COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Envirocon Environmental Services, ULC v. Suen,* 2019 BCCA 46

Date: 20190205
Docket: CA45533

Between:

Envirocon Environmental Services, ULC

Appellant
(Petitioner)

And

Brian Suen and British Columbia Human Rights Tribunal

Respondents
(Respondents)

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated August 14, 2018 (*Envirocon Environmental Services, ULC v. Suen*, 2018 BCSC 1367, Vancouver Docket S1711631).

Counsel for the Appellant:	M.A. Wagner J.D. Kondopulos B.I. Hillis
Counsel for the Respondent, Brian Suen:	F.G. Wynne M. Freedman
Counsel for the Respondent, British Columbia Human Rights Tribunal	K.A. Hardie B.A. Korenkiewicz
Place and Date of Hearing:	Vancouver, British Columbia November 27, 2018
Place and Date of Judgment:	Vancouver, British Columbia February 5, 2019

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Goepel

Summary:

Appeal by an employer from the dismissal of its judicial review application from a decision of the Human Rights Tribunal denying its application to dismiss a former employee's complaint on a preliminary basis. The employee was fired when, shortly after the birth of his first child, he refused to accept an out-of-province assignment that required him to be away for several months. The Tribunal held there was a reasonable prospect the employee could establish indirect or adverse effect discrimination. Held: Appeal allowed; Tribunal's decision set aside. To prove indirect discrimination an employee must establish: (i) there had been a change in a term or condition of employment; and (ii) such a change resulted in a serious interference with a substantial parental or other family duty or obligation: Heath Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society (B.C.C.A., 2004). The facts the employee alleged are not capable of satisfying the second step of this test. As result, the Tribunal's discretionary decision is arbitrary and, therefore, patently unreasonable: Administrative Tribunals Act, ss. 59(3), (4).

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] Envirocon Environmental Services, ULC appeals the order of Justice Maisonville of the Supreme Court of British Columbia dismissing its application for judicial review of a decision of the British Columbia Human Rights Tribunal. The Tribunal denied Envirocon's preliminary application to dismiss a complaint filed by Brian Suen. Mr. Suen alleges Envirocon discriminated against him in the area of employment on the basis of "family status" when, shortly after the birth of his daughter, it assigned him to a project that required him to be away from home for eight to ten weeks. Envirocon terminated Mr. Suen's employment when he refused to accept that assignment.

[2] The Tribunal held there were two bases on which Mr. Suen may be able to establish discrimination: (i) his employment was terminated because he had become a parent, i.e., direct discrimination; and (ii) there had been a change in a term or condition of his employment that resulted in a serious interference with a substantial parental or other family duty of obligation, i.e., indirect or adverse effect discrimination. Only the second of those bases is in issue on this appeal. Envirocon accepts there will be a hearing of Mr. Suen's complaint. What it seeks is to limit that hearing to the direct discrimination aspect of the complaint.

[3] For the reasons that follow, I would allow this appeal and quash the adverse effect discrimination aspect of the Tribunal's decision.

Statutory Provisions

[4] The following are relevant to this appeal:

Human Rights Code, R.S.B.C. 1996, c. 210

13**(**1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

…

27(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

…

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

(c) there is no reasonable prospect that the complaint will succeed;

(d) proceeding with the complaint or that part of the complaint would not

…

(ii) further the purposes of this Code;

Administrative Tribunals Act, S.B.C. 2004, c. 45 [*ATA*]

59(1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.
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> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Background

[5] Envirocon provides environmental remediation services. In 2012, Mr. Suen started working as a project manager at Envirocon's office in Burnaby, British Columbia. From time to time, he was required to travel to project sites away from home. However, it is not clear how long Mr. Suen would be away from home.

[6] On September 5, 2015, Mr. Suen's wife gave birth to their first child. Following the birth, Mr. Suen worked from home for two weeks. He then took two weeks' vacation. When Mr. Suen returned to work, he worked on projects from Envirocon's Burnaby office.

[7] On January 20, 2016, the manager of a project in Manitoba resigned unexpectedly. Ryan Hope, Envirocon's Director of Projects, assigned Mr. Suen as manager for that project. Mr. Suen was advised it was expected he would be away for eight to ten weeks and that Envirocon would not pay for him to return home until the end of that period. Mr. Suen told Mr. Hope he needed to think about accepting the assignment. Over the next few days, Mr. Suen and Mr. Hope exchanged emails.

