Ms. Johnstone had proven a *prima facie* case of discrimination based on family status. It identified the test to establish a *prima facie* case as set out in the Supreme Court of Canada's decision in *Ontario Human Rights Commission v Simpson- Sears Limited*, [1985] 2 SCR 536 [*O'Malley*] at para 28.

[57] The Tribunal set out a two step process, the question of a *prima facie* case being first and a *bona fide* occupational requirement [BFOR], being second. The Tribunal stated:

> … if the allegations by the Complainant are covered, and if believed, the evidence is complete and sufficient to justify a verdict in Ms. Johnstone's favour, in absence of an answer from the Respondent. If the Tribunal answers in the affirmative to this, then the onus shifts to the Respondent to show that despite the discrimination found it had a Bona Fide Occupational Requirement (BFOR) to engage in it, and that accommodation of those affected would amount to undue hardship for the employer.

[58] The Tribunal noted that the parties disagreed on the definition of family status within the meaning of sections 3, 7, and 10 of the *Act*. Accordingly, the Tribunal addressed the meaning of family status before addressing whether a *prima facie* case has been made out.

[59] The Tribunal turned to the Supreme Court of Canada, in *Canada (House of Commons) v Vaid*, 2005 SCC 30 [*Vaid*], to apply Driedger's modern approach to statutory interpretation: "the words of an Act are to be read with the scheme of the Act, the object of the Act, and the intention of Parliament".

[60] The Tribunal found the inclusion of the phrase "have their needs accommodated" in the *Act's* purpose clause has led to a broadening of interpretation. It found that family status should not be limited to identifying one as a parent or a familial relation of another person, but rather include the needs and obligations naturally flowing from that relationship.

[61] The Tribunal looked to the underlying purpose of the *Act* as providing all individuals a mechanism "to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society…" The Tribunal that found the phrase in the *Act* "lives that they are able and wish to have" to be an acknowledgement that individuals make choices including to have children, and that the *Act* affords protections against discrimination regarding those choices.

[62] Finally, the Tribunal concluded at para 233:

> This Tribunal finds that the freedom to choose to become a parent is so vital that it should not be constrained by the fear of discriminatory consequences. As a society, Canada should recognize this fundamental freedom and support that choice wherever possible. For the employer, this means assessing situations such as Ms. Johnstone's on an individual basis and working together with her to create a workable solution that balances her parental obligations with her work opportunities, short of undue hardship.

With that statement, the Tribunal found the enumerated ground of family status in the *Act* does include parental childcare responsibilities.

[63] The Tribunal then considered the CBSA submission that there is a different and higher threshold for family status discrimination as demonstrated by *Health Sciences Assoc. of B.C. v Campbell River and North Island Transition Society*, 2004 BCCA 260 [*Campbell River*]. The Tribunal noted the *Campbell River* test was rejected by *Hoyt v Canadian National Railway*, [2006] CHRD No 33 [*Hoyt*] and also *Rajotte v The President of the Canadian Border Services Agency et al*, 2009 PSST 0025 [*Rajotte*].

[64] The Tribunal found confirmation of this position in *Johnstone* FC that an individual should not have to tolerate some discrimination before being afforded the protection of the *Act*.

[65] The Tribunal concluded that Ms. Johnstone had made out a *prima facie* case of discrimination contrary to sections 7 and 10 of the *Act*. The CBSA had engaged in a discriminatory and arbitrary practice in the course of employment that adversely differentiated Ms. Johnstone on the prohibited ground of family status. More specifically, the Tribunal found that the CBSA established and pursued an unwritten policy communicated to and followed by management that affected Ms. Johnstone's employment opportunities including, but not limited to promotion, training, transfer, and benefits on the prohibited ground of family status.

[66] The Tribunal noted that although the CBSA accommodated those seeking accommodation for medical and religious reasons, and although the CBSA departed from its arbitrary policy in other cases, it had been unyielding in Ms. Johnstone's case.

[67] The Tribunal examined the evidence of Mr. Sheridan, the District Director of Passenger Operations for CBSA at Pearson who gave extensive testimony on Pearson operations. It observed that the level of detail on operations did not really assist in the fundamental questions before the Tribunal.

[68] Mr. Sheridan articulated the CBSA's view that employees with childcare responsibilities do not require accommodation. CBSA does consider accommodation for religious or medical reasons but treats non-medical accommodation requests as "arrangements" outside of any

requirement to accommodate. Requests based on family responsibilities for childcare issues were considered the result of a worker's personal choice for which the employer bears no responsibility.

[69] The Tribunal understood Mr. Sheridan to be saying that, if Ms. Johnstone was accommodated for childcare responsibilities, management would be inundated with such requests, costs would be prohibitive, and it would be destructive to CBSA Pearson operations. The Tribunal noted when asked under cross-examination if there were many requests returning from maternity leave, he replied in the negative.

[70] Mr. Sheridan offered reasons why part-time work offered for static shifts was restricted to 10 hours a day to a maximum of 34 hours. It was to discourage employees from seeking part-time status nearly equivalent to full-time hours just to get around VSSA. Moreover, he said employees would suffer in terms of energy and focus when working longer than 10 hours. The Tribunal noted Mr. Sheridan acknowledged there were part-time employees working more than 10 hours per day. The Tribunal considered this view about loss of employee effectiveness to be merely impressionistic.

[71] The Tribunal also noted medical considerations were dealt with as requiring accommodation and opined the CBSA had found an efficient and individualized way to deal with medical accommodation at Pearson.

