April 9, 2015

Alberta Arbitration Decision Embraces Broadening Trend on Family Status Discrimination

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Case Commented On: *SMS Equipment Inc v Communications, Energy and Paperworkers Union,* 2015 ABQB 162

The definition of discrimination on the basis of family status has recently been extended in federal and provincial human rights law to mean not only one's relationship to another person, but also to include recognition of childcare responsibilities. The leading case, *Canada v Johnstone*, 2014 FCA 111, was discussed in previous ABlawg posts (see here). The decision *SMS Equipment Inc v Communications, Energy and Paperworkers Union,* 2015 ABQB 162, demonstrates that Alberta labour arbitrators have joined the "family".

SMS Equipment applied for judicial review of the arbitration award of Arbitrator Lyle Kanee. Arbitrator Kanee concluded that the employer, SMS, must accommodate Ms. Cahill-Saunders, a single mother of two children. She first worked as a labourer for SMS, and was required to work rotating seven night and seven day shifts, after moving from Newfoundland to Fort McMurray. Cahill-Saunders had one son when she was hired, and he remained in Newfoundland with his grandmother for the first nine months she worked in Fort McMurray, joining her later. At that time, the baby's father lived in Fort McMurray and provided some childcare while Cahill-Saunders worked, although they did not cohabit (at para 5).

Cahill-Saunders gave birth to her second son (with a different father) in 2012. While she was on maternity leave, Cahill-Saunders applied for a position with SMS as a first-year apprentice welder, and she was successful, actually returning to work several months prior to the expiry of her maternity leave. The position had shifts of seven days followed by seven nights. After the first night shift tour, Cahill-Saunders requested that her shift be changed to straight days, as the older son's father's work schedule had changed and he was no longer providing any significant childcare; the father of her younger son had no involvement with his child, and there was no extended family in Fort McMurray (at paras 6-7).

Cahill-Saunders' request was refused by SMS. She had explained to the human resources department that while she had childcare during her night shifts, she would have to pay for childcare in the days, too, so that she could sleep. She explained that this was too expensive. If she did not obtain childcare, she did not get sufficient sleep. The fathers were not contributing to childcare or childcare expenses (at paras 8-10).

Cahill-Saunders' Union requested that she and another welding apprentice modify their shifts so that she worked exclusively days and the other worked exclusively nights, but SMS also denied that request (at para 11). The Union proceeded to arbitration.

The Arbitrator relied on Alberta Human Rights Tribunal decisions (*Rawleigh v Canada Safeway Limited*, 2009 AHRC 6; *Rennie v Peaches and Cream Skin Care Limited*, 2006 AHRC 13) and *Johnstone* (above) to conclude that family status under the *Alberta Human Rights Act,* RSA 2000 c A-25.5 includes childcare responsibilities. He concluded that SMS's rule requiring welders to work night shifts had the effect of imposing a burden on Cahill-Saunders due to her childcare responsibilities that is not imposed on other welders who do not share her status. Further, SMS had tried to defend by arguing that the rule was a *bona fide* occupational requirement. Arbitrator Kanee held that this defence had not been made out, as SMS had not provided evidence to justify the rule requiring workers to rotate night and day shifts, or evidence that accommodating Cahill-Saunders would cause SMS undue hardship (at paras 15-16).

SMS applied for judicial review of all three aspects of the Arbitrator's decision. The issues on judicial review may be summarized as follows (at para 18):

1. whether "family status" includes the duties and responsibilities of childcare;

2. whether the Union has established a *prima facie* case of discrimination; and

3. whether the Employer has established that its rule or policy is a *bona fide* occupational requirement.

Madam Justice June Ross first addressed the standard of review. She concluded that the reasonableness standard of review applied to all three aspects of the Arbitrator's decision. First, Justice Ross concluded that the Arbitrator's inclusion of childcare responsibilities as part of family status clearly fell within a range of possible, acceptable outcomes defensible in facts and law (at para 50). Second, it was reasonable that the Arbitrator had indicated that there is a range in the case law of the tests required to establish a *prima facie* case of discrimination (see *Hoyt v Canadian National Railway,* 2006 CHRT 33 and *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*, 2004 BCCA 260). The Arbitrator concluded that, regardless of which test was used, discrimination was made out. The Arbitrator's assessment of Cahill-Saunders' self-accommodation efforts was reasonable, as SMS had not provided any self-accommodation case that held that a single parent must seek government benefits or commence legal proceedings against the biological parents of her children before seeking a workplace accommodation (at para 67).

In case Justice Ross was incorrect in her assessment of the reasonableness standard for the first two issues, she performed a correctness analysis and determined that she would have arrived at the same conclusion as the Arbitrator (at para 69).

There was no dispute as to the use of the reasonableness standard for the third issue. The Arbitrator applied the three-part test from *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 ("*Meiorin*", at para 54):

> An employer may justify the impugned standard by establishing on the balance of probabilities:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Justice Ross held that the Arbitrator had reasonably concluded that the extent of Cahill-Saunders' self-accommodation efforts might have been found insufficient if SMS had provided some evidence in support of its rule or some evidence of undue hardship. In addition, Cahill-Saunders had provided evidence that she had found another employee who was prepared to work nights exclusively and that other employees had been permitted to work nights exclusively. SMS had provided no reasons for rejecting her request for accommodation. Thus, the Arbitrator's decision on this (and all three issues) was reasonable (at paras 92-93).

Commentary

A few features of this case merit comment. First, some who read the facts may have wondered why Cahill-Saunders accepted a job that required night shift work when she knew or should have known it would probably require accommodation. This may be easily answered: SMS never provided any evidence as to why it used rotating shifts or why it would be an undue hardship to accommodate Cahill-Saunders. Further, the job involved work (welding) for which she was trained. Perhaps when she applied for the job she thought she could manage or that the fathers would be involved more in the care of her children. Once she encountered a difficulty, she attempted to assist in her accommodation by working out a shift trade with a co-worker.

Moreover, during the arbitration, Cahill-Saunders provided expert evidence about the circumstances of working women with children. In *Communications, Energy, and Paperworkers Union, Local 707 v SMS Equipment Inc,* 2013 CanLII 71716 (AB GAA), the Arbitrator referred to an expert opinion of Karen D. Hughes, PhD, to the effect that (at para 27):

- Women face unique challenges and disadvantