Federal Court  Cour fédérale

Date: 20130201

Docket: T-1775-10

Citation: 2013 FC 117

Ottawa, Ontario, February 1, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

CANADIAN NATIONAL RAILWAY

Applicant

and

DENISE SEELEY AND
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

ONTARIO HUMAN RIGHTS COMMISSION,
FEDERALLY REGULATED EMPLOYERS
– TRANSPORTATION AND
COMMUNICATION

Interveners

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the Canadian Human Rights Tribunal [the Tribunal] September 29, 2010 decision allowing Ms. Denise Seeley's complaint of human rights discrimination because of family status by the employer the Canadian National Railway [CN].

[2] Ms. Seeley had filed a complaint alleging that her employer, CN, has discriminated against her on the basis of her family status by failing to accommodate her parental childcare obligations and by terminating her employment. Family status is a protected ground under the *Canadian Human Rights Act*, RSC 1985, c H-6 [the *Act*].

[3] Ms. Seeley was employed by CN as a freight train conductor and her home terminal was Jasper, Alberta. She was on laid off status and was recalled by CN to report to a temporary work assignment to cover a major shortage in Vancouver, British Columbia. She advised she could not report to Vancouver because of childcare issues. CN gave Ms. Seeley additional time to report. After she did not report for work to Vancouver by a June 30, 2005 deadline, CN terminated her employment.

[4] The Tribunal found that Ms. Seeley had proven *prima facie* employment discrimination on the basis of family status. It further found that CN had not met its duty to accommodate Ms. Seeley. Finally, the Tribunal issued the remedial order directing the CN review its accommodation policy, pay compensation for lost earnings as well as additional compensation for pain and suffering and for reckless conduct.

[5] The Applicant submits the Tribunal made errors of law as well as fact in sustaining Ms. Seeley's complaint. It submits the Tribunal erred in finding *prima facie* case of discrimination had been made out, in finding CN had not met its duty to accommodate, and in awarding additional damages based on a finding of reckless conduct.

[6] I conclude that the Tribunal did not err in finding parental childcare obligations comes within the term "family status" in the *Act*. I also conclude the Tribunal applied the correct test for finding *prima facie* discrimination on the basis of family status. Finally, I conclude the Tribunal did not err in finding, on the evidence before it, that the CN had not met its duty to accommodate Ms. Seeley.

Background

[7] Ms. Seeley was hired by CN as a brakeman in 1991 and qualified as a freight train conductor 1993. Her home terminal was Jasper, Alberta. Ms. Seeley's husband is also employed by CN as a locomotive engineer. Ms. Seeley's first child was born in 1999 and her second child was born in 2003. The family lived in Brule, Alberta approximately 98 km from Jasper.

[8] Ms. Seeley worked as a conductor from 1991 to 1997. In 1997 she was laid off. Ms. Seeley remained on layoff status from November 1997 until February 2005 but continued to accumulate seniority in accordance with the collective agreement between CN and the Union. During the period 1997 to 2001 she performed work for CN on emergency calls.

[9] CN is a transcontinental railway operating throughout Canada and the United States. It operates trains 24 hours a day, seven days a week, throughout the entire year.

[10] CN has negotiated arrangements to protect against shortages of employees to run trains in any particular terminal in its large rail network. Article 115 of CN's collective agreement with

the United Transportation Union allows the CN to recall employees who have been laid off, in order of seniority, and require such employees to report to work within 15 days. Article 148.11 requires employees with a seniority date after June 29, 1990 to protect shortages throughout the western region of Canada which includes Vancouver.

[11] In 2005 CN experienced a severe shortage of conductors at its Vancouver terminal. In response to that shortage, CN recalled 47 laid-off employees from across western Canada in order of seniority beginning February 25, 2005.

[12] A CN representative telephoned Ms. Seeley's home on February 26, 2005 and spoke to Ms. Seeley's husband advising that Ms. Seeley was being recalled to protect the Vancouver shortage.

[13] Ms. Seeley wrote and requested a 30-day extension of the reporting deadline which CN granted. Shortly before the new deadline she wrote a further letter to CN asking that she be relieved from reporting to Vancouver on a compassionate basis. Her concern related to the lack of childcare options.

[14] Ms. Seeley’s initial March 4, 2005 letter to CN set out her family situation. She indicated she had two children, one six years old in kindergarten and the other 21 months old. She had no immediate family nearby to help care for the children and the daycare in nearby Hinton only covered the standard daily business hours. Her husband is also a railroader and may be away for periods from 14 to 24 hours at a time. She requested the 30-day extension to explore childcare

options that may exist. She also made telephone requests. On March 26, 2005 Ms. Seeley wrote asking she be relieved from reporting to Vancouver on a compassionate basis under the terms of the collective agreement. CN never responded nor did it provide any information about the term or details of the shortage recall assignment in Vancouver.

[15] CN maintained its position that Ms. Seeley was required to report to Vancouver under the terms of the collective agreement but did provide additional time. Ms. Seeley's reporting date was extended from March 14, 2005 to March 29, 2005 and further extended until May 6, 2005. The Union indicated that Ms. Seeley required additional time to report and CN extended that the reporting deadline to June 30, 2005.

[16] On June 20, 2005, CN requested Ms. Seeley advise, by June 30, 2005, whether or not she would report for duty to cover the shortage in Vancouver. CN further informed her that her failure to do so would result in her employment being terminated. Ms. Seeley responded on June 27, 2005 stating that she was awaiting a decision on her request for relief and asked the June 30 deadline be forgone until CN made a decision on the request for compassionate allowance.

[17] On July 4, 2005, CN advised to Ms. Seeley her employment was terminated because she failed to cover the shortage in Vancouver.

[18] Ms. Seeley filed a complaint with the Canada Human Rights Commission [the Commission] on June 26, 2006, alleging discrimination on the basis of family status. The matter

went before the Tribunal in 2009, and the Tribunal released its decision on September 29, 2010, allowing Ms. Seeley's complaint.

Decision under Review

[19] The Tribunal noted that Ms. Seeley bore the onus of establishing a *prima facie* case of discrimination based on family status. It adopted the approach that a *prima facie* case exists where the duties and obligations incurred by parents combined with the employer's rules make the complainant unable to participate equally and fully in employment with the employer. *Hoyt v Canadian National Railway*, [2006] CHRD No 33 [*Hoyt*]; *Brown v Canada (Department of National Revenue, Customs and Excise)*, [1993] CHRD No 7 [*Brown*].

[20] The Tribunal decided that family status included parental child care obligations. It rejected CN's submission for a more onerous test for *prima facie* discrimination of "a serious interference" drawn from the British Columbia Court of Appeal decision in *Health Services Association of British Columbia v Campbell River and North Island Transition Society*, 2004 BCCA 260 [*Campbell River*].

[21] The Tribunal concluded that Ms. Seeley had established a *prima facie* case since CN's ordering Ms. Seeley into cover the Vancouver shortage made it impossible for her to arrange for appropriate childcare. The Tribunal found, because of Ms. Seeley's parental duties and obligations, she was unable to participate equally and fully in employment due to CN rules and practices.

[22] The Tribunal held the onus shifted it to CN to demonstrate that the requirement to report to cover the Vancouver shortage was a *bona fide* occupational requirement [BFOR]. *Public Service Labour Relations Commission v BCGSEU*, [1999] 3 SCR 3, at paras. 54 – 68 [*Meiorin*].

[23] The Tribunal went on to conclude CN did not produce evidence to prove that accommodating Ms. Seeley would have constituted undue hardship for the CN. The Tribunal decided the undue hardship analysis must be applied in the context of the individual accommodation requested which was not done in Ms. Seeley's case. The Tribunal found the CN had a comprehensive accommodation policy which could include the ground of family status and the collective agreement allowed CN to exempt employees from covering the shortage if they have a "satisfactory reason".

[24] The Tribunal decided that CN did not provide reasonable accommodation to Ms. Seeley because CN did not respond to Ms. Seeley's request for accommodation nor did it meet with her to discuss her situation. The Tribunal found CN did not apply its own accommodation guidelines and policies and instead had decided that parental childcare obligations was not a family status category for which accommodation was required.

[25] Finally the Tribunal imposed following remedies:

a. CN must work with the Commission to ensure discriminatory practices did not continue and appropriate accommodation policies were in place,
b. CN reinstate Ms. Seeley as of March 2007 with her seniority uninterrupted,

c. compensation for loss of wages and benefits,

d. compensation for pain and suffering in the amount of $15,000, and

e. damages for reckless conduct in the amount of $20,000, the maximum allowable.

[26] CN now applies for judicial review of the Tribunal decision.

[27] The Commission [the Respondent Commission] participates as a respondent along with Ms. Seeley [the Respondent].

[28] The Ontario Human Rights Commission [the Intervener OHRC] intervenes as well as the Federally Regulated Employers - Transportation and Communications [the Intervener FRE-T&C].

Legislation

[29] 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	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

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.

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.

7. It is a discriminatory 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

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) 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. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

...

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 :

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 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

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 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

(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 alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(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

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 maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

> 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

[30] The parties and interveners raise a number of issues. The Intervener OHRC does not set out issues but addresses topics that relate to the issues. The issues identified overlap or are differently phrased and may be reduced to the following:

a. what is the appropriate standard of review for the Tribunal's rulings with respect to:
   i. the interpretation of family status in the *Act*;
   ii. the test for *prima facie* discrimination on family status;
   iii. the determination of remedies?
b. did the Tribunal err in finding *prima facie* discrimination on the evidence before it?
c. did the Tribunal err in finding a failure to accommodate?
d. did the Tribunal err in its order for remedies?