[72] The Tribunal summarized the evidence of Ms. Raby who was then the acting Chief of Terminal 1 at Pearson Passenger Operations. She testified that she was not aware of Ms. Johnstone's first request. However, the Tribunal found that in following the CBSA's unwritten policy, Ms. Raby's approach would not have been any different had she known of Ms. Johnstone's earlier request. The Tribunal also took note that Ms. Raby could not recall anyone else asking for full-time work on return from maternity leave.

[73] Finally, the Tribunal looked at the evidence of CBSA's witness, Dr. Moore-Ede, who was qualified as an expert in the study of shift work and extended working hours. His report that concluded that between 31 to 52% of CBSA workers would seek the same accommodation as Ms. Johnstone. The Tribunal found serious flaws in Dr. Moore-Ede's report, finding that the sampling of workers involved a very small percentage of Canadian workers, the rest being American, and that no questionnaire or surveying had been done of CBSA workers. The Tribunal found that the numbers put forward in the report were not realistic as being founded on either inadequate detail in the question posed or unproven assumptions.

Bona Fide *Occupational Requirement [BFOR]*

[79] The Tribunal relied on the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*] for the principle that the duty of employers to accommodate is a fundamental legal obligation. It referred to the *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15 [*VIA Rail*] for the definition of undue hardship. The Tribunal stated that the CBSA must not base

its assessment of whether an employee needs accommodation or whether it can implement accommodation measures on impressionistic assumptions.

[74] The Tribunal found there are no viable health and safety concerns about Ms. Johnstone's ability to perform 13-hour shifts. The Tribunal also noted that no analysis has been done by the CBSA nor any policies put in place since *Brown* or the Commission direction 10 years later. The Tribunal found that none of the various draft accommodation policy proposals were ever put into action.

[75] The Tribunal concluded that the CBSA had not established a *bona fide* occupational requirement defence nor had it established a sufficient undue hardship rationale to discharge the onus to show hardship.

[76] The Tribunal found that the CBSA had given management a cursory nominal understanding of human rights legislation and provided no management training or awareness of the details of the *Brown* decision. Nor had the CBSA undertaken any detailed look at *bona fide* operational requirements and examined options short of undue hardship.

[77] The Tribunal found that the evidence substantiated Ms. Johnstone's complaint. Ms. Johnstone had proven *prima facie* employment discrimination on the basis of family status and the CBSA had not proven a *bona fide* occupational requirement or hardship necessary to exempt it from the obligation to accommodate for family status arising from childcare responsibilities under the *Act*.

Remedies

[78] The Tribunal ordered the CBSA to cease its discriminatory practices against employees seeking accommodation based on family status for purposes of childcare responsibilities. It required the CBSA to consult with Ms. Johnstone and the Commission to develop a plan to prevent further incidents of such discrimination. The Tribunal ordered the CBSA establish written policies including processes for individualized assessments to address family status accommodation requests within six months.

[79] The Tribunal ordered that Ms. Johnstone be compensated for her lost wages and benefits, including overtime that she would have received and pension contributions that would have been made had she been able to work on a full-time basis during the period in question. The Tribunal directed that Ms. Johnstone be entitled to pension contributions as a full-time employee during this period.

[80] The Tribunal also awarded Ms. Johnstone $15,000.00 for general damages for pain and suffering pursuant to s 53(2)(e) of the CHRA, and $20,000 for special compensation under s 53(3) of the CHRA, finding that the CBSA had deliberately denied protection to those by ignoring efforts, both externally and internally, to bring about change with respect to its policies on family status accommodation. The Tribunal did not award solicitor client costs in light of the Federal Court of Appeal's decision in *Canada (Attorney General) v Mowat* ,2009 FCA 309 [*Mowat* FCA].

Legislation

[81] The *Canadian Human Rights Act*, RSC, 1985, c H-6 provides:

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.
3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.	3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
7. It is a discriminatory	7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

practice, directly or indirectly,
...

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or

...

b) de le défavoriser en cours d'emploi.

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.

(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à

to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining

leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité

alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and	maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.
(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.	
(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.	
[Emphasis added]	

Issues

[82] The issues raised by this application are as follows:

a. What standard of review applies to the Tribunal's determinations with respect to:

i. interpretation of "family status" in the *Act*,

ii. the legal test for *prima facie* discrimination based on family status,

iii. finding of *prima facie* discrimination based on family status, and

iv. remedies?

b. Did the Tribunal err in interpreting the term "family status" in section 3 of the *Act* to include childcare responsibilities?
c. Did the Tribunal err in finding the *prima facie* case of discrimination was established?
d. Did the Tribunal err in making its remedial orders?

Standard of Review

[83] The Applicant submits that the issues relating to the proper interpretation of family status, the legal test for establishing *prima facie* discrimination and whether the Tribunal erred in crafting its remedial orders are all questions of law to which the standard of correctness applies. While the *Act* is the home statute for the Canadian Human Rights Tribunal, it is also within the jurisdiction of other tribunals, such as labour, arbitration and public service tribunals.

Interpretation of "family status" in the Act

[84] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held there are two standards of review: correctness and reasonableness. *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its home statute. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil rule in relation to a specific statutory context (*Dunsmuir* at para 54). In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC [*Khosa*] the Supreme Court confirmed that administrative decision makers are entitled to a measured

deference in matters that relate to their special role, function and expertise (*Khosa* at paras 25-26).

[85] The Supreme Court stated the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise as well as questions regarding jurisdictional boundaries between two or more competing specialized tribunals (*Dunsmuir* at paras 58, 60, 61). Furthermore, the standard of correctness will also apply to true questions of jurisdiction.

