Federal Court of Appeal | Cour d'appel fédérale

Date: May 2, 2014

Docket: A-89-13

Citation: 2014 FCA 110

CORAM: **PELLETIER J.A.**
MAINVILLE J.A.
SCOTT J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

FIONA ANN JOHNSTONE and CANADIAN HUMAN RIGHTS COMMISSION

Respondents

and

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Intervener

Heard at Toronto, Ontario, on March 11, 2014.

Judgment delivered at Ottawa, Ontario, on May 2, 2014.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: PELLETIER J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment reported as 2013 FC 113 of Mandamin J. of the Federal Court (Federal Court Judge) dismissing the judicial review application of the Attorney General of Canada challenging a decision of the Canadian Human Rights Tribunal (Tribunal) reported as 2010 CHRT 20.

[2] The Tribunal held that the Canadian Border Services Agency (CBSA) had discriminated within the meaning of section 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 against the respondent Fiona Ann Johnstone on the ground of family status by refusing to accommodate her childcare needs through work scheduling arrangements.

[3] For the reasons set out below, I would allow the appeal in part to vary the judgment of the Federal Court Judge on the subject of two remedial measures flowing from the Tribunal's decision, and in all other respects I would dismiss the appeal with costs in favour of Ms. Johnstone.

Background and context

[4] The full background to this litigation is extensively set out in the Tribunal's decision and need not be repeated here. It is sufficient for the purposes of this appeal to simply point out some of the salient facts.

[5] Ms. Johnstone is an employee of the CBSA since 1998. Her husband also works for the CBSA as a supervisor. They have two children. After the eldest was born in January 2003, Ms. Johnstone returned to work from her maternity leave on January 4, 2004. The second child was then born in December 2004, and Ms. Johnstone returned to work on December 26, 2005.

[6] Prior to returning to work from her first maternity leave, Ms. Johnstone asked the CBSA for an accommodation to her work schedule at the Pearson International Airport in Toronto.

[7] The work schedule for full-time CBSA employees occupying positions similar to that of Ms. Johnstone is built around a rotating shift plan referred to as a Variable Shift Scheduling Agreement or VSSA. At the pertinent time, full-time employees rotated through 6 different start times over the course of days, afternoons, and evenings with no predictable pattern, and they worked different days of the week throughout the duration of the schedule. The schedule was based on a 56 day pattern, and employees were given 15 days notice of each new shift schedule, subject to the employer's discretion to change the schedule on 5 days' notice.

[8] Full-time employees such as Ms. Johnstone were required to work 37.5 scheduled hours per week under the VSSA on the basis of an 8 hour day that included a one half hour meal break. Any individual who worked less than 37.5 hours a week was considered a part-time employee. Part-time employees had fewer employment benefits than full-time employees, notably with regard to pension entitlements and promotion opportunities.

[9] It is useful to note that Ms. Johnstone's husband also worked on a variable shift schedule as a customs superintendent. Their work schedules overlapped 60% of the time but were not coordinated. The Tribunal concluded that Ms. Johnstone's husband was facing the same work scheduling problems, and that neither could provide the necessary childcare on a reliable basis.

[10] In the past, the CBSA had accommodated some employees who had medical issues by providing them with a fixed work schedule (static shift) on a full-time basis. The CBSA also accommodated employee work schedules with respect to constraints resulting from religious

beliefs. However, the CBSA refused to provide an accommodation to employees with childcare obligations on the ground that it had no legal duty to do so. Instead, the CBSA had an unwritten policy allowing an employee with childcare obligations to work fixed schedules, but only insofar as the employee agreed to be treated as having a part-time status with a maximum work schedule of 34 hours per week.

[11] Prior to returning from her first maternity leave, Ms. Johnstone asked the CBSA to provide her with static shifts on a full-time basis. She wished to work 3 days per week for 13 hours a day (including one half-hour meal break) so that she could remain full-time. She requested this schedule since she only had access to child care arrangements with family members for the three days in question, and was unable to make other childcare arrangements on a reasonable basis. In light of its unwritten policy, CBSA only offered her static shifts for 34 hours per week resulting in her being treated as a part-time employee.

[12] It is useful to note that the CBSA did not refuse to provide static shifts to Ms. Johnstone on a full-time basis on the ground that this would cause it undue hardship. Rather, it refused the proposed schedule on the ground that it had no legal duty to accommodate Ms. Johnstone's childcare responsibilities.

[13] Ms. Johnstone was not satisfied with the CBSA's unwritten policy that required her to accept part-time employment in return for obtaining static shifts. As a result, she filed a complaint with the Canadian Human Rights Commission on April 24, 2004, alleging

discrimination on the basis of family status contrary to sections 7 and 10 of the *Canadian Human Rights Act*.

[14] The provisions of the *Canadian Human Rights Act* that are particularly pertinent for the purposes of Ms. Johnstone's complaint are subsection 3(1), paragraph 7(b) and section 10, which read 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 an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**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.
[Emphasis added]	[Je souligne]
7. It is a discriminatory practice, directly or indirectly,	**7**. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
[…]	[…]
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	*b*) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
10. It is a discriminatory practice for an employer, employee organization or employer organization	**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*) to establish or pursue a policy or practice, or	*a*) de fixer ou d'appliquer des lignes de conduite;
(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,	*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.
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.	

Procedural history

(a) *Proceedings before the Canadian Human Rights Commission and related proceedings in the Federal Courts*

[15] The investigator who examined the complaint recommended that it be referred to the Tribunal. However, the Canadian Human Rights Commission did not follow this recommendation and instead dismissed the complaint. The Commission found that the CBSA had offered Ms. Johnstone accommodation in the form of a 34 hour a week part-time fixed work schedule. The Commission was not convinced that this policy constituted a serious interference with Ms. Johnstone's duties as a parent or that it had a discriminatory impact on the basis of family status.

[16] Ms. Johnstone sought judicial review of this refusal before the Federal Court. In *Johnstone v. Canada (Attorney General)*, 2007 FC 36, 306 F.T.R. 271, Barnes J. allowed the

judicial review application and remitted the matter back to the Commission for a new determination.

[17] Applying a standard of correctness to the legal issue before him, Barnes J. rejected the test for *prima facie* discrimination taken from the British Columbia Court of Appeal's decision in *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, 2004 BCCA 260, 240 D.L.R. (4th) 479 (*Campbell River*) that the Commission had adopted for screening out the complaint. Under the *Campbell River* test, "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": *Campbell River* at para. 39.

[18] On the basis of the discussion of the Tribunal in *Hoyt v. Canadian National Railway*, 2006 CHRT 33 (*Hoyt*), Barnes J. found that (a) the *Campbell River* test conflated the threshold issue of *prima facie* discrimination with the second stage of the analysis relating to discrimination that deals with *bona fide* occupational requirements, and (b) the suggestion in *Campbell River* that *prima facie* discrimination only arises where the employer changes the conditions of employment was wrong in law. Barnes J. rather concluded that the threshold for *prima facie* discrimination on the ground of family status should be the same as for any other prohibited ground of discrimination. As a result, the simple fact that Ms. Johnstone had been adversely affected by the CBSA's unwritten policy was sufficient to establish a *prima facie* ground of discrimination. The matter was, therefore, remitted to the Commission for reconsideration on that basis.

[19] The appeal from Barnes J.'s decision was dismissed by this Court in *Canada (Attorney General) v. Johnstone*, 2008 FCA 101, 377 N.R. 235 with no opinion being expressed as to whether the appropriate legal test for *prima facie* discrimination in this case should be based on *Campbell River* or on *Hoyt*.

[20] The Commission subsequently referred the complaint to the Tribunal.

(b) The decision of the Tribunal

[21] Following an extensive review of the case law, the Tribunal held that the prohibited ground of discrimination on family status includes family and parental obligations such as childcare obligations. It consequently rejected the Appellant's definition of family status that limited its scope to the status of being in a family relationship. In this regard, the Tribunal noted the following at paragraph 233 of its decision:

> [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.

[22] With respect to the *prima facie* case of discrimination on the ground of family status, the Tribunal rejected the test set out in *Campbell River*. It rather followed the test propounded in *Hoyt* and approved by Barnes J. Under this approach, "an individual should not have to tolerate some amount of discrimination to a certain unknown level before being afforded the protection of the [*Canadian Human Rights*] Act": Tribunal's decision at para. 238.

[23] As a result, the Tribunal held that Ms. Johnstone had made out a case of *prima facie* discrimination in that the "CBSA engaged in a discriminatory practice by establishing and pursuing 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": Tribunal decision at para. 242.

[24] The Tribunal further held that the CBSA had not established a defence based on a *bona fide* occupational requirement that would justify its refusal of the work schedule accommodation sought by Ms. Johnstone, nor had it developed a sufficient undue hardship argument to discharge it from its duty of accommodation. The Tribunal noted, at paragraphs 359 and 362 of its decision, that the position advanced on behalf of the CBSA throughout the proceedings was that it had no legal duty to accommodate Ms. Johnstone, rather than whether such an accommodation would lead to undue hardship.

[25] The Tribunal, therefore, ordered the CBSA to cease its discriminatory practice against employees who seek accommodation on the basis of family status for purposes of childcare responsibilities, 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: Tribunal's decision at para. 366. It further ordered the CBSA to establish written policies satisfactory to Ms. Johnstone and the Canadian Human Rights Commission that would implement a mechanism where family status accommodation requests would be addressed within 6 months, and include a process for individualized assessments of those making such requests: Tribunal's decision at para. 367.

[26] The Tribunal also ordered the CBSA to compensate Ms. Johnstone for her lost wages and benefits from January 4, 2004, when she first commenced part-time employment, until the date of its decision. It awarded Ms. Johnstone $15,000 for pain and suffering pursuant to paragraph 53(2)(*e*) of the *Canadian Human Rights Act*.

[27] The Tribunal further awarded the maximum amount of $20,000 for special compensation pursuant to subsection 53(3) of the *Canadian Human Rights Act*, as a result of its finding that the CBSA had engaged in the discriminatory practice wilfully and recklessly. This award was largely based on the Tribunal's conclusion that the CBSA had failed to follow *Brown v. Canada (Department of National Revenue)*, 1993 CanLII 683 (CHRT) (*Brown*), a prior decision of the Tribunal dealing with the issue of discrimination based on sex (pregnancy) and family status.

[28] In *Brown*, the Tribunal had "ordered the Respondent to prevent similar events from recurring 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'": Tribunal's decision at para. 57. In the Tribunal's view, this prior order had been ignored by the CBSA, thus justifying in this case an award of special compensation under subsection 53(3): Tribunal's decision at paras. 381 and 382.

(c) Judicial Review before the Federal Court

[29] The Attorney General of Canada sought judicial review of the Tribunal's decision. The Federal Court Judge dismissed the application, with the exception of two issues. First, he referred the matter back to the Tribunal so as to allow it to reconsider its award of loss wages and benefits for the period from August 2007 to August 2008 during which Ms. Johnstone opted for unpaid leave so as to accompany her spouse to Ottawa, and (b) he excluded Ms. Johnstone as a party to be consulted with respect to the development of a written remedial policy by the CBSA.

[30] The Federal Court Judge applied the reasonableness standard of review to all of the issues raised before him, including the legal definition and scope of the prohibited ground of discrimination on the basis of family status and the legal test for finding a *prima facie* case of discrimination on that ground

[31] The Federal Court Judge held that the Tribunal had reasonably concluded that family status includes childcare responsibilities, since that interpretation was well within the scope of the ordinary meaning of the words, was consistent with the opinions of numerous human rights and labour relations adjudicative bodies that have considered the matter, and was consistent with the objectives of the *Canadian Human Rights Act*.

[32] The Judge also held that the test used by the Tribunal for finding a *prima facie* case of discrimination was reasonable, as was its application of that test in this case. In so doing, he specifically discarded the "serious interference" test used in *Campbell River*.

[33] However, the Federal Court Judge found fault with the Tribunal's remedies. He noted that the evidence showed that Ms. Johnstone had sought, and obtained, an unpaid leave from August 2007 to August 2008 to accompany her husband to Ottawa. Since he could not discern the basis on which the Tribunal awarded full wages to Ms. Johnstone for that period of time, he referred that issue back to the Tribunal for reconsideration.

[34] The Federal Court Judge also concluded that the Tribunal exceeded its jurisdiction when it ordered the CBSA to establish written remedial policies satisfactory to Ms. Johnstone. In the Judge's view, the *Canadian Human Rights Act* "does not provide that a victim may have a role or participate in the development of remedial polic[i]es to redress the discriminatory practices": Federal Court Judge's reasons at para. 168.

Issues raised in this appeal

[35] The issues raised in this appeal may be set out as follows:

1. What is the applicable standard of review?

2. Did the Tribunal commit a reviewable error in concluding that family status includes childcare obligations?

3. Did the Tribunal commit a reviewable error in identifying the legal test for finding a *prima facie* case of discrimination on the ground of family status?

4. Applying the proper meaning and scope to family status, and using the proper legal test, did the Tribunal commit a reviewable error in finding that a *prima facie* case of discrimination on the ground of family status had been made out in this case?

5. Did the Tribunal commit reviewable errors with respect to its remedial orders, notably with respect to: (a) the award of lost wages for the period subsequent to December 2005; (b) the requirement that the CBSA establish a written policy satisfactory to the Canadian Human Rights Commission; and (c) the award of special damages under paragraph 53(3) of the *Canadian Human Rights Act*?

The standard of review

[36] In an appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the application judge identified and applied the correct standard of review, and in the event he or she has not, to assess the decision under review in light of the correct standard: *Keith v. Correctional Service of Canada*, 2012 FCA 117, 40 Admin. L.R. (5th) 1 at para. 41; *Yu v. Canada (Attorney General)*, 2011 FCA 42, 414 N.R. 283 at para. 19; *Canada Revenue Agency v. Telfer*, 2009 FCA 23, 386 N.R. 212 at para. 18.

[37] This means, in effect, that an appellate court's focus is on the administrative decision; in this case, the decision of the Tribunal: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 46; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at para. 247; *Minister of Citizenship and Immigration v. Kandola*, 2014 FCA 85 at para. 29.

[38] The application judge's selection of the appropriate standard of review is itself a question of law subject to review on the standard of correctness: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at para. 35; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 43; *Prairie Acid Rain Coalition v. Canada (Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610 at para. 14.

[39] There is no dispute in this appeal that the conclusion of the Tribunal with respect to questions of fact and of mixed fact and law are to be reviewed on a standard of reasonableness. However, there is substantial disagreement as to the standard of review that applies to findings of law made by the Tribunal, particularly with respect to (a) the meaning and scope of family status as a prohibited ground of discrimination and (b) the applicable legal test under which a finding of discrimination may be made with respect to that prohibited ground.

[40] The interpretation by an adjudicative tribunal of its enabling statute or of statutes closely related to its functions are presumed to be subject to deference on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teacher's Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 34, 39 and 41; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 366 D.L.R. (4th) 30 at paras. 21, 22 and 33.

[41] That presumption may, however, be rebutted if it can be concluded that Parliament's intent is inconsistent with its application: *Rogers Communication Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 at para. 15 (*Rogers*

Communications). Indeed, the determination of the appropriate standard of review is essentially a search for legislative intent: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) at para. 30; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, above at para. 21.

[42] Prior to *Dunsmuir*, the Supreme Court of Canada had specifically held that the standard of review pertaining to the meaning and scope of family status as a prohibited ground of discrimination was correctness: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 576-578 (*Mossop*). Our Court had also held that the standard of review for the test for *prima facie* discrimination is correctness: *Canada (Attorney General) v. Sketchley*, 2005 FCA 404, [2006] 3 F.C.R. 392. The question before us here is whether this is still good law in light of *Dunsmuir* and the decisions of the Supreme Court of Canada which have followed it.

[43] That question was left unanswered by the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (*Mowat*). That case concerned the interpretation by the Tribunal of paragraphs 53(2)(*c*) and (*d*) of the *Canadian Human Rights Act* with respect to its authority to award legal costs. In *Mowatt*, LeBel and Cromwell JJ. applied a standard of reasonableness to the Tribunal's decision to award legal costs, and they concluded that the Tribunal's decision in that case was unreasonable. In so doing, they emphasized that a standard of correctness may well apply to decisions of the Tribunal dealing with broad human rights principles: *Mowat* at para. 23.

[44] In light of the four factors discussed below, I conclude that, in this case, the presumption of reasonableness is rebutted and a standard of correctness is to be applied with respect to the two legal issues before us, namely (a) the meaning and scope of "family status" as a prohibited ground of discrimination, and (b) the applicable legal test under which a finding of *prima facie* discrimination may be made under that prohibited ground.

[45] First, the Supreme Court of Canada has consistently held that fundamental rights set out in human rights legislation, such as the *Canadian Human Rights Act*, are "quasi-constitutional" rights: see notably *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at pp. 157-158; *Ont. Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at pp. 546-547; *Dickason v. University of Alberta*, [1992] 2 R.C.S. 1103 at p. 1154; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, 2003 SCC 68, [2003] 3 S.C.R. 228 at para. 43; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 81; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604 at para. 19.

[46] As noted in *Dunsmuir* at paragraph 58, and for obvious reasons, constitutional issues are necessarily subject to review on a correctness standard. In my view, this approach extends as well to quasi-constitutional issues involving the fundamental human rights set out in *Canadian Human Rights Act* and provincial human rights legislation.

[47] Second, a multiplicity of courts and tribunals are called upon to interpret and apply human rights legislation, including the *Canadian Human Rights Act*. As this appeal illustrates,

labour arbitration boards, labour relations boards and superior courts throughout Canada are regularly called upon to adjudicate with respect to the fundamental human rights described in the *Canadian Human Rights Act* and other human rights legislation. As a result, courts have been called upon in the past and will be called upon in the future to examine the same legal issues the Tribunal is required to address in these proceedings.

[48] As aptly noted in *Rogers Communications* at paragraph 14, it would be inconsistent to review the legal questions at issue here on judicial review of a decision of the Tribunal on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question. This concurrent jurisdiction of a multiplicity of decisions makers, including the Tribunal and the courts, rebuts the presumption of reasonableness with regard to the two questions of law raised in this appeal: *Rogers Communications* at para. 15.

[49] Third, in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 at pp. 368 and 369 and 372-373 and in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at paras. 47-48, the Supreme Court of Canada concluded that the interpretation of "service customarily available to the public" for the purposes of the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22 and of "services to the public" in the Yukon *Human Rights Act*, R.S.Y. 1986 (Supp.) c. 11 were general questions of law to be reviewed on a standard of correctness, based on the principle that "in order for the interpretation of human rights legislation to be purposive, differences in wording among the various provinces should not be permitted to frustrate the similar purpose underlying these provisions": *Gould* at para. 47; Berg at p. 372-373.

[50] Most provinces have adopted human rights legislation that prohibits discrimination on the basis of family status: *Human Rights Code*, R.S.O. 1990, c. H-19, s.1; *Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 7(1); *Human Rights Act*, R.S.N.S. 1989, c. 214, par.. 5(1)(*r*); *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5. ss. 3(1); *The Human Rights Code*, C.C.S.M., H175, ss. 9(2); *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, par. 2(1)(*m.01*); *Human Rights Act*, S.N.L. 2010, c. H-13.1, ss. 9(1); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 13.