[31] The issues in the proceeding follow much as in *Attorney General of Canada v Fiona Ann Johnstone and the Canadian Human Rights Commission* 2013 FC 113 which I have also decided.

Standard of Review

[32] CN 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 Tribunal, it is also within the jurisdiction of other tribunals, such as labour, arbitration and public service tribunals.

Standard of Review for Interpretation of "family status" in the Act

[33] CN submits the interpretation of "family status" is a question of central importance to the legal system since the Supreme Court of Canada recognized that all human rights legislation across Canada should be similarly interpreted. If human rights legislation is to be interpreted in a purposive manner, differences in wording should not obscure the essentially similar purposes of such provisions, unless the wording evinces a different purpose on behalf of a particular provincial legislature. *University of British Columbia v Berg*, [1993] 2 SCR 353 at para 32 [*Berg*]; *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571 at para 48 [*Gould*].

[34] In 2008, 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 12 [*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).

[35] 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.

[36] 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. 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 paragraph 27 stating:

> In summary, the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*. As such, the Tribunal's decision to award legal costs to the successful complainant is reviewable on the standard of reasonableness.
>
> [Emphasis added]

[37] In assessing the reasonableness of the Tribunal decision the Supreme Court 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 of the Tribunal's interpretation of its home statute was that of reasonableness keeping in mind the basic principles of statutory interpretation and respect for the words of Parliament.

[38] While the scope of human rights is an important question 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 similar provisions in federal or other provincial jurisdictions as long as regard is had for similar purposes;

[39] Turning to the specific question of the standard of review of the Tribunal's interpretation of family status in the *Act* in this proceeding, 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 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.

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

Prima Facie Discrimination Based on Family Status

[41] In *Johnstone v Canada (Attorney General)*, 2007 FC 36 [*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 *Sketchely*, 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 facts situation.

[42] 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.
>
> [Emphasis added]

[43] 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.
>
> [Emphasis added]

[44] *Johnstone v Canada (Attorney General)*, 2008 FCA 101 [*Johnstone* FCA] was appealed to the Federal Court of Appeal which upheld the Federal Court decision stating:

> [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.
> …

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

[46] The requirement for *prima facie* discrimination was reviewed by the Supreme Court of Canada in *Ontario Human Rights Commission and O'Malley v Simpson Sears,* [1985] 2 SCR 536 [*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 at paragraph 28 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.

[47] CN submits that the test for *prima facie* discrimination based on family status is a question of law of central importance to the legal system. A reasonableness standard would promote disparate interpretations, contrary to the principle that a public statue that applies equally to all should have a universally accepted interpretation.

[48] There are many situations that may arise with respect to family status and employment, some which would not constitute grounds for a finding of discrimination on the basis of family status on a *prima facie* basis, some of which would.

[49] In my view it is necessary to have reference to the facts relating to the individual's circumstances since questions of discrimination based on family status may arise in many different situations. For instance, in *B v Ontario*, [2002] 3 SCR 403 [*B*], the basis for the

complainant was his status of being in a family relationship with two others, his wife and daughter who incurred the ire of the employer. The Supreme Court confirmed that to prove discrimination on the grounds of marital or family status, complainants only needed to establish they experienced discrimination on the prohibited grounds. The Court recognized grounds such as family or marital status, or age, may have less to do with belonging to a disadvantaged group than with the individual's personal characteristics.

[50] The examination of individualized circumstances necessarily calls for a contextual assessment of the facts. The requirement for a contextual analysis with respect to accommodation on a case by case basis was made by Justice Abella in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal,* [2007] 1 SCR 161, 2007 SCC 4 at paragraph 22 [*McGill*]. In my view, the same is true for a finding of *prima facie* discrimination. What is the employee's individual circumstances and does it give rise to *prima* facie discrimination based on family status? This attracts a standard of review of reasonableness being a matter of fact and fact and law as enunciated in *Dunsmuir*.

[51] I conclude the standard of review applicable to the Tribunal's finding of *prima facie* discrimination based on family status necessarily involves application of the law to the facts, a question of mixed law and fact. This invokes a standard of reasonableness. *Dunsmuir* para 53.

Remedies

[52] 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.

[53] The Tribunal is entitled to deference given its expertise in human rights questions. The award of remedies comes within the Tribunal's 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.

[54] In result I am satisfied the standard of review is reasonableness with respect to the Tribunal's determination of remedies.

Analysis

[55] CN submits that the underlying issue in this proceeding is whether the question of balancing obligations of family life and employment duties will be transferred from the home to the work place. In its written submissions it submits:

> The Tribunal erred by equating "family status" with a parent's choice as to how to define and meet his or her childcare obligations. … Such personal choices, which have no link to one's employment and which no employer is in a position to evaluate,

> are not protected by human rights legislation. Parliament cannot have intended that an employee could choose to live in a location with few child care options, and require her employer to accommodate her child care needs until such time as she chose to move elsewhere.