[86] Recently, in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 [*Mowat* SCC], the Supreme Court considered whether the Canadian Human Rights Tribunal could order legal costs as a form of compensation. This issue directly related to the interpretation and application of the Tribunal's own statute namely the *Act*. The Supreme Court held the question of whether a particular tribunal could grant legal costs was not one of central importance to the Canadian legal system. The Court also found that question was not outside the expertise of the Tribunal. In result the Supreme Court found the Tribunal's decision on the issue of awarding costs based on its interpretation of the relevant provision in the *Act* to be reviewable on the standard of reasonableness. *Mowat* SCC at para 27.

[87] In assessing the reasonableness of the Tribunal decision the Supreme Court in *Mowat* went on to state:

> [33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of

> the provision in their entire context and according to the grammatical and ordinary sense, harmoniously with the scheme an object of the Act and the intention of Parliament [citation omitted]. In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposely so that the rights enunciated are given their full recognition and effect: [citation omitted]. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

Accordingly, the standard of review was that of reasonableness keeping in mind the basic principles of statutory interpretation and respect for the words of Parliament.

[88] While the scope of human rights is important and important issues arise because of family matters, it cannot be readily said that the interpretation of "family status" in the *Act* is a question of law of central importance to the legal system as a whole. It is true that provincial human rights tribunals across the country also address human rights issues arising because of family matters but they do so in accordance with their own legislation and, while preferable, the tribunals are not obligated to apply the same precise interpretation as given in similar provisions in federal or other provincial provisions as long as regard is had for similar purposes.

[89] Turning to the specific question of the standard of review of the Tribunal's interpretation of "family status" in the *Act*, the following considerations apply:

a. the Tribunal is interpreting its home statute;

b. the Tribunal is adjudicating within an area in which it has expertise;

c. this question also does not relate to jurisdictional boundaries between competing specialized tribunals; in this respect the various federal tribunals' that may have

regard to the *Act*, such as labour arbitrators and public service tribunals, have overlapping rather than jurisdictional boundaries; and,

d. the interpretation of "family status" in the *Act* cannot be said to raise a constitutional question given it involves the interpretation of a federal statute.

[90] Having regard to the teachings in *Dunsmuir*, *Khosa* and *Mowat* SCC and to the above considerations, I conclude that the Tribunal's determination of whether "family status" includes childcare based on its interpretation of the term in the *Act* is reviewable on a standard of reasonableness.

Legal Test for Prima Facie *Discrimination*

[91] In *Johnstone* FC the Court was reviewing the screening decision of the Commission in dismissing Ms. Johnstone's complaint. Justice Barnes found the issue was very much like that in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 [*Sketchley*]. In *Sketchley*, the Commission's reasoning was dependent on its legal conclusions as to the precedential value of *Scheuneman v Canada (Attorney General)*, (2000) 266 NR 154 and did not engage the respondent's specific circumstances and fact situation.

[92] The Federal Court of Appeal undertook a pragmatic and functional approach to the issue in reviewing the Commission's decision identified as the legal question of whether the employer Treasury Board's policy was *prima facie* discriminatory. *Sketchley* at paras. 61- 81 The Federal Court of Appeal concluded:

> [81] Applying the pragmatic and functional approach to the Commission's particular decision in the TB complaint, the four factors lead on balance to a standard of review of correctness. For its decision with respect to this complaint to be upheld, the Commission was required to have decided correctly the legal question of whether the TB policy is *prima facie* discriminatory, a question which I consider below.

[93] In *Johnstone* FC the Federal Court decided the appropriate standard of review of the Commission's screening decision to be correctness stating:

> [18] In this case the Commission was not convinced that the loss of hours suffered by Ms. Johnstone brought about by the CBSA's fixed shift policy constituted "a serious interference" with her parental duties or that it had a discriminatory impact on the basis of family status. As in *Sketchley*, above, this characterization of the CBSA's employment policy as non-discriminatory was based on a discrete and abstract question of law and, as such, it is reviewable on the standard of correctness.

[94] *Johnstone* FCA was appealed to the Federal Court of Appeal which upheld the Federal Court decision. In doing so, the Federal Court of Appeal stated:

> [2] The reasons given by the Commission for screening out the compliant indicate that the Commission adopted a legal test for *prima facie* discrimination that is apparently consistent with *Health Sciences Association of British Columbia v. Campbell River & North Island Transition Society*, [2004] B.C.J. No. 922, 2004 BCCA 260 but inconsistent with the subsequent decision of the Canadian Human Rights Tribunal in *Hoyt v. C.N.R., [2006] C.H.R.D. No. 33*. We express no opinion on what the legal test is.
> …

[95] In the case at hand the Applicant submits the Tribunal erred in the legal test for establishing *prima facie* discrimination based on family status.

[96] The requirement for *prima facie* discrimination was reviewed by the Supreme Court of Canada in *O'Malley*. The Supreme Court stated a complainant must show a *prima facie* case of discrimination in proceedings before human rights tribunals describing the test as;

> A *prima facie* case in this context 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.
>
> *O'Malley* at para 28.

Finding of Prima Facie *Discrimination on Family Status*

[97] The standard of review applicable to the Tribunal's finding of *prima facie* discrimination necessarily involves application of the law to the facts, a question of mixed law and fact. I find this invokes a standard of reasonableness. *Dunsmuir* para 57.

Remedies

[98] Finally, the standard of review applicable to the assessment of the Tribunal's remedial orders is dependent on the Tribunal's findings of fact. As such the Tribunal must address questions of fact and law and fact.