[51] The two principal legal issues raised in this appeal concern questions of fundamental rights and principles in a human rights context. These are not issues about questions of proof or mere procedure, or about the remedial authority of a human rights tribunal or commission. As such, for the sake of consistency between the various human rights statutes in force across the country, the meaning and scope of family status and the legal test to find *prima facie* discrimination on that prohibited ground are issues of central importance to the legal system, and beyond the Tribunal's expertise, which attracts a standard of correctness on judicial review: *Dunsmuir* at para. 60.

[52] Fourth, *Dunsmuir* also stands for the proposition that when the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular question, the matter should be deemed settled. As noted above, the Supreme Court of Canada has determined in the past that a correctness standard of review applies to the meaning and scope of family status under the *Canadian Human Rights Act*: *Mossop* at pp. 576-578. Whether the jurisprudence of the Supreme Court of Canada post-*Dunsmuir* has implicitly overruled this prior approach with respect to fundamental human rights is a matter best left for

the Supreme Court itself to decide. Until the Supreme Court of Canada decides otherwise, our Court is bound by *Mossop*: *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489 at para. 21.

The meaning and scope of family status

[53] The appellant submits that the ordinary and grammatical meaning of the expression family status should prevail, and that this expression should therefore be interpreted as defining a legal status, like the ground of marital status. As a consequence, the prohibited ground of family status would be limited to the personal characteristic of whether or not one is part of a family or has a particular family relationship, but it would not include any substantive parental obligations such as childcare obligations.

[54] The appellant notably submits that by defining family status broadly to include parental obligations, the Tribunal adopted a meaning that does not align with the other prohibited grounds of discrimination that are all based on immutable or constructively immutable personal characteristics. In the appellant's view, a person's absolute or relative family status is immutable or constructively immutable, but the same cannot be readily said of childcare obligations.

[55] The appellant thus proposes a literal interpretation of the expression family status that excludes childcare obligations. According to this interpretation, by defining the ground in terms of status, Parliament did not intend to protect childcare responsibilities. Conflicts between these responsibilities and the terms and conditions of employment would not represent a disadvantage that is arbitrary or based on stereotypes concerning a person's family status.

[56] The appellant finds comfort for this interpretation in the legislative history of the provision, and relies on a statement from the responsible Minister at the time the ground of family status was incorporated into the *Canadian Human Rights Act* to the effect that Parliament's intent was primarily to prevent discrimination based on one's relative family status.

[57] The appellant further submits that by introducing into the *Canadian Human Rights Act* the notion of discrimination on the ground of childcare obligations, the Tribunal modified the Act in a significant way, and that a change of this magnitude raises difficult questions of social policy that Parliament, rather than the courts, is best placed to address.

[58] However, the appellant cites no judicial authority that would directly support this restrictive interpretation of the expression family status. On the contrary, all the decisions of the courts, human rights tribunals and labour adjudicators that have been submitted to us in this appeal, and that have directly considered the matter, have decided the contrary.

[59] In fact, judges and adjudicators have been almost unanimous in finding that family status incorporates parental obligations such as childcare obligations. This has been the position consistently held by:

(a) the Tribunal: *Brown, Hoyt, Woiden v. Lynn*, 2002 CanLII 8171; *Closs v. Fulton Forwarders Incorporated and Stephen Fulton*, 2012 CHRT 30; *Richards v. Canadian National Railway*, 2010 CHRT 24; *Whyte v. Canadian National Railway*, 2010 CHRT 22; *Seeley v. Canadian National Railway*, 2010 CHRT 23;

(b) the Federal Court: *Johnstone v. Canada (Attorney General)*, 2007 FC 36, 306 F.T.R. 271 referred to above; *Patterson v. Canada (Revenue Agency)*, 2011 FC 1398, 401 F.T.R. 211 at paras. 34-35;

(c) the British Columbia Court of Appeal: *Campbell River* at para. 39;

(d) the Human Rights Tribunal of Ontario: *Devaney v. ZRV Holdings Limited and Zeidler Partnership Architects*, 2012 HRTO 1590; *Callaghan v. 1059711 Ontario Inc.*, 2012 HRTO 233; *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306; *C.D. v. Wal-Mart Canada Corp.*, 2009 HRTO 801;

(e) labour arbitrators: *Canada Post Corp. v. Canadian Union of Postal Workers (Sommerville Grievance)*, 156 L.A.C. (4th) 109; *Ontario Public Service Employees Union v. Ontario Public Service Staff Union (DeFreitas Grievance)*, [2005] O.L.A.A. No. 396 (QL).

[60] Our Court is not bound by these decisions, but they are difficult to ignore since their logic is compelling and better reflects the large and liberal interpretation that is to be given to human rights legislation.

[61] It is generally accepted that human rights legislation must be given a broad interpretation to ensure that the stated objects and purposes of such legislation are fulfilled. As a result, a narrow restrictive interpretation that would defeat the purpose of eliminating discrimination should be avoided: *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 114 at pp. 1137-1138 quoting approvingly from *Canadian*

Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission, [1985] 3 W.W.R. 717 at p. 735.

[62] As also noted in numerous decisions of the Supreme Court of Canada, the key provisions of human rights legislation must be interpreted in a flexible manner and with an adaptive approach: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 at para. 76; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Lexis Nexis, 2008) at pp. 502-503.

[63] The proper interpretative rule was set out as follows in *B v. Ontario (Human Rights Commission)*, 2002 SCC 66, [2002] 3 S.C.R. 403 at para. 44:

> More generally, this Court has repeatedly reiterated the view that human rights legislation has a unique quasi-constitutional nature and ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it: see, for example, *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at para. 120; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 370; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at pp. 157-58.

[64] In that case, the Supreme Court of Canada was called upon to determine whether the expressions "marital status" and "family status" in the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 were broad enough to encompass a situation where an adverse distinction is drawn on the particular identity of a complainant's spouse or family member, or whether the ground was restricted to distinctions based on the mere fact that the complainant has a certain type of marital or family status. Iacobucci and Bastarache JJ. noted that the broad goal of anti-

discrimination statutes is furthered by embracing a more inclusive interpretation of the expression family status: *B v. Ontario (Human Rights Commission)*, above at para. 4.

[65] That broad and purposive approach also applies in this case, particularly where due regard is given to the purpose of the *Canadian Human Rights Act* set out in section 2:

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.
[Emphasis added]	[Je souligne]

[66] There is no basis for the assertion that requiring accommodation for childcare obligations overshoots the purpose of including family status as a prohibited ground of discrimination. Indeed, without reasonable accommodation for parents' childcare obligations, many parents will be impeded from fully participating in the work force so as to make for themselves the lives they are able and wish to have. The broad and liberal interpretation of

human rights legislation requires an approach that favours a broad participation and inclusion in employment opportunities for those parents who wish or need to pursue such opportunities.