[56] In counterpoint to this broad declaration, the Respondent Commission submits this Court should be guided by the Supreme Court's reasoning in *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219 [*Brooks*]:

> That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious.

[57] CN submits the Tribunal erred on four major questions:

a. the Tribunal's interpretation of "family status" in the *Act* is overly broad;

b. the Tribunal erred in making out a *prime facie* case of discrimination merely because Ms. Seeley suffered adverse effects in balancing family and work obligations;

c. the Tribunal erred in finding CN did not meet its duty to accommodate; and

d. the Tribunal erred in deciding CN was wilful and reckless in awarding punitive damages.

[58] I will address each in turn.

Does "family status" in the Act *include childcare obligations?*

[59] 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.
>
> [Emphasis added]

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

[60] CN submits the Tribunal erred in adopting an overly broad interpretation of 'family status' under the *Act*.

[61] The Tribunal was cognizant that in recent years the notion of family status has led to two distinct schools of thought. Some cases have taken a broad approach while others have taken a more narrow approach. It took note of its decision in *Schaap v Canada (Dept. of National Defence)*, [1988] CHRD No 4 where is found the need for a blood or legal relationship to exists and defined family status as including among other relationships the blood relationship between a parent and child.

[62] The Tribunal also referenced *Brown v Department of National Revenue (Customs and Excise)*, 91993) TD 7/93. There the Tribunal had stated:

> We can therefore understand the obvious dilemma facing the modern family wherein the present socio-economic trends find

> both parents in the work environment, often with different rules and requirements. More often that not, we find the natural nurturing demands upon the female parent place her invariably in the position wherein she is required to strike this fine balance between family needs and employment requirements.

The Tribunal concluded that a purposive interpretation required "clear recognition that within the context of 'family status' it is a parent's right and duty to strike that balance coupled with a clear duty on the part of the employer to facilitate and accommodate that balance within the criteria set out by jurisprudence."

[63] 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 v the President of the Canadian Border Services et al*, 2009 PSST 0025 [*Rajotte*], and the Federal Court: *Johnstone* FC.

[64] In addition, while CN relies on the British Columbia Court of Appeal decision in *Campbell River*, it must be noted that the Court of Appeal in that decision proceeded on the premise that the reference to family status in the British Columbia human rights legislation does include childcare obligations.

[65] Human rights legislation has a quasi-constitutional status. This elevated status derives from the fundamental character 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 *C.N.R. 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]

[66] Finally, 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]

[67] If one looks to the ordinary meaning of the words, 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 amount to more than a mere descriptor of a parent of a child and also reference the obligations of a parent to care for the child.

[68] 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.

[69] In *Mowat*, the Supreme Court stated that the standard of review was of a tribunal interpreting its own statute is reasonableness but nevertheless having regard to the principles of statutory interpretation:

> 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.

[70] The Tribunal treated the interpretation of family status as including childcare obligations. It is within the scope of the ordinary meaning of the words; it is in accord with the objects of the *Act* which express Parliament's intent; it is interpreted liberally giving the right enunciated full recognition and effect, and it is in keeping with previous decisions in related human rights and labour forums as well as relevant jurisprudence.

[71] In result, I conclude the Tribunal's interpretation of family status in the *Act* is reasonable.

Finding a prima facie *case of discrimination based on family status.*

[72] CN submits the Tribunal erred in finding a *prima facie* case of discrimination. It contends the evidence failed to establish adverse differential treatment or that such treatment was related to Ms. Seeley's family status. CN submits the Tribunal failed to apply the essential third step to the *prima facie* test that, that being a link between the group membership and the arbitrariness of the disadvantaging criterion. CN refers to Justice Abella's statement in *McGill* at paragraph 49:

> Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such

> membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. [Applicant's emphasis]

[73] CN notes that Justice Abella's reasoning was confirmed by the majority of the Supreme Court in *Honda Canada Inc. v Keays*, [2008] 2 SCR 362 [*Honda*]. Further, in *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at paragraph 94 [*Tranchemontagne*] the Ontario Court of Appeal, after citing *McGill* and *Honda* stated:

> In my opinion, Abella J's comments make it clear that finding discrimination in human rights context entails more than simply identifying a distinction based on a prohibited ground were a negative impact is to result.