[99] The award of remedies comes within the Tribunal's area of expertise in deciding factual questions as to the amount of compensation, if any, to award. Furthermore, the issuing of remedial orders to address offending discrimination is entirely within the Tribunal's discretion as is the question whether punitive damages should be awarded where supported by the facts.

[100] I conclude the standard of review for the Tribunal's decisions on remedies is that of reasonableness.

Analysis

[101] The Applicant submits the Tribunal erred in adopting an overly broad interpretation of "family status" under the *Act*. The Applicant submits the Tribunal erred in that it:

a. gave no regard to the ordinary and grammatical meaning of the term "family status" or to Parliament's use of "status" as a qualifying term;
b. acknowledged the intent of Parliament as reflected in *Hansard* but held it was *not persuasive*; and
c. failed to give due regard to the object and purpose of the *Act*, the inclusion of "family status" in section 3, and the scheme of the *Act* as a whole.

[102] The Applicant submits the proper interpretation of the term "family status" is one which prevents individuals from being denied opportunities on the basis of arbitrary or stereotypical assumptions relating to irrelevant personal characteristics. It protects against distinctions based

on family characteristics for which a person has little or no control. The Applicant submits this term does not include the obligations that arise between the parent and their children including childcare. Rather the intention was to prevent discrimination by reason of the mere fact that being a parent or a parent of a particular child.

[103] The Applicant also contends the inclusion of the qualifying term "status", which is generally understood to convey a particular position or legal standing, operates to limit the scope of the term "family status". It refers to a personal characteristic which Parliament deemed should be irrelevant to employment.

Interpretation of "Family Status" in the Act

[104] Section 3 of the *Act* provides as follows:

> 3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

The *Act* does not define the term "family status".

[105] The Tribunal has previously interpreted "family status" to include regular childcare obligations. In *Brown*, the Tribunal stated:

> It is this Tribunal's conclusion that the purposive interpretation to be affixed to s. 2 of the *CHRA* is a clear recognition within the context of "family status" of a parent's right and duty to strike that balance coupled with a clear duty on the part of an employer to facilitate and accommodate that balance with in the criteria set out

> in the Alberta Dairy Pool case. To consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of "family status" as a ground of discrimination.
>
> *Brown* at paras 17-18

[106] The Tribunal came to the same conclusion in *Hoyt* where the Tribunal had found the employer failed to modify an employee's shift requirements that prevented her from making childcare arrangements for her daughter. In *Hoyt*, at para 117,the Tribunal referred to the judicial definition of the term family status stating discrimination on this ground has been judicially defined as "….practices or attitudes which have the effect of limiting the conditions of employment of, or employment opportunities available to, employees on the basis of a characteristic relating to their…family". *B. v Ontario (Human Rights Commission),* affirmed 2002 SCC 66 [*B*].

[107] The inclusion of family childcare obligations within family status has been adopted in other forums and jurisdictions: provincial human rights tribunals (Ontario: *Wight v Ontario (Office of the Legislative Assembly),* [1998] OHRBID No 13; Alberta: *Rennie v Peaches and Cream Skin Care Ltd.*, 2006 AHRC 13 (CanLII) [*Rennie*]; federal labour boards (*Canada Post v Canada Union of Postal Workers (Somerville Grievance, CUPW 790-03-00008, Arb. Lanyon),* [2006] CLAD No 371 at para 66, and *Rajotte,* and provincial and federal superior courts (BC Court of Appeal: *Campbell Rive*; Federal Court: *Johnstone* FC.

[108] Human rights legislation has a quasi-constitutional status. This elevated status derives from the fundamental character and values such legislation expresses and pursues. The Supreme

Court of Canada has held that human rights legislation must be interpreted in a large and liberal manner in order to attain the objects of the legislation. In *CNR v Canada (Human Rights Commission)*, [1987] 1 SCR 1114 [*Action Travail des Femmes*] the Supreme Court stated:

> 24 Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated by given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. …
>
> [Emphasis added]

[109] The *Interpretation Act* RSC 1985 c I-21, section 12 provides: "Every enactment is deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objectives" The term "family status" in section 3 of the *Act* should be interpreted in a large and liberal manner consistent with the attainment of the *Act's* objectives and purposes stated in section 2:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual

> orientation marital status, family status, disability or conviction for an offence for which a pardon has been granted.
>
> [Emphasis added]

[110] The definition of word 'family' in the *Canadian Oxford Dictionary* 2d includes "the members of a household esp. parents and their children." The definition of the word "status" includes "a person's legal standing which determines his or her rights and duties". The two words taken together amounts to more than a mere descriptor of a parent of a child and also can reference the obligations of a parent to care for the child.

[111] There are two other sources which help set context and provide guidance with respect to the question of the interpretation to be given the interpretation of "family status":

a. first, *Brooks v Canada Safeway*, [1989] 1 SCR 1219 at para 40 [*Brooks*] are worth repeating:

> Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious.

b. second, in the *Report on Equality in Employment*, Justice Abella wrote at p 185: "From the point of view of mothers, access to childcare and the nature of such care limits employment options."
Furthermore, in her *Report*, Justice Abella relied on the ILO's 1981 Recommendation Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities. Article 6 of that document contains: "With a view to creating effective equality of opportunity and treatment of men and women workers, each Member should make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to

> discrimination and to the extent possible, without conflict between their employment and family responsibilities."

[112] Finally, it is difficult to have regard to family without giving thought to children in the family and the relationship between parents and children. The singular most important aspect of that relationship is the parents' care for children. It seems to me that if Parliament intended to exclude parental childcare obligations, it would have chosen language that clearly said so.

[113] In result, I conclude the Tribunal's conclusion that family status includes childcare obligations is reasonable. It is within the scope of 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*.