[8] In an email sent on January 25, 2016, Mr. Suen stated, "In consideration of my wife and 4 month old baby, I will not be going to Manitoba." Mr. Hope advised Mr. Suen he was being given one final opportunity to reconsider his position. Mr. Suen was told he would be dismissed for cause if he did not accept the assignment. In response, Mr. Suen said he would not change his decision.

[9] On January 26, 2016, Paul Halliday, Envirocon's President, delivered a letter to Mr. Suen terminating his employment immediately. In that letter, Mr. Halliday stated, in part:

> In refusing to accept our most recent out-of-town assignment, you have outright refused to comply with our clear, lawful and repeated direction to you. You have communicated with management in a flippant, disrespectful and unprofessional way and you have been insubordinate. You have completely rejected or disregarded all of our attempts to communicate to you the seriousness of the situation.

[10] On July 26, 2016, Mr. Suen filed a complaint against Envirocon with the Tribunal alleging discrimination on the basis of family status. Under the heading "Family Status" he stated:

> 8. On September 5, 2015, Mr. Suen's wife gave birth to their daughter (the "Family Status").
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> 9. Mr. Suen's daughter was born with jaundice. In order to help assist his wife in caring for their newborn child, Mr. Suen worked from home for the first two weeks following his daughter's birth.
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> 10. Following the initial two weeks of working from home, Mr. Suen took an additional two weeks of vacation in order to continue to aid his wife in caring for their newborn daughter.
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> 11. Neither Mr. Suen nor his wife has any additional support to help care for their daughter.

[11] The remedies sought in the complaint are:

(a) a declaration Envirocon committed discriminatory acts in breach of the *Code*;

(b) an order Envirocon cease contravening the *Code* and refrain from future contraventions;

(c) compensation for lost wages, salary, or expenses;

(d) damages for injury to dignity; and

(e) interest on any amounts awarded.

[12] On September 28, 2016, Envirocon filed its response to the complaint. Among other things, it pleaded Mr. Suen's dismissal was unrelated to his family status.

[13] On December 7, 2016, Envirocon filed an application seeking to have the complaint dismissed without a hearing. Envirocon filed an affidavit from Mr. Hope in support of the application. Mr. Suen filed his own affidavit in response. There is a conflict in those affidavits that raises the question of whether assigning Mr. Suen to a project that required him to be away from home for an extended period constituted a significant change in the terms of his employment.

Tribunal Decision
(2017 BCHRT 226)

[14] Before the Tribunal, Envirocon sought to have Mr. Suen's complaint dismissed pursuant to ss. 27(1)(b), (c), and (d)(ii) of the *Code*. There is, however, no need to refer to the Tribunal's reasons with respect to s. 27(1)(d)(ii), as that provision is not in issue on this appeal.

[15] In declining to dismiss Mr. Suen's complaint with respect to adverse effect discrimination, the Tribunal had regard to *Moore v. British Columbia*, 2012 SCC 61, [2012] 3 S.C.R. 360, and *Heath Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260, 240 D.L.R. (4th) 479 [*Campbell River*]. However, the Tribunal questioned whether *Campbell River* "remains good law": paras. 33, 77.

[16] With respect to s. 27(1)(b) of the *Code*, the Tribunal held Mr. Suen's complaint, on its face, alleged facts that could constitute adverse effect discrimination on the basis of family status:

> [35] On the first two parts of the *Moore* test, Mr. Suen has the protected characteristic of family status given his spouse and infant child, and Envirocon terminated his employment, which is an adverse impact regarding employment.
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> [36] On the third part of the *Moore* test, Mr. Suen says that Envirocon terminated his employment because he refused the Manitoba Project assignment – a decision based on the assignment's infringement upon his