[74] CN quotes with approval the following *prima facie* test expressed by the British Columbia Court of Appeal in *Armstrong v British Columbia (Ministry of Health)*, 2010 BCJ No 216 paragraph 10:

> i) is (the claimant)… a member of a group possessing a characteristic… protected under the Code?
>
> ii) did (the claimant) suffer some adverse treatment…?
>
> iii) is it reasonable to infer that the protected characteristic played some role in the adverse treatment
>
> [Applicant's emphasis]

[75] CN submits that the Tribunal erred by interpreting family status to include personal choices as to how a parent will address his or her parental obligations. To this submission, CN refers to a series of decisions :

> a. *CROA Cases 3549 (Whyte) and 3550 (Richards)* which dealt with grievances filed by two CN female conductors who failed to protect the Vancouver shortage. At issue was Article 148.1(d) of the collective agreement which states that employees who fail to protect a shortage will lose seniority and their employment unless they can provide a satisfactory reason for refusing. The arbitrator held that with respect to childcare the onus remained on parents and neither the collective agreement nor Parliament obliged employers to take such factors into account concerns by the grievers did not constitute a satisfactory reason for failing to report.
>
> b. *Canada Staff Union v Canadian Union of Public Employees*, (2006) *88 CLAS 212* where the arbitrator ruled it was the employee's personal choice, not his marital and family responsibilities, that preclude him from moving to Halifax.
>
> c. *Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungworth Grievance)*, [2010] AGAA No 5 (Jungworth) where the employee must first show to have taken all reasonable steps to fulfill both parental obligations and work commitments.
>
> d. *Quebec (Commission des droits de la personne et droits de la jeunesse) v Makesteel Quebec Inc.*, 2003 SCC 68 where the Supreme Court draws a distinction between a termination between an unjustified stigma which is precluded by human rights law and unavailability for work owing to the employee's own actions.
>
> e. *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551 [*Amselem*] where the Supreme Court held the complainant must demonstrate a sincerely held belief that is interfered with in a substantial manner.
>
> f. *Quebec (Commission des droits de la personne et des droits de la jeunesse v Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse v Broisbrand (City)*, [2000] 1 SCR 665 where the Supreme Court held that

> although, disability in human rights legislation should not be interpreted restrictively, there were limits and allowing employees to self-diagnose posed serious practical problems.

[76] The Respondent Seeley, the Respondent Commission and the Respondent OHRC Commission refers this Court to a number of several human rights decisions:

> a. *Brown,* where the Tribunal held an employee was discriminated against because she did not receive accommodation for day shift necessitated by inability to arrange for daycare.
>
> b. *Hoyt,* where the Canadian Human Rights Tribunal held the complainant had been discriminated on the basis of sex and family status and the employer failed to accommodate her.
>
> c. *Rajotte*, where the Tribunal found the complainant was discriminated against because of family status.
>
> d. *Falardeau v. Ferguson Moving (1990) Ltd. (c.o.b. Ferguson Moving and Storage)*, 2009 BCHRT 272 where an employee sought to avoid overtime hours because of his child care demands was held to not have made out a *prima facie* case as there was no evidence of the child having special needs and no change in the employee's work pattern given he had met such work requirements previously.
>
> e. *McDonald v Mid-Huron Roofing*, 2009 HRTO 1306 where the employer refused to allow an employee time to take a 12 day old premature son to a doctor's appointment when his wife was too ill to do so and terminating the employment instead of considering and exploring whether the employee's needs were serious and explore whether they could be accommodated;
>
> f. *Rennie, supra,* where the panel found *prima facie* discrimination was made out when a woman's employment was terminated for not resuming the shift schedule after returning from maternity leave when she could not find evening childcare.

[77] Illustrative of the debate between CN and the Respondents are the cases of two female conductors, Ms. Richards and Ms. Whyte who had difficulty with the shortage recall because of childcare obligations. Their grievances under the collective agreement, CROA Cases 3549 and 3550 (Arbitration Decisions), were dismissed by the arbitrator. However, their complaints against CN for discriminating against them on the basis of family status were upheld by the Tribunal. *Whyte v Canadian National Railway*, [2010] CHRD No 22; *Richards v Canadian National Railway*, [2010] CHRD No 24 (Tribunal Decisions).

[78] In trying to distil the principles the above cases represent, I would venture to suggest there are underlying questions one or the other has either raised or addressed:

a. does the employee have a substantial obligation to provide childcare for the child or children; in this regard, is the parent the sole or primary care giver, is the obligation substantial and one that goes beyond personal choice;
b. are there realistic alternatives available for the employee to provide for childcare: has the employee had the opportunity to explore and has explored available options; and is there a workplace arrangement, process, or collective agreement available to the employee that may accommodate an employee's childcare obligations and workplace obligations;
c. does the employer conduct, practice or rule put the employee in the difficult position of choosing between her (or his) childcare duties or the workplace obligations?

[79] CN argues the test in *Campbell River* is applicable here. It notes that the British Columbia Court of Appeal held that the family status "cannot be an open-ended concept as urged by the appellant for that would have the potential to cause disruption and great mischief in the workplace." The Appeal Court stated:

> … it seems to me that a *prima facie* case of discrimination is made out when a change in the term 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 that in the vast majority of situations in which there is a conflict between a work requirement in a family obligation it would be difficult to make out a *prima facie* case.