Test for Prima Facie *Discrimination based on Family Status*

[114] The onus is on the complainant to establish discrimination has occurred contrary to the prohibition in the *Act*. The test of what constitutes a *prima facie* case of discrimination in human rights cases was set out by the Supreme Court of Canada in *O'Malley*:

> A *prima facie* case 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".
>
> *O'Malley,a*t para 28.

[115] The complainant needs to demonstrate that the employer's conduct, policies or practices has some differential impact due to a personal characteristic which is recognized as a prohibited ground of discrimination contrary to sections 7 and 10 of the *Act*. *Morris v Canada* (*Canadian Armed Forces*), [2005] FCJ No 731, [*Morris*] paras 26-28.

[116] The Applicant points to tribunal and court decisions that recognize not all claimants' conditions will trigger the protection of human rights legislation. (*Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungwirth Grievance)*, [2010] AGAA No 5; *Syndicat Northcrest v Amselem*, 2004 SCC 47, paras 46-54 [*Amselem*]; *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital general de Montréal*, 2007 SCC 4, Abella, concurring at para 49).

[117] The Applicant submits the Tribunal erred in rejecting the test set out *Campbell River*. In that case the Court of Appeal held that the mere fact that an employee with a family is affected by a policy of the employer would not be sufficient to establish a *prima facie* case. Rather, discrimination is only made out where the evidence established a serious interference with a substantial parental or other family duty. The British Columbia Court of Appeal set out the test in *Campbell River* at para 39 to be applied as:

> Whether particular conduct does or does not amount to *prima facie* discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think

> in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.
>
> [Emphasis added]

[118] The Applicant points out the problem with "family status" discrimination cases are the inherent ambiguity in family responsibilities. The jurisprudence to date have identified family responsibilities for which employees have sought accommodation include karate lessons, attendance at an out-of-town hockey tournament, unspecified commitments of family, continued residence in a particular city, attendance at a spouse's medical appointments, assisting family members with immigration process and preference to be at home with a pre-school child. The Applicant emphasizes that the *Campbell River* test calls for "serious interference" with parental obligations.

[119] The Respondent counters with cases that have held otherwise. *Hoyt*, *supra* at paras 120-121, *Rajotte*, *supra*, rejecting the "serious interference" test from *Campbell River, supra*; *Wight, supra*, at para 310, *B., supra* at paras 44-45, 58; *Meiroin, supra*, at paras 69-70; *Sketchley, supra* at para 91; *McGill, supra* at para 11.

[120] The Tribunal acknowledged that "not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence". In my view the childcare obligations arising in discrimination claimed based on family status must be one of substance and the complainant must have tried to reconcile family obligations with work obligations.

However, this requirement does not constitute creating a higher threshold test of serious interference.

[121] The Federal Court of Appeal held in *Morris*, *supra* at para 27:

> In other words, the legal definition of a *prima facie* case does not require the Commission to adduce any particular type of evidence to prove the facts necessary to establish that the complainant was the victim of a discriminatory practice as defined in the Act. Paragraph 7(b) requires only that a person was differentiated adversely on a prohibited ground in the course of employment.

This approach was followed in *Johnstone* FC and applies equally here.

[122] In *Johnstone* FC Justice Barnes stated:

> 30 The Commission's apparent adoption of the serious interference test for identifying family status discrimination also fails to conform with other binding authorities which have clearly established the test for a finding of *prima facie* discrimination. Nowhere to be found in those authorities is a requirement that a complainant establish a "serious interference" with his or her protected interests. …
>
> 31 On this issue I agree with the legal analysis at para. 38 of the Applicant's Memorandum of Fact and Law where it stated:
>
> > The Applicant submits that the underlying circumstances in the present case are no different, and the same threshold for discrimination should apply. To that end, pursuant to the *CHRA*, any and all discrimination is contrary to the *Act*. There is no discretion, and no degree or level of discrimination which must be suffered by the complainant to obtain the protection of the *CHRA*. Thus, the fact that the Applicant was adversely affected by the Respondent's policy is sufficient to establish a *prima facie* case of discrimination, and, by applying a higher standard to the ground of family status in its decision, the Commission erred in law.

> *Johnstone* FC at paras 30-31.
>
> [Emphasis added]

[123] Requiring a higher threshold, a serious interference, for the ground of family status is to lessen the protection on that ground as compared with other protected grounds. I agree that the requirement for a higher threshold for proof of *prima facie* discrimination for one ground as opposed to the other grounds for which discrimination is prohibited in section 3 would contrary to the remedial purpose and objective of the *Act*.

[124] The emphasis on the words "a serious issue" in *Campbell River* confounds the question of employment discrimination on the basis of family status. It is to be remembered that *Campbell River* involved the employer society changing the hours of employment of an employee mother who needed to be at home after school hours to care for her son who was afflicted with a psychiatric disability and had behavioural problems. The B.C. Court of Appeal stated at para 40:

> In the present case, the arbitrator accepted the evidence of Dr. Lund that Ms. Howard's son has a major psychiatric disorder and that her attendance to his needs during after-school hours was "an extraordinarily important medical adjunct to the son's well being. In my opinion, this was a substantial parental obligation of Ms. Howard to her son. The decision by the respondent to change Ms. Howard's hours of work was a serious interference off her discharge of that obligation. Accordingly, the arbitrator erred in not finding a *prima facie* case of discrimination on the merits of family status.
>
> [Emphasis added]

[125] Simply stated, any significant interference with a substantial parental obligation is serious. Parental obligations to the child may be met in a number of different ways. It is when an employment rule or condition interferes with an employee's ability to meet a substantial parental obligation in any realistic way that the case for *prima facie* discrimination based on family status is made out.