> family status. Moving further within the third part of *Moore* to the *Campbell River* test, Mr. Suen alleges among other things that prior to his becoming a father and being confronted with the Manitoba Project assignment, his previous out-of-town assignments were either short or had negotiable terms with paid rotations home, but the Manitoba Project assignment was non-negotiable and would require him to be in Manitoba for a long period of time without those things. These allegations could be found to constitute a change in a term or condition of his employment in line with the first part of the *Campbell River* test. I further note that Mr. Suen alleges that he and the Director of Projects agreed that he would manage two local projects that allowed him to return home each night in order to help care for his daughter. Envirocon's alleged sudden, unilateral Manitoba Project assignment could also be found to constitute a change in a term or condition of employment.
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> [37] On the second part of the *Campbell River* test, I note that this case is distinguishable from many of the family status cases that come before the Tribunal in that the work condition at issue is not a question of flexibility in timing of a regular work schedule, but rather a requirement to be physically absent for an extended period of time. Mr. Suen's required absence from his wife and four-month-old infant for consecutive 24-hour periods over a number of weeks could be found to constitute serious interference with a substantial parental or other family duty or obligation.
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> [38] I am satisfied that the facts alleged on the face of the complaint could constitute a breach of the *Code* under a straight application of *Moore* as well as an application of *Campbell River*. I decline to exercise my discretion to dismiss the complaint under s. 27(1)(b).
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> [Emphasis added.]

[17] With respect to s. 27(1)(c) of the *Code*, the Tribunal held there was a reasonable prospect Mr. Suen's complaint could succeed:

> [52] With respect to the second part of the *Campbell River* test, Envirocon argues "nothing he has alleged is capable of leading to the conclusion that his circumstances are unique, that his child required special care, medical or otherwise, or that he alone was capable of providing such care." Envirocon says that at best Mr. Suen could establish that he is a parent with a conflict between a work requirement and a parental preference.
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> [53] [Tribunal decisions referred to by Envirocon omitted.]
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> [54] I distinguish [Envirocon's] cases on their facts, noting in particular that in each, the complainant was not required to be physically absent for consecutive 24 hour periods over a number of weeks from a very young infant, but rather had conflicts between regular working hours and the availability of childcare or another resource. This case is not about whether there is a conflict between regular working hours and childcare or other resource availability. Rather, the question of whether the Manitoba Project assignment constitutes a serious infringement on a substantial parental or other family duty goes to the very nub of what being part of a family is – both as a parent of an infant and as a spouse with one.

> [55] In my view, it would be open to the Tribunal to conclude that unilaterally requiring Mr. Suen's physical absence for consecutive 24-hour periods over two-plus months in order for him to reside full-time at the Manitoba Project site meets the threshold of "something more" than the usual work/family tensions that every parent faces at some time or another and which *Campbell River* purports to put beyond the protection of the *Code*. At a hearing of this case, the Tribunal could well characterize the physical presence of a parent in the same province as a spouse and four-month-old child within an eight to ten-week period as more than mere "parental preference".
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> [Emphasis added.]

Chambers Judge's Reasons
(2018 BCSC 1367)

[18] The chambers judge reviewed the Tribunal's application of the *Campbell River* test on a standard of patent unreasonableness. She reasoned that absent an extricable question of law, the Tribunal's discretionary decision under s. 27(1) of the *Code* had to be reviewed on that standard pursuant to s. 59(3) of the *ATA*: paras. 64−72. Further, she noted that discretionary decisions under s. 27(1) are entitled to a high degree of deference: para. 73.

[19] In holding that the Tribunal's decision was not patently unreasonable, the chambers judge stated:

> [79] The Tribunal member's decision not to dismiss Mr. Suen's complaint under s. 27 of the *Code* was a discretionary one, and is entitled to deference.
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> [80] It is clear that one of the main tasks before the Tribunal, in considering Envirocon's application to dismiss the complaint, was to determine whether there was a *prima facie* case, based on the materials and submissions before the Tribunal member. There are no findings made at this preliminary stage. I find that there was evidence to support the Tribunal's decision that a *prima facie* case was made out.
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> [81] I am satisfied that the Tribunal did not make a legal error or apply the wrong legal test, given that the Tribunal here applied both the *Campbell River* and the *Moore* tests in determining that Mr. Suen had made out a *prima facie* case of discrimination on the basis of family status.
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> [82] There is no clear evidence of any unreasonable finding. There is nothing before the court which supports any submission that the Tribunal member based her decision on irrelevant factors. In her decision, she clearly analyzed each of the three grounds for dismissal of the complaint alleged by Envirocon under s. 27(1) of the *Code*. She considered and reviewed each ground, the materials before her and the arguments raised by Envirocon, and

> explained why she declined to exercise her discretion to dismiss the complaint.
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> [83] In assessing the materials put before her by the parties, the Tribunal member concluded that the evidence before her justified the matter proceeding to a hearing. Upon review of her decision with consideration to the test under s. 59(4) of the *ATA*, I conclude that the decision was not patently unreasonable.