[67] It is noteworthy that Parliament chose to use two distinct words for the word "status" in the French version of sections 2 and 3 of the *Canadian Human Rights Act*: "l'état matrimonial" for marital status and the much broader "situation de famille" for family status. The French word "situation" is broadly defined in *Le Nouveau Petit Robert* as "[e]nsemble des circonstances dans lesquelles une personne se trouve" (the whole of the circumstances in which an individual finds himself). In contrast, that same common dictionary defines "état" as "[m]anière d'être (d'une personne ou d'une chose) considérée dans ce qu'elle a de durable" (state of being of a person or thing considered in its enduring aspects). The distinction is important, and supports a much broader interpretation of "family status" that includes family circumstances, such as childcare obligations.

[68] That being said, the precise types of childcare activities that are contemplated by the prohibited ground of family status need to be carefully considered. Prohibited grounds of discrimination generally address immutable or constructively immutable personal characteristics, and the types of childcare needs which are contemplated under family status must therefore be those which have an immutable or constructively immutable characteristic.

[69] It is also important not to trivialize human rights legislation by extending human rights protection to personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities. These types of activities would

be covered by family status according to one of the counsel who appeared before us, and I disagree with such an interpretation.

[70] The childcare obligations that are contemplated under family status should be those that have immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and a child. As a result, the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability. Thus a parent cannot leave a young child without supervision at home in order to pursue his or her work, since this would constitute a form of neglect, which in extreme examples could even engage ss. 215(1) of the *Criminal Code*, R.S.C. 1985, c. C-46; *R. v. Peterson* (2005), 34 C.R. (6th) 120, 201 C.C.C. (3d) 220 (Ont. C.A.) at para. 34; *R. v. Popen*, [1981] O.J. No. 921 (QL), 60 C.C.C. (2d) 232 (C.A.) at para. 18.

[71] Even conduct which meets the criminal standard, minimal as it is, does not necessarily meet other legal standards of childcare, such as those found in the child welfare legislation of the various provinces or in article 599 of the Quebec *Civil Code*. Put another way, the parental obligations whose fulfillment is protected by the *Canadian Human Rights Act* are those whose non-fulfillment engages the parent's legal responsibility to the child.

[72] Voluntary family activities, such as family trips, participation in extracurricular sports events, etc. do not have this immutable characteristic since they result from parental choices rather than parental obligations. These activities would not normally trigger a claim to discrimination resulting in some obligation to accommodate by an employer: *International*

Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc. (Bender Grievance), [2009] O.L.A.A. NO. 447, 186 L.A.C. (4th) 180 (*Power Stream*) at paras. 65-66.

[73] I note that there is no fundamental discrepancy between an interpretation of family status as including childcare obligations that engage the parent's legal responsibility for the child and Parliament's intent in including that prohibited ground of discrimination in the *Canadian Human Rights Act*. Protection from discrimination for childcare obligations flows from family status in the same manner that protection against discrimination on the basis of pregnancy flows from the sex of the individual. In both cases, the individual would not require accommodation were it not for the underlying ground (family status or sex) on which they were adversely affected.

[74] In conclusion, the ground of family status in the *Canadian Human Rights Act* includes parental obligations which engage the parent's legal responsibility for the child, such as childcare obligations, as opposed to personal choices. Defining the scope of the prohibited ground in terms of the parent's legal responsibility (i) ensures that the protection offered by the legislation addresses immutable (or constructively immutable) characteristics of the family relationship captured under the concept of family status, (ii) allows the right to be defined in terms of clearly understandable legal concepts, and (iii) places the ground of family status in the same category as other enumerated prohibited grounds of discrimination such as sex, colour, disability, etc.

The legal test for finding a *prima facie* case of discrimination on the prohibited ground of family status

[75] There is no fundamental dispute between the parties as to many aspects of the legal test that is used to determine whether there is discrimination on the prohibited ground of family status. All parties agree that the test comprises two parts. First, a *prima facie* case of discrimination must be made out by the complainant. Once that *prima facie* case has been made out, the analysis moves to a second stage where the employer must show that the policy or practice is a *bona fide* occupational requirement and that those affected cannot be accommodated without undue hardship.

[76] The parties also agree that the first part of the test that concerns a *prima facie* case requires complainants to show that they have a characteristic protected from discrimination, that they experienced an adverse impact with respect to employment, and that the protected characteristic was a factor in the adverse impact.

[77] Beyond that however, the parties disagree as to how the *prima facie* part of the test should be defined and applied. The appellant submits that an approach similar to the one used by the British Columbia Court of Appeal in *Campbell River* should be used, while the other parties submit that this would result in imposing a higher *prima facie* threshold for cases based on discrimination on the ground of family status.

[78] *Campbell River* concerned an arbitration award under a collective agreement where the legal issue was the meaning and scope of the expression family status found in subsection 13(1) of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210. The complainant was the

mother of a boy then aged thirteen who had severe behavioral problems requiring specific parental and professional attention. Her employer changed her work schedule from an 8am to 3pm shift to an 11:30am to 6pm shift. This shift change impeded the complainant from attending to the needs of her son after his school hours. The arbitrator denied the grievance brought by the complainant to challenge the work schedule change. The arbitrator found that the circumstances involving childcare arrangements did not raise an issue of discrimination based on the prohibited ground of family status. The British Columbia Court of Appeal overturned the arbitrator and remitted the grievance for a new determination. In so doing, the Court made the following conclusions of law:

> [39] […] 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 that 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.
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> [Emphasis added]

[79] The requirements of a "serious interference" with a "substantial" duty or obligation are the subjects of the controversy between the parties. The appellant invokes the reasoning in *Campbell River* as a practical approach, and thus proposes to limit *prima facie* cases of discrimination to circumstances where (a) the parental obligation at issue cannot be delegated to a third party, (b) the claimant has tried unsuccessfully to reconcile the non-delegable parental obligation with the employment duties, and (c) the non-delegable parental obligation at issue is substantial.