[126] In *Amselem* the Supreme Court of Canada ruled that a person's freedom of religion is interfered with where the person demonstrates that he or she has a sincere religious belief and a third party interfered, in a manner that is non-trivial or not insubstantial, with that person's ability to act in accordance with the belief.

[127] The phrase "a substantial parental duty or obligation" equates with and establishes the same threshold as a sincere religious belief. *Amselem*.

[128] In my view, the serious interference test as proposed by the Applicant is not an appropriate test for discrimination on the ground of family status. It creates a higher threshold to establish a *prima facie* case on the ground of family status as compared to other grounds. Rather, the question to be asked is whether the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way.

Finding Proof of Prima Facie *Discrimination*

[129] The Applicant submits the Tribunal focussed only on the impact of the local shift scheduling rule instead of first considering if the rotational shift schedule had an adverse impact and then considering whether the local scheduling rule an employee must accept part-time employment in order to work fixed shifts was reasonable accommodation.

[130] The Applicant argues Ms. Johnstone did not show that rotating shifts interfered with her core obligation as a parent to arrange for childcare for the children. Moreover, she did not show the reasons for the conflict were due to circumstances beyond her control instead of the result of a series of choices she and her husband jointly made. The Applicant submits the evidence before the Tribunal was the availability of childcare depended on a number of choices many of which were in the sole control of the parent: the choice of where to live, what size home to have, the choice to have the father continue to work rotating shifts, their preference to have their children in their care as much as possible or to have only family members provide care, their preference not to pay for childcare and the Respondent Johnstone's preference to work three days a week.

[131] The Applicant points out Ms. Friendly conceded there was little empirical data on the availability of non-regulated childcare which was the type overwhelmingly used by most Canadians. The Applicant notes Ms. Johnstone acknowledged from 1998-2002 she had worked the rotational shift and also worked a second job on Monday to Thursday 9:00 a.m. to 1:00 p.m. She did this by switching shifts whenever conflicts arose. Given this, the Applicant submits it is unclear why the Respondent and her husband could not have arranged childcare for certain days,

switched shifts or taken family or other leave if necessary. The Applicant also points out no consideration was given to the choice by Ms. Johnstone and her husband to move from a home she owned in Toronto, six kilometres from the airport, to the small town of Cookstown, near Barrie.

[132] The Applicant argues that it was unreasonable for the Tribunal to find that it was doubtful anyone in Ms. Johnstone's situation would find any third party other than family willing to provide childcare. The Applicant also submits that this finding was unsupported by the evidence.

[133] The Applicant emphasizes that Pearson is a 24 hour, 7 day a week operation and rotating shifts is a condition of employment for all employees. Application of the VSSA to full-time employees cannot be viewed as arbitrary, nor does it engage in stereotypical presumptions about parents of young children. As a result, the Applicant submits *prima facie* discrimination on the basis of "family status" was not made out on the facts of this case. While it may be that Ms. Johnstone and her husband faced difficulties in balancing their work schedules and their childcare arrangements, these same challenges were faced by other border services officers at Pearson, all of whom were able to resolve the conflict, by making different choices.

[134] Nevertheless I find there was evidence before the Tribunal supporting its conclusion that Ms. Johnston was discriminated against on the basis of her family status.

[135] Ms. Johnstone testified about her efforts to secure childcare which would allow her to continue to work the rotating schedule as set out in VSSA. She investigated both regulated childcare providers and unregulated childcare providers and made broader inquiries in an attempt to secure flexible childcare. She found she could not secure childcare that would allow her to continue under the VSSA schedule.

[136] Ms. Johnstone's evidence with respect to the need for accommodation was confirmed by expert testimony. Ms. Friendly testified that unpredictability in hours required was the most difficult factor in accommodating childcare and opined that Ms. Johnstone's situation was one of the most difficult childcare situations she could imagine.

[137] The Tribunal also had evidence the CBSA made no attempt to accommodate Ms. Johnstone or inquire into her individual circumstances, choosing to rely on its unwritten blanket policy.

[138] The Tribunal was in a position to assess whether the CBSA adversely differentiated against Ms. Johnstone compared to treatment of other individuals seeking accommodation for medical and religious reasons, given that it allowed individuals in those groups to continue to work full-time. The CBSA allowed individualized assessments of employees seeking accommodation on medical or religious grounds but responded to Ms. Johnstone on the basis of a blanket policy that required her to forfeit her status as a full-time employee.

[139] The CBSA's policy was based on the arbitrary assumption that the need for accommodation on the basis of family obligations was merely the result of choices that individuals make, rather than legitimate need.

[140] While the CBSA contended that some of the couples that have children under school age, Ms. Johnstone's evidence was that virtually all of the couples dealt with their childcare obligations by accepting part-time hours imposed on them in exchange for the static shifts they required.

[141] Finally, there was evidence before the Tribunal that some CBSA employees have been allowed to work more than 10-hour shifts. The Tribunal had the factual basis to conclude there was no support for CBSA's conclusion that the 10-hour shift maximum was related to a legitimate health or occupational requirement.

[142] On the evidence before it, the Tribunal found Ms. Johnstone was a parent who had substantial childcare obligations and despite her best efforts could not find daycare for her children. The Tribunal also found on the evidence that accommodating Ms. Johnstone would not have caused undue hardship to the CBSA.