Grounds of Appeal

[20] In its factum, Envirocon contends the chambers judge erred in:

a. her determination of the standard of review applicable to the Tribunal's interpretation of the *Campbell River* Test;

b. finding that there was nothing incorrect or, alternatively, patently unreasonable about the Tribunal's characterization of the *Campbell River* Test; and

c. finding that there was nothing patently unreasonable about the Tribunal's decision not to dismiss the Complaint under s. 27(1)(b) and (c) of the *Code.*

Analysis

Does *Campbell River* Remain Good Law?

[21] In *Campbell River*, the issue before this Court turned on the meaning and scope of the term "family status" in the *Code*. That case involved an appeal from an arbitrator appointed under a collective agreement to adjudicate a grievance. The employee had four children, one of whom was a teenage son who had a major psychiatric disorder that required the employee to attend to his needs after school hours. A change in the employee's work schedule interfered with her ability to care for her son as it required her to work until 6:00 p.m. rather than 3:00 p.m. In holding that the employee had not been discriminated against, the arbitrator stated:

> Thus family status in these circumstances deals with the status of parent and child, and not with the individual circumstances of a family's needs, such as those concerning childcare arrangements. I therefore conclude that all parents that experience difficult childcare arrangements, as a result of their employment, are not a class or category that section 13 of the *Human Right Code* seeks to protect.

[22] In holding that the arbitrator erred in not finding a *prima facie* case of discrimination, Justice Low stated:

> [38] …In my opinion, [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; nor, in the context of the present case, can it be limited to "the status of being a parent per se" as found by the arbitrator (and as argued by the respondent on this appeal) for that would not address serious negative impacts that some decisions of employers might have on the parental and other family obligations of all, some or one of the employees affected by such decisions.
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> [39] If the term "family status" is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. 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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> [40] In the present case, the arbitrator accepted the evidence of Dr. Lund that Ms. Howard's son has a major psychiatric disorder and that her attendance to his needs during after-school hours was "an extraordinarily important medical adjunct" to the son's wellbeing. In my opinion, this was a substantial parental obligation of Ms. Howard to her son. The decision by the respondent to change Ms. Howard's hours of work was a serious interference with her discharge of that obligation. Accordingly, the arbitrator erred in not finding a *prima facie* case of discrimination on the basis of family status.
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> [Emphasis added.]

[23] As indicated above, although the Tribunal was guided by the *Campbell River* test—i.e., the underlined portion of the above quotation—it questioned whether that test remains good law. On this appeal, Mr. Suen argues this Court should reconsider the test for family-status discrimination set out in *Campbell River*. In doing so, he refers to decisions in which criticism of that test has been expressed*:* *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, [2015] 2 F.C.R. 595; *SMS Equipment Inc. v. Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162, [2015] 8 W.W.R. 779; *City of Yellowknife v. A.B.*, 2018 NWTSC 50. He also refers to *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, *Moore v. British Columbia*, and *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591, cases that do not involve family-status discrimination.

[24] In essence, Mr. Suen's position is that the test in *Campbell River* is too restrictive. He submits it is only necessary for a complainant to show that a change in a term or condition of employment interferes with a parental or other family duty or obligation.

[25] It is unnecessary to address Mr. Suen's arguments in any detail, as this division is bound by *Campbell River*. In that regard, I note Mr. Suen requested this appeal be heard by a five-justice division so the Court could consider whether *Campbell River* ought to be overruled: see *Practice Directive (Criminal & Civil), Five Justice Divisions* (February 3, 2012). That request was denied.

Standard of Review

[26] The correctness standard applies to this Court's review of the chambers judge's decision. Our task is to "step into the shoes" of that judge and determine whether she identified the correct standard of review applicable to the Tribunal's decision and applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45−46, [2013] 2 S.C.R. 559; *Compagna v. Nanaimo (City)*, 2018 BCCA 396 at para. 33, 79 M.P.L.R. (5th) 217; *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4 at para. 16. The parties disagree as to what standard applies to the Tribunal's decision.