[80] The other parties to this appeal submit that adopting this approach would entail a higher threshold for a finding of *prima facie* discrimination on the ground of family status than for the other prohibited grounds set out in the *Canadian Human Rights Act*. In their view, a *prima facie* case requires only that a person be differentiated adversely on a prohibited ground in the course of employment. They thus submit that the standard set out in *Campbell River* is wrong in law and fundamentally flawed in that it conflates the issue of *prima facie* discrimination – which is determined at the first stage of the test - and that of undue hardship - which is determined at the second stage of the test. They notably rely on the following criticism of *Campbell River* made by the Tribunal in its *Hoyt* decision:

> [119] A different articulation of the evidence necessary to demonstrate a *prima facie* case is articulated by the British Columbia Court of Appeal in [*Campbell River*]. The Court of Appeal found that the parameters of family status as a prohibited ground of discrimination in the *Human Rights Code* of British Columbia must not be drawn too broadly or it would have the potential to cause 'disruption and great mischief' in the workplace. The Court directed that a *prima facie* case is made out 'when a change in a term or condition of employment imposed by an employer results in serious interference with a substantial parental or other family duty or obligation of the employee." Low, J.A. observed that the *prima facie* case would be difficult to make out in cases of conflict between work requirements and family obligations.
>
> [120] With respect, I do not agree with the Court's analysis. Human rights codes, because of their status as 'fundamental law,' must be interpreted liberally so that they may better fulfill their objectives […] It would, in my view, be inappropriate to select out one prohibited ground of discrimination for a more restrictive definition.
>
> [121] In my respectful opinion, the concerns identified by the Court of Appeal, being serious workplace disruption and great mischief, might be proper matters for consideration in the *Meiorin* analysis and in particular the third branch of the analysis, being reasonable necessity. When evaluating the magnitude of hardship, an accommodation might give rise to matters such as serious disruption in the workplace, and serious impact on employee morale are appropriate considerations […] Undue hardship is to be proven by the employer on a case by case basis. A mere apprehension that undue hardship would result is not a proper reason, in my respectful opinion, to obviate the analysis.

[81] I agree that the test that should apply to a finding of *prima facie* discrimination on the prohibited ground of family status should be substantially the same as that which applies to the other enumerated grounds of discrimination. There should be no hierarchies of human rights. However, though the test should be substantially the same, that test is also necessarily flexible and contextual, as aptly noted by the Canadian Human Rights Commission in its submissions before this Court.

[82] The starting point of the test to establish a *prima facie* case of discrimination is set out in *Ontario Human Rights Commission v. Simpsons-Sears*, above at p. 558, where McIntyre J. noted that the complainant in proceedings before a human rights tribunal must show a *prima facie* case of discrimination, and such 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."

[83] The test is necessarily flexible and contextual because it is applied in cases with many different factual situations involving various grounds of discrimination. As noted by Evans J.A. in *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154, 344 N.R. 316 at para. 28, a "flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment…".

[84] As a result, a *prima facie* case must be determined in a flexible and contextual way, and the specific types of evidence and information that may be pertinent or useful to establish a

prima facie case of discrimination will largely depend on the prohibited ground of discrimination at issue.

[85] As an example, in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (*Amselem*) the Supreme Court of Canada considered the test for establishing a breach of the guarantee of religious freedom under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12. In that case, the Court rejected the idea that religious belief must be objectively grounded, and instead held that the issue is whether the individual has a sincerely held religious belief. For that purpose, the Court set out certain factors that can assist in assessing whether a *prima facie* case of religious discrimination is established taking into account the particular nature of the prohibited ground at issue. It is useful to review these factors that are set out at paragraphs 56 to 62 of *Amselem*:

> [56] Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.
>
> [57] Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*.
>
> …
>
> [59] It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial. The question then becomes: what does this mean?

> [60] At this stage, as a general matter, one can do no more than say that the context of each case must be examined to ascertain whether the interference is more than trivial or insubstantial. But it is important to observe what examining that context involves.
>
> [61] In this respect, it should be emphasized that not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute […].
>
> [62] Freedom of religion, as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec *Charter* and the Canadian *Charter* and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.
>
> [Emphasis in original]

[86] As is readily apparent from these passages of *Amselem*, the specific types of evidence and information that may be applied to establish a *prima facie* case of discrimination largely depend on the nature of the prohibited ground of discrimination at issue.

[87] In this case, the Federal Court Judge concluded, at paragraph 121 of his reasons, that "the childcare obligations arising in discrimination claim[s] based on family status must be one of substance and the complainant must have tried to reconcile family obligations with work obligations", adding that "this requirement does not constitute creating a higher threshold test for serious interference." I agree.

[88] Normally, parents have various options available to meet their parental obligations. Therefore, it cannot be said that a childcare obligation has resulted in an employee being unable to meet his or her work obligations unless no reasonable childcare alternative is reasonably available to the employee. It is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a *prima facie* case of discrimination will be made out.

[89] This principle has been recognized in numerous labour arbitration cases dealing with the issue. As noted in *Alberta (Solicitor General) v. Alberta Union of Provincial Employees (Jungwirth Grievance)*, [2010] A.G.A.A. No. 5 (QL) at para. 64, "[i]n order to work, all parents must take some steps on their own to ensure that they can fulfill both their parental obligations and their work commitments. Part of any examination of whether a *prima facie* case has been established for family status discrimination must therefore include an analysis of the steps taken by the employee him or herself to balance their family life and workplace responsibilities."

[90] The same principle was applied in *Ontario Public Service Employees Union v. Ontario (Liquor Control Board of Ontario) (Thompson Grievance)*, [2012] O.G.S.B.A. No. 155 (QL) at para. 40: "This test requires an employee seeking accommodation to demonstrate he or she was not able to meet a family obligation by reasonable means other than accommodation in the workplace." That same principle was also applied by a Board of Inquiry established under the Ontario *Human Rights Code* in *Wright v. Ontario (Office of the Legislative Assembly)*, [1998] O.H.R.B.I.D. No.13 (QL) at paras. 309 to 311, and in *Power Steam* at para. 62.

[91] This approach is not adding an extra burden on complainants in cases involving family status. As aptly noted in *Alliance Employees Union, Unit 15 v. Customs and Immigrations Union (Loranger Grievance)*, [2011] O.L.A.A. No. 24 at para. 45, complainants in disability cases must first establish that they have a disability and have an ongoing obligation to notify the employer of changes in their restriction; it is not more onerous to require a parent to establish the nature of the restrictions he or she faces in meeting both parental and employment obligations.

[92] The Tribunal's decision in *Hoyt* also implicitly accepted the significance of the claimant's efforts in that case to seek childcare arrangements that would allow compliance with both parental and professional obligations. The Tribunal's finding of discrimination in that case rested on the claimant having made considerable efforts in this regard: *Hoyt* at paras. 123-124.