CN submits the reasoning in *Campbell River's* compelling since it is the only appellate decision on point. CN submits the Tribunal erred in law in refusing to follow it.

[80] CN also quotes from the arbitrator's decision in *International Brotherhood of Electrical Workers, Local 636 v Power Stream Inc. (Bender Grievance)*, [2009] OLAA No 447 at paragraph 60 [*Power Stream*] who held that not every characteristic of family status should trigger the protections of the *Act*:

> … But an employer cannot be expected to establish terms of work that do not create conflict [with] each and every characteristic of family status. Nor should employees expect their employer to accommodate every characteristic of family status. Nor should employees expect their employer to accommodate every characteristic. Employees can and do make accommodations to meet the needs of their employer so they can work for themselves and their families. Those accommodations include their choice of accommodation, choice and degree of child care, and choice of what kind of jobs to accept.

[81] In my view, *Power Stream* is noteworthy. The arbitrator examined the individual circumstances of four grievers, finding discrimination was not made out in three cases where potential childcare obligations could be met by alternate arrangements but was made out in the fourth where the employment rule, a work schedule change, would disrupt the griever's custody sharing arrangement based on the original work schedule. *Power Stream* demonstrates an individualized assessment of the individual's options for childcare.

[82] In *McGill*, Justice Abella concluded that a contextual analysis must be completed on a case-by-case basis to take into account all the relevant factors to identify a link between the complainant's group characteristic and the disadvantaging criterion or conduct.

[83] CN submits the Tribunal failed to perform a contextual analysis in this case. It erred in concluding a *prima facie* case had been made out in the absence of any evidence of relevant factors indicating that CN's rules or practices played a role in any adverse treatment or that Ms. Seeley's dismissal was linked to her status as a parent rather than to other issues such as lifestyle choices.

[84] CN submits that its rules and practices did not preclude Ms. Seeley from being able to participate equally and fully unemployment. It submits that no evidence was presented that CN's rules and practices disallowed children's or parents with children in the facilities to which Ms. Seeley had to report to protect the Vancouver shortage. CN submits it has facilities in Vancouver that could be available to Ms. Seeley but admits either she or her husband had personal knowledge of the housing available in Vancouver. CN did not respond to Ms. Seeley's

articulation of her difficulty nor did it inform Ms. Seeley of the anticipated duration of the Vancouver posting, its specific site location, the shifts she would work or the availability of facilities.

[85] The difficulty with CN's submissions is that it makes no reference to its failure to provide Ms. Seeley with information concerning the location, duration and work about the shortage recall assignment. CN's conduct is to be factored into the assessment of whether there has been workplace discrimination based on family status.

[86] On learning the recall posting was for Vancouver, Ms. Seeley wrote to her supervisor and advised him she could not report to Vancouver because of childcare issues. She requested a 30-day extension to explore her options. CN did not respond. Later, on March 26, 2005 she asked to be considered on a compassionate basis under the collective agreement and offered to work at Jasper or Edson. CN never responded.

[87] Instead on June 20, 2005, CN wrote stating "The Company has accommodated your need for additional time to consider your options and make the necessary child care arrangements." CN further stated:

> While the Company recognizes that <u>your child-care is an important personal responsibility</u>, you must acknowledge that your <u>obligation to CN is to manage these personal obligations in such a way that you are also able to fulfill your employment and collective agreement obligations.</u>
>
> [Emphasis added]

[88] In my view, CN's choice of language in its letter and its failure to respond to Ms. Seeley's letters and telephone call and her request for consideration under the collective agreement on the basis of childcare, is indicative of CN's unwavering view that childcare was not a part of what was captured by the *Act*'s prohibition against discrimination in the work place on the basis of family status.

[89] Applying a *prima facie* standard to finding of discrimination based on family status does require a claimant to provide evidence but that does not create a high standard of proof.

[90] I would agree that by any standard, Ms. Seeley has provided evidence of a *prima facie* case of discrimination based on family status. She is the primary caregiver for two children of tender age. Her husband works full time and is the family breadwinner. The choice of residence in Brule was not an issue previously and Ms. Seeley's evidence indicates she considered whether childcare was available in nearby Hinton. CN never provided information necessary to explore whether childcare options were available or feasible in Vancouver. A realistic assessment of Ms. Seeley's familial circumstances does disclose she would have significant difficulty in fulfilling her childcare responsibilities in responding to an indefinite recall assignment to cover the Vancouver shortage.

[91] CN submits Ms. Seeley never made inquiries. It seems to me that CN was the party with the knowledge about work requirements and facilities in Vancouver. It was put on notice about the problem by Ms. Seeley's letters and has a responsibility to respond with information. It did not.

[92] Accordingly, Ms. Seeley satisfies the requirement for having a substantial childcare family obligation. She did not have a realistic opportunity to respond to what CN by its own evidence and submissions, was a major shortage recall well outside the ordinary course of events. CN, by its failure to respond to Ms. Seeley, denied her the opportunity to realistically explore and consider options for childcare in responding to the shortage or accessing accommodation if available under CN policy or the collective agreement.

[93] The Tribunal had evidence before it in that:

a. Ms. Seeley's letter of March 4, 2005 where she advised she had two children, one 6 years old and the other 21 months old with immediate family nearby or suitable daycare in Brule or Hinton;
b. her telephone call on March 7, 2005 to her supervisor leaving a voice mail explaining the family situation and daycare situation;
c. her March 26, 2005 letter which reiterated her husband's obligations (to CN) meant it was not feasible for him to assume the childcare obligations and indicated her understanding the shortage coverage in Vancouver was for an undetermined length of time;
d. her testimony that CN had not informed her which location CN wanted her to go to, what shifts she would be working, or for how long she would be in Vancouver and her assessment that the chance of finding some kind of daycare in that situation was just about impossible;

e. although CN indicated it had facilities to accommodate employees in Vancouver including the option of a rental home, CN acknowledged neither Ms. Seeley or her husband had personal knowledge of the housing available;

f. the absence of any evidence that CN responded in any way other than the extension of time and the letter of June 20, 2005 putting Ms. Seeley on notice and stating her childcare obligations were personal matters;

g. evidence that CN did not enter into any discussions concerning possible options for Ms. Seeley under its accommodation policy; and

h. CN's discussions with the Union concerning Article 148.1(d) of the collective agreement did not occur until well after Ms. Seeley was terminated.

[94] Given the standard for finding *prima facie* discrimination based on family status and the evidence before the Tribunal, I am satisfied the Tribunal's finding was reasonable.

[95] Before leaving the analysis on *prima facie* discrimination I should note the Intervener FRE-T&C submits the Tribunal erred in adopting a test based on "general" family responsibilities. However, in reviewing the Tribunal's decision it is clear to me the Tribunal was cognizant and addressed the question of Ms. Seeley's specific parental childcare obligations arising and not "general" undefined family responsibilities.

Accommodation

[96] CN submits the Tribunal erred in finding that CN had not met its duty to accommodate. CN submits it gave Ms. Seeley four months in which to prepare to relocate to Vancouver, well beyond the 15 days provided in the collective agreement. Ms. Seeley provided no evidence that her children's basic needs could not be met in Vancouver, took no steps to inform herself of the working and living conditions in Vancouver, and did not prepare for the temporary location in any way.

[97] However, CN was clearly the party with the information on working conditions and the housing facilities that could be available for Ms. Seeley during coverage of the shortage. Ms. Seeley wrote to her supervisor outlining her difficulties. She testified that the supervisor never responded and CN did not call the supervisor to testify.

[98] CN says it would have been preferable to engage in discussions. I do not regard such discussions as merely optional in these circumstances. It was essential that CN engage in discussions by responding to Ms. Seeley's letters and telephone call with information it alone had about the Vancouver working conditions and the accommodation that may be available for her and her children.

[99] Moreover, Ms. Seeley specifically requested consideration under provisions of the collective agreement. It is not an answer for CN to say that is solely a matter for the Union to raise as the exclusive bargaining agent. CN states unions must be involved in tripartite (union,

employee and employer) accommodation mediation. Nevertheless even if negotiations must be done with or through the Union, that cannot preclude an employee requesting accommodation. It would remain upon CN, having been presented with a request by an employee, to involve the Union. The evidence is that the only discussions between CN and the Union about Ms. Seeley's situation were held after CN fired Ms. Seeley.

[100] CN goes further into the terms and implications arising from the collective agreement with the Union. However, CN never acknowledged the availability of collective agreement process in response to Ms. Seeley's request for consideration. Had it done so, that might have been a different situation but as it was not, I do not need to consider this further except to observe in *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 [*Central Okanagan*] the Supreme Court found where the employer has a duty to accommodate, the union shares that duty if the provisions of a collective agreement impedes an employer's attempt to accommodate. In addition, Justice Abella clearly stated that a termination of employment clause will be applicable only if it meets the requirements of reasonable accommodation adapted to the individual circumstances of the specific case. *McGill* at para 25. Here the question of accommodation was never considered under the collective agreement by CN before firing Ms. Seeley.

[101] The Tribunal did consider whether CN satisfied its burden of demonstrating accommodation would cause undue hardship.

[102] The Tribunal applied the test set out by the Supreme Court of Canada in *Meiorin*. CN had to demonstrate that the *prima facie* discriminatory standard or conduct is a *bona fide* occupational requirement (BFOR). The Tribunal was satisfied CN met the first part of *Meiorin* standard, being whether the standard was adopted for a purpose rationally connected to the performance of the job. CN had a legitimate purpose for calling up employees to address the shortage. The Tribunal was also satisfied CN met the second part of the *Meiorin* test, the requirement that the standard was adopted in good faith. The Tribunal found there was no evidence the shortage call up requirement was adopted for the purpose of discriminating against Ms. Seeley.