[27] Envirocon accepts that, by reason of s. 59(3) of the *ATA*, the patent unreasonableness standard applies on judicial review of the Tribunal's exercise of discretion under s. 27(1) of the *Code*. However, Envirocon submits the correctness standard under s. 59(1) of the *ATA* applies in the present case because what is in issue is the Tribunal's "characterization" of the *Campbell River* test. Envirocon says that issue is an "extricable question of law". On the other hand, Mr. Suen—supported by the Tribunal—says the patently unreasonable standard under s. 59(3) applies because what is in issue is the application of the *Campbell River* test in the context of a discretionary decision. I agree with Mr. Suen.

[28] In *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122 at para. 28, 17 B.C.L.R. (5th) 191, Justice Groberman said this:

> If there is a readily extricable finding of fact or law underlying the discretionary decision, that finding will be reviewed on the standard applicable to issues of fact or law, as the case may be. On the other hand, if the issues of fact or law are inextricably intertwined with issues of discretion, the review must take place on the standard applicable to discretionary decisions.
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> [Emphasis added.]

See also: *Chen v. Surrey (City)*, 2015 BCCA 57 at para. 29, 69 B.C.L.R. (5th) 235: the patently unreasonable standard applies on a review of the Tribunal's application of a legal standard in making a discretionary decision.

[29] Although the Tribunal expressed some doubt as to the validity of the *Campbell River* test it applied that test in deciding Envirocon's application. What must now be decided is whether, having regard to *Campbell River*, the manner in which the Tribunal exercised its discretion to permit the adverse effect discrimination aspect of Mr. Suen's complaint to proceed is patently unreasonable having regard to s. 59(4) of the *ATA*.

Was the Tribunal's Decision Patently Unreasonable?

[30] In determining how to exercise its discretion, the Tribunal had to consider whether, based on the facts Mr. Suen alleged, it could be found that he had been discriminated against on the basis of his family status. Put in terms of *Campbell River*, in deciding Envirocon's application, the Tribunal had to determine whether, on the basis of those alleged facts, it could be found that: (i) there had been a change in a term or condition of Mr. Suen's employment; and (ii) such a change resulted in "a serious interference with a substantial parental or other family duty of obligation". Only the second question is in issue on this appeal.

[31] With respect to s. 27(1) of the *Code*, the Tribunal concluded that the facts alleged on the face of the complaint—i.e., that Mr. Suen would be required to be away from his wife and child for a number of months—"could be found to constitute serious interference with a substantial parental or other family duty of obligation": paras. 37−38. With respect to s. 27(1)(c) of the *Code*, the Tribunal concluded requiring Mr. Suen to be away for that period could be found to be "'something more'

than the usual work/family tensions that every parent faces at some time or another": para. 55. In doing so, the Tribunal rejected Envirocon's argument that the facts alleged by Mr. Suen could, at best, establish a conflict between a work requirement and a parental preference. In advancing that position, Envirocon noted Mr. Suen had not alleged his child required special care or that he alone was capable of caring for the child: para. 52.

[32] In my view, the facts alleged by Mr. Suen are not capable of satisfying the second step of the *Campbell River* test. Those facts are only capable of establishing the undisputed fact that he is a parent. While Mr. Suen's desire to remain close to home to be with his child and to assist his wife in caring for the child outside of his normal weekday working hours and on weekends is understandable and commendable, he is no different than the vast majority of parents. There are many parents who are required to be away from home for extended periods for work-related reasons who continue to meet their obligations to their children. Nothing in Mr. Suen's complaint or affidavit suggests his child would not be well cared for in his absence.

[33] What remains to be determined is what flows from the Tribunal's erroneous conclusion that the facts alleged by Mr. Suen could satisfy the second step of *Campbell River*.

[34] In *Morgan-Hung*, this Court held that a discretionary decision based on an error with respect to a material fact was patently unreasonable because it was "arbitrary", as that term is used in s. 59(4)(a) of the *ATA*: paras. 32−33. By a parity of reasoning, a discretionary decision will be arbitrary if it is grounded on an erroneous conclusion with respect to a material consideration.

[35] In the present case, the Tribunal's erroneous finding with respect to the second step of *Campbell River* was key to its decision to allow the adverse effect discrimination aspect of Mr. Suen's complaint to proceed. Because of this error, its decision is arbitrary and cannot stand.

Disposition

[36] I would allow this appeal, set aside the chambers judge's order, quash the Tribunal's decision declining to dismiss the adverse effect discrimination aspect of Mr. Suen's complaint, and remit the matter to the Tribunal for further proceedings consistent with these reasons.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

I AGREE:

"The Honourable Mr. Justice Goepel"