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

[94] The first factor requires the claimant to demonstrate that a child is actually under his or her care and supervision. This requires the individual claiming *prima facie* discrimination to show that he or she stands in such a relationship to the child at issue and that his or her failure to meet the child's needs will engage the individual's legal responsibility. In the case of parents, this will normally flow from their status as parents. In the case of *de facto* caregivers, there will be an obligation to show that, at the relevant time, their relationship with the child is such that they have assumed the legal obligations which a parent would have found.

[95] The second factor requires demonstrating an obligation which engages the individual's legal responsibility for the child. This notably requires the complainant to show that the child has not reached an age where he or she can reasonably be expected to care for himself or herself during the parent's work hours. It also requires demonstrating that the childcare need at issue is one that flows from a legal obligation, as opposed to resulting from personal choices.

[96] The third factor requires the complainant to demonstrate that reasonable efforts have been expended to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible. A complainant will, therefore, be called upon to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or an alternative arrangement is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a *bona fide* childcare problem. This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances.

[97] The fourth and final factor is that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation. The underlying context of each case in which the childcare needs conflict with the work schedule must be examined so as to ascertain whether the interference is more than trivial or insubstantial.

[98] It is not necessary to define in more precise terms the test for *prima facie* discrimination on the ground of family status resulting from childcare obligations. The test itself must be sufficiently flexible so as to advance the broad purpose of the *Canadian Human Rights Act* as set out in section 2 of that Act, notably the principle that individuals should have the opportunity equal with other individuals to make for themselves the lives 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 family status

[99] Consequently, deciding what specific types of evidence are required to meet all four factors of the above test for a *prima facie* case of discrimination in any given context will vary with the facts of each case, and is better left to be determined on a case-by-case basis.

Application to the circumstances of Ms. Johnstone

[100] Applying the proper legal test, I can find no reviewable error in the Tribunal's conclusion that Ms. Johnstone has made out a *prima facie* case of adverse discrimination by the CBSA on the basis of family status.

[101] First, it is not disputed that Ms. Johnstone had one and then two children under her care and supervision during the times pertinent to her complaint. Though this responsibility was shared with her husband, this does not detract from Ms. Johnstone's shared responsibility for the care and supervision of her two children. As a result, she satisfied the first leg of the test outlined above for establishing a *prima facie* case.

[102] Second, both children were toddlers for which she and her husband were legally responsible. She and her husband could not leave the children on their own without adult supervision during their working hours without breaching their legal obligations towards them. As a result, they were legally required to provide their children with some form of childcare arrangement while they were away to attend to their work with the CBSA. As a result, Ms. Johnstone's childcare obligations engaged her legal responsibilities as a parent towards her children, as opposed to a personal choice. As such, Ms. Johnstone satisfied the second leg of the test.

[103] Third, the Tribunal found as a matter of fact that Ms. Johnstone had made serious but unsuccessful efforts to secure reasonable alternative childcare arrangements: Tribunal's decision at paras. 187,188, 193 and 194. The Tribunal outlined the significant efforts of Ms. Johnstone to secure childcare arrangements that would allow her to continue to work the rotating and irregular schedule set out in her VSSA.

[104] In particular, the Tribunal noted that Ms. Johnstone had investigated numerous regulated childcare providers, both near her home and near her work, but that none of these

provided services outside standard work hours: Tribunal's decision at para. 79. The Tribunal also noted her efforts with unregulated childcare providers, including family members, as well as the broader inquiries she made to secure flexible childcare arrangements that would meet her work schedule: Tribunal's decision at paras. 80-81. The Tribunal found that the work schedules of Ms. Johnstone and of her husband were such that neither could provide the childcare needed on a reliable basis: Tribunal's decision at para. 82. The Tribunal further noted that the alternative of a live-in nanny was not an appropriate option in the circumstances, since Ms. Johnstone's family would have had to move into a home that could accommodate another adult person: Tribunal's decision at para. 83.

[105] Consequently, Ms. Johnstone clearly satisfied the third leg of the test for a *prima facie* case, in that she made reasonable efforts to meet her childcare obligations through reasonable alternative solutions, but no such alternative solution was reasonably available

[106] Fourth, the Tribunal found that Ms. Johnstone's regular work schedule based on the VSSA interfered in a manner that was more than trivial or insubstantial with the fulfillment of her childcare obligations.

[107] The Tribunal notably relied on the evidence of Martha Friendly, who was qualified as an expert on childcare policy in Canada, including childcare availability for people who work rotating and fluctuating shifts on an irregular basis: Tribunal's decision at paras.174 to 195. Ms. Friendly testified that unpredictability in work hours was the most difficult factor in accommodating childcare, and that it made finding a paid third-party provider of childcare,

regulated or unregulated, almost impossible: Tribunal's decision at paras. 178 and 179. She also testified that the next most difficult factor was the need for extended work hours outside standard operating hours, which also rendered childcare availability virtually impossible to find: Tribunal's decision at para. 180. She concluded that Ms. Johnstone's situation was "one of the most difficult childcare situations that she could imagine" based on different shifts at different times and different days including weekends, overtime, shifts at all hours of the day or night, and the fact her husband worked a similar type of job schedule: Tribunal's decision at para. 195.

[108] As a result, Ms. Johnstone clearly made out a *prima facie* case of discrimination on the ground of family status resulting from childcare obligations, and the Tribunal committed no reviewable error in so finding.

[109] Since the appellant is not asserting any *bona fide* occupational requirement or an undue burden in providing Ms. Johnstone fixed shifts on a full-time basis, the Tribunal's ruling that Ms. Johnstone's complaint under the *Canadian Human Rights Act* was substantiated must be upheld.

Remedies

[110] The Attorney General of Canada submits that the Tribunal committed reviewable errors in its remedial orders, notably with respect to the award of lost wages for the period subsequent to December 2005, the requirement that the CBSA establish a written policy satisfactory to the Canadian Human Rights Commission, and the award of special damages under paragraph 53(3) of the *Canadian Human Rights Act*.

(a) Award of lost wages

[111] The appellant submits that the Tribunal acted unreasonably in ordering lost wages to be paid to Ms. Johnstone for the periods of December 2005 to August 2007 and August 2008 to August 2010.

[112] For the first period (December 2005 to August 2007) CBSA offered to Ms. Johnstone that she work part-time for 34 hours a week. She elected instead to work 20 hours per week. The appellant submits that since Ms. Johnstone was only available to work 20 hours per week during this period, she should not be entitled to wages on a full-time basis since there would be no causal connection between the award of full time wages for the period at issue and the alleged discrimination.

[113] The Tribunal's decision to award lost wages on a full-time basis during the period of December 2005 to August 2007 rests on its finding of fact that had Ms. Johnstone been accommodated in her work schedule through static shifts on a full-time basis, as she had initially requested, she would have accepted those hours: Tribunal's decision at para. 372. A causal nexus was, therefore, established. The Tribunal's conclusion on this point was based on an assessment of Ms. Johnstone's testimony and was open to it. Given that this finding of fact is supported by the evidence in the record before us, there is no basis on which this Court could overturn the Tribunal's conclusion on this point. That conclusion is also supported by the fact the CBSA denied Ms. Johnstone's request to work three thirteen hour shifts per week: Tribunal's decision at paras. 99 and 100.

[114] For the second period (August 2008 to August 2010) the appellant notes that the Federal Court Judge concluded that the Tribunal failed to justify its award of full time lost wages for the period from August 2007 to August 2008 during which Ms. Johnstone had moved to Ottawa to join her husband under a spousal relocation leave. When that leave expired, she then took care and nurturing leave. Since there was no change in Ms. Johnstone's situation during the period of August 2008 to August 2010 as compared with the period of August 2007 to August 2008 – she continued to live in Ottawa with her husband under a work leave arrangement – the Federal Court Judge should have returned the matter back to the Tribunal for both periods.

[115] Since Ms. Johnstone has not appealed from the judgment referring back to the Tribunal its award of full-time lost wages for the period of August 2007 to August 2008 when Ms. Johnstone opted for unpaid leave to accompany her husband to Ottawa, there is much logic in the appellant's submission that the same conclusion should apply to the period of August 2008 to August 2010 during which Ms. Johnstone continued to remain on leave in Ottawa. As a result, I would vary accordingly the judgment of the Federal Court Judge.

(b) Establishment of a written policy satisfactory to the Canadian Human Rights Commission

[116] The appellant also seeks that this Court amend the judgment of the Federal Court Judge to reflect that the CBSA is required to establish a written remedial policy in consultation with the Canadian Human Rights Commission, rather that one that is satisfactory to the Commission.

[117] The appellant relies for this purpose on the language of paragraph 53(2)(a) of the *Canadian Human Rights Act*:

53. (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:	**53**. (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*) 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 …	*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 […]
[Emphasis added]	[Je souligne]

[118] The interpretation of paragraph 53(2)(*a*) of the *Canadian Human Rights Act* by the Tribunal is to be reviewed on a standard of reasonableness: *Mowat* at paras. 24 to 27.

[119] In this case, at paragraph 366 of its decision, the Tribunal crafted an order with specific reference to paragraph 53(2)(*b*). It thus ordered the CBSA "to consult with the Canadian Human Rights Commission, in accordance with the provisions of Section 53 (2)(a) of the *Act*, to develop a plan to prevent further incidents of discrimination based on family status in the future" [emphasis added].

[120] However, at paragraph 367 of its decision, the Tribunal went further by specifically ordering that remedial policies be satisfactory to both Ms. Johnstone and the Canadian Human

Rights Commission. The specific words used by the Tribunal are revealing: "this Tribunal further orders that CBSA establish written policies satisfactory to Ms. Johnstone and the CHRC to address family accommodation requests within 6 months, and that these policies include a process for individualized assessments of those making such requests" [emphasis added]. The Tribunal offers no explanation as to the statutory basis on which it can make such an order.

[121] There is a substantial difference between, on the one hand, developing a policy in consultation with the Canadian Human Rights Commission, and on the other hand, having that policy subject to its approval. I do not exclude the possibility that the word "consultation" used in paragraph 53(2)(a) reproduced above could include an approval for a proposed measure. However, without a sufficient explanation from the Tribunal as to the statutory basis for making its order in this case, and the reasons why such an order was required in the circumstances of this case, I conclude that the impugned order lacks the justification, transparency and intelligibility required to meet the standard of reasonableness: *Dunsmuir* at para. 47.

[122] As a result, I would vary the judgment of the Federal Court Judge so as to require the CBSA to develop the policies referred to at paragraph 377 of the Tribunal's decision in consultation with the Canadian Human Rights Commission. The issue of whether the consultation required under paragraph 53(2)(a) of the *Canadian Human Rights Act* includes an implicit power of approval is best left to be decided later in the event the policies actually adopted by the CBSA are not indeed deemed satisfactory by the Commission.

(c) The award of special damages

[123] The appellant also challenges the Tribunal's order of special damages made against it pursuant to subsection 53(3) of the *Canadian Human Rights Act*, which reads as follows:

53. (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.	**53**. (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.

[124] The appellant submits that the Tribunal had no reasonable basis to conclude that the CBSA had engaged in the discriminatory practice wilfully or recklessly, particularly when regard is had to the flux in the law relating to family status as illustrated by the conflicting decisions of *Campbell River* and *Hoyt*.

[125] I disagree with the appellant on this point. The Tribunal's conclusion of wilful or reckless practice was largely founded on the CBSA's disregard for the prior decision of the Tribunal in *Brown*. The Tribunal concluded that in *Brown* it had ordered the organization to which the CBSA succeeded to prevent similar events from recurring through recognition and policies that would acknowledge family status. This was a reasonable interpretation of *Brown* by the Tribunal and a reasonable finding as to the CBSA's failure to follow that prior decision. As a result, the Tribunal acted reasonably in concluding that wilful and reckless conduct had occurred in this case.

Conclusions

[126] I would consequently allow the appeal in part to vary the judgment of the Federal Court Judge with respect to the two remedies described below:

(a) the second paragraph of the judgment should be varied by replacing therein the date "August 2008" by the date "August 2010";

(b) the third paragraph of the judgment should be varied by adding at the end the following sentence: "Moreover, the order of the Tribunal at paragraph 367 of its decision is varied by replacing therein the words 'satisfactory to Ms. Johnstone and the CHRC' by 'in consultation with the CHRC'".

[127] In all other aspects, I would dismiss the appeal.

[128] Since Ms. Johnstone has been largely successful in this appeal, I would order the appellant to pay her costs. There should be no order for costs with respect to the respondent the Canadian Human Rights Commission and with respect to the intervener the Women's Legal Education and Action Fund Inc.

"Robert M. Mainville"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-89-13
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MANDAMIN DATED JANUARY 31, 2013, DOCKET NUMBER T-1418-10	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. FIONA ANN JOHNSTONE and CANADIAN HUMAN RIGHTS COMMISSION and WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 11, 2014
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	PELLETIER, SCOTT JJ.A.
DATED:	MAY 2, 2014

APPEARANCES:

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