[103] The Tribunal found that CN failed to meet the third part of the *Meiorin* test. It examined whether the impugned standard was reasonably necessary for CN to accomplish its purpose. It decided CN must show that it cannot accommodate Ms. Seeley and others adversely affected by the standard without experiencing hardship. Or as the Tribunal rephrased the question, since Ms. Seeley was adversely affected on the ground of her family status by the standard of compelling employees to cover shortages, could CN accommodate her without experiencing hardship? The Tribunal found the answer to be affirmative.

[104] The Tribunal had regard for the jurisprudence. The adoption of a stringent standard is justified if it accommodates factors relating to the capabilities, worth and dignity of each individual up to the point of undue hardship. *Central Okanagan* at 984. The employer must do an individualized assessment of the employee's situation *McGill* at para 22. The factors to consider set out by Supreme Court in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*,

[1990] 2 SCR 489, at pages 520 – 21 [*Central Dairy* Pool] including cost of accommodation, the relative interchangeability of the workforce and facilities and the prospect of interference with rights of other employees.

[105] The Tribunal considered CN's submission that the provision of more than four months rather than the minimum 15 days set out in the collective agreement was reasonable accommodation. The Tribunal found CN's provision of extra time was not, in any way, a meaningful response.

[106] The Tribunal reviewed the evidence before it. Ms. Seeley requested accommodation because of her family status. CN never responded nor Ms. Seeley's supervisor or the general manager involved call to either provide information or to explain. The Tribunal found that CN witnesses did not consider family status involving parental childcare obligations as requiring accommodation. The Tribunal also found that CN failed to meet the procedural component of the duty to accommodate. CN did not consider Ms. Seeley's request for accommodation nor did it apply its own accommodation polices.

[107] Since, the Tribunal considered the jurisprudence and the evidence before in addressing whether CN provided adequate accommodation, the Tribunal's finding that the CN's claim that merely providing extra time was not a meaningful response to the request for accommodation is reasonable.

[108] The Tribunal went on to address CN's position to the effect that it would be undue hardship to grant the relief sought by Ms. Seeley because she would be granted super seniority based of her family status. However, The Tribunal directed its analysis to the floodgates argument rather than any intersection between the collective agreement and the request for accommodation.

[109] I agree CN's submission on the issue of super seniority brings in the issue of interference with rights of other employees which would be a valid question if the collective agreement had been engaged. However, CN never responded to Ms. Seeley's request for consideration under the terms of the collective agreement and it did not raise this question with the Union before firing Ms. Seeley. In my view, it is not open for CN to raise this issue after the fact and consequently, the Tribunal was not obligated to consider this question.

[110] I find nothing unreasonable about the Tribunal's determination that CN had not met its duty to accommodate.

Remedies

[111] CN submits the Tribunal erred in awarding compensation because it may only award compensation if "the person is engaging or has engaged in the discriminatory practice wilfully or recklessly." The Tribunal found CN's conduct to be reckless. CN submits this finding ignores the uncertain state of the law on family status at the material time and the finding is unsupported by the evidence.

[112] CN relies on the 2004 British Columbia Court of Appeal decision in *Campbell River* elsewhere in its submissions on this judicial review. That decision clearly treats substantial childcare obligations as engaging the human rights protection against discrimination on the ground of family status.

[113] CN, in its treatment of Ms. Seeley's situation, steadfastly ignored the basis for Ms. Seeley's request for accommodation despite available jurisprudence recognized childcare as within the scope of human rights based on family status. It would seem to me that, at the very least, CN had to turn its mind to whether Ms. Seeley's situation required consideration.

[114] The Tribunal took note that CN had an accommodation policy which included family status could have application. It considered the fact that CN and its senior managers involved decided they need not be concerned with family status and ignored their responsibilities under the CN accommodation guidelines.

[115] I consider the Tribunal had sufficient basis to reasonably conclude CN's conduct in this matter was reckless.

Conclusion

[116] I find the Tribunal's finding that parental childcare obligations comes within the term "family status" in the *Act* was reasonable in keeping with the Supreme Court of Canada guidance in *Dunsmuir*, *Khosa* and *Mowat*. I also conclude the Tribunal applied the correct test for finding

prima facie discrimination on the basis of family status and reasonably found there was *prima facie* discrimination. I conclude the Tribunal's determination that the CN had not met its duty to accommodate Ms. Seeley was reasonable. Finally, the Tribunal's award of compensation is reasonable.

[117] The application for judicial review is dismissed.

[118] Having regard to the outcome of this judicial review and the representations of the parties on costs, costs are awarded to Ms. Seeley.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs are awarded to the Respondent Seeley.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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