[143] In *Dunsmuir* the Supreme Court stated that "a court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, justification, transparency and intelligibility, but it is also concerned with whether the decision falls within a range of possible acceptable outcomes defensible in respect of the facts and the law". *Dunsmuir*

para 47. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland and Labrador Nurses Union*], the Supreme Court emphasized "the reasons must be read together with the outcome and serve the purpose of showing whether the results falls within a range of possible outcomes". *Newfoundland and Labrador Nurses Union* para 14.

[144] Here the Tribunal, after addressing the interpretation of "family status" in the legislation, and treatment of the words in jurisprudence, set out the legal test for a *prima facie* case and considered the evidence before it. The Applicant prefers certain facts and interpretations of these facts but the substance of the matter is the Tribunal had evidence before it that support the outcome it arrived at. In doing so, the Tribunal's decision falls within a range of possible outcomes.

[145] The Tribunal's finding that Ms. Johnstone had established a *prima facie* case of discrimination pursuant to ss. 7 and 10 of the *Act*. I am satisfied its findings are supported by the evidence and are within the range of reasonable outcomes.

Remedial Orders

[146] The Applicant submits that even if the Tribunal's findings with respect to *prima facie* discrimination are sustained, the Tribunal made the following errors of law and mixed fact and law in crafting their remedial order:

a. the Tribunal erred in awarding lost wages for periods of time that Ms. Johnstone's admitted she was unavailable or otherwise chose not to work;

b. the Tribunal erred in finding CBSA's conduct toward Ms. Johnstone was wilful and reckless warranting the maximum allowable special compensation under subsection 53(3);

c. the Tribunal exceeded its jurisdiction requiring the CBSA to establish written policies satisfactory to Ms. Johnstone and the Commission.

Lost Wages

[147] The Federal Court of Appeal decision in *Chopra v Canada (Attorney General)*, 2007 FCA 268 [*Chopra*] confirms that there is no requirement that the Tribunal apply common law principles such as foreseeability and mitigation in the statutory context of the *Act*:

> [37] The fact that foreseeability is not an appropriate device for limiting the losses for which a complainant may be compensated does not mean that there should be no limit on the liability for compensation. The first limit is that recognized by all members of the Court in *Morgan*, that is, there must be a causal link between the discriminatory practice and the loss claimed. The second limit is recognized in the Act itself, namely, the discretion given to the Tribunal to make an order for compensation for any or all of wages lost as a result of the discriminatory practice. This discretion must be exercised on a principled basis.

Accordingly, the damages in human rights cases are only limited by causality and the requirement that any decision limit the remedial order be made on a "principled basis".

[148] The Tribunal noted that the parties seemed confident they could reach agreement on the quantum to which Ms. Johnstone would be entitled for lost wages and benefits if the Tribunal ordered compensation on this basis. The Tribunal found Ms. Johnstone would have worked full-time hours from the entire period January 2004 to the present had the impudent scheduling rule not applied to her. The Tribunal had ordered the CBSA to pay the difference between full-time wages and the hours worked other than when she was on her second maternity leave from December 2004 to December 2005.

[149] The Applicant submits the CBSA had no control over the Ms. Johnstone's decision to reduce her hours from 34 hours to 30 hours during the first period and from 34 hours to 20 hours during the second period. The Applicant also submits that Ms. Johnstone voluntarily opted to reduce her work schedule during the first period to three days a week for a maximum of 30 hours instead of the three and a half days a week for a maximum of 34 hours. After the second parental leave the Applicant submits Ms. Johnstone chose to only work 20 hours per week because her sister was unavailable to provide childcare on Fridays.

[150] The Applicant also submits the Tribunal erred in ordering the CBSA pay Ms. Johnstone full time from August 2007 to August 2008 since she took advantage of unpaid leave provisions under VSSA while her spouse was stationed in Ottawa and she made no effort to seek a position with CBSA in Ottawa. The Applicant submits that there is no causal connection between the lost wages during this period and the alleged discriminatory practice.

[151] The Tribunal's decision to award full time pay status for part time work does have a causal connection with the discrimination the Tribunal found to have occurred while Ms. Johnstone worked at CBSA operations at Pearson. The Tribunal noted that Ms. Johnstone testified she "would have made it work" had she been granted full time shifts. Ms. Johnstone was not able to work full time regardless of the amount of hours she worked part time.

[152] However, I find it difficult to discern the basis for the Tribunal's award of full wages for the period Ms. Johnstone was on unpaid leave under VSSA on accompanying her spouse to Ottawa. Both the change in the terms of taking leave and relocating to Ottawa require further rationale for the award for this period which the Tribunal has not provided. Without such, I cannot say there is a causal connection between the discrimination found to have occurred at Pearson and Ms. Johnstone's sojourn in Ottawa.

[153] The Tribunal's award of full time wages and benefits is reasonable but for the period from August 2007 to August 2008 when Ms. Johnstone opted for unpaid leave provisions under VSSA to accompany her husband to Ottawa. Since the Tribunal did not address that circumstance satisfactorily, I am referring that portion of the award back to the Tribunal for reconsideration.

Special Compensation

[154] In making an order for special compensation under subsection 53(3) of the *Act*, the Tribunal must establish the person is engaging or has engaged in discriminatory practice wilfully and recklessly. This is a punitive provision intended to provide a deterrent and discourage those

who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the *Act* is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.

[155] The Applicant submits the Tribunal erred in finding the CBSA conduct was wilful and reckless advancing four main arguments:

a. the Tribunal misdirected its inquiry under subsection 53(3) by not focusing on the particular facts relating to Ms. Johnstone's present complaint, instead directing its inquiry into a review of the CBSA's failure to implement a ruling in *Brown* that did not direct the employer to "develop accommodation policies for those seeking accommodation on the ground of family status";

b. the Tribunal mischaracterized and misconstrued documentary evidence concerning employment equity that were not properly identified by witnesses and were not relevant;

c. the Tribunal ignored evidence of good faith on the part of CBSA's management including the approach they took to the request for accommodation which included seeking the advice of human resources experts;

d. the Tribunal failed to give due regard to the unsettled nature of the law noting that CBSA's decision was consistent with that of the earlier Commission decision on October 11, 2005 decision which applied *Campbell River*.

[156] The Applicant submits there have been a number of conflicting decisions with respect to the meaning and scope of the ground family status by arbitrators, labour boards and human rights tribunals. The Applicant submits that employers are entitled and obliged to adhere to developments in the law but it is unreasonable to find an employer's conduct to be wilful and reckless when the law is so unsettled.

[157] The Tribunal is a specialized human rights tribunal whose decisions in the area of its expertise are due deference. The gist of the Tribunal's award on special damages is that the CBSA failed to have regard to the central question of accommodation for family status when it was well aware of the issue arising on the question of childcare.

[158] Administrative decision makers are masters of general proceedings and have significant latitude in applying the rules of evidence. Section 50(3)(c) of the *Act* provides the Tribunal with a wide discretion to:

> Receive and accept in the evidence and other information which on oath or by affidavit or otherwise the member of the panel sees fit whether or not that evidence or information would be admissible in a court of law.
>
> See also *Dhanjal v Air Canada*, [1996] CHRD No 4 at paras 9-24; aff'd [1997] FCJ 1599.

In result, the Court ought not to reweigh the evidence that was before the Tribunal in this matter.

[159] The CBSA cannot rely on the Commission's decision to screen out Ms. Johnstone's complaint when it was overturned by the Court in *Johnstone* FC. The jurisprudence, including *Campbell River*, concluded that family status included family childcare obligations. The jurisprudence largely relied upon by the Applicant other than *Campbell River* turns on fact situations where the purported childcare obligations were matters of personal choice or of a minor nature.

[160] It is open for the Tribunal to conclude the CBSA ignored the jurisprudence when it took the position that family obligations did not fall within family status because having children was a matter of personal choice. It was also open for the Tribunal to find there was no individual analysis by the CBSA of Ms. Johnstone's request by the CBSA.

[161] The Tribunal identified the basis in evidence to support its award of special compensation. In particular, the Tribunal found the CBSA disregarded the decision in *Brown* which squarely addressed the issue of family status accommodation for this employer at this worksite, developed but never implemented a policy on family status accommodation, lacked human rights training for senior management levels, and made no attempt to inquire into Ms. Johnstone's personal circumstances or inform her of options.

[162] Given the deference accorded to the Tribunal on matters concerning its expertise and its identification of the basis for its award of special compensation, I conclude the Tribunal's order of special compensation is justified.

Exceeding Jurisdiction

[163] Finally, the Applicant submits the Tribunal erred and exceeded its jurisdiction in ordering the CBSA to establish written policies "satisfactory to Ms. Johnstone and the CHRC". [Emphasis added]. The Applicant submits the Tribunal has no authority to require that such policies be subject to the approval of another party.

[164] The Tribunal's order to establish policies is authorized by the *Act* given the wording of paragraph 53(2)(a). The Tribunal has a broad remedial authority to order measures in consultation with the Commission to redress the offending practice or prevent the same or similar practice occurring in the future.

[165] The Tribunal ordered the CBSA to cease its discriminatory practices against employees who seek accommodation based on family status for purposes of childcare and to consult with the Canadian Human Rights Commission to develop a plan to prevent further incidents of discrimination based on family status in the future. The Tribunal further ordered the CBSA to establish written policies satisfactory to Ms. Johnstone and the Canadian Human Rights Commission to address family status accommodation requests within six months and that these policies include a process for individualized assessments of those making such requests.

[166] The *Act* expressly provides the Tribunal may direct an offending employer involve the Canadian Human Rights Commission by way of consultation and development of measures to redress discriminatory practices:

> 53(2)(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;
>
> [Emphasis added]

This legislation overrides the employer's right to manage its own enterprise without interference from external agencies or persons.

[167] The *Act* provides that a person who was the subject of discriminatory treatment may receive compensation in the form of lost wages and expenses as well as any pain and suffering experiences. However, it does not provide that a victim may have a role or participate in the development of remedial polices to redress the discriminatory practices.

[168] In ordering the CBSA to develop written policies to address family status accommodation requests satisfactory to Ms. Johnstone, I find the Tribunal exceeded the bounds of the jurisdiction the *Act* confers on the Tribunal to order remedial measures.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed subject to the exceptions that follow.

2. The Tribunal's award of full-time wages and benefits for the period from August 2007 to August 2008 when Ms. Johnstone opted for unpaid leave provisions under VSSA to accompany her spouse to Ottawa is referred back to the Tribunal for reconsideration.

3. The portion of the Tribunal Order that includes Ms. Johnstone as a party to be consulted in the development of written remedial policies is struck.

4. Costs are awarded to the Respondent Johnstone.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Christine Morh Susan Keenan	FOR THE APPLICANT
Andrew Raven Andrew Astritis	FOR THE RESPONDENT FIONA ANN JOHNSTONE
Ikram Warsame Daniel Poulin	FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
Raven, Cameron, Ballantyne & Yazbeck LLP Ottawa, Ontario	FOR THE RESPONDENT FIONA ANN JOHNSTONE
Canadian Human Rights Commission Litigation Services Ottawa, Ontario	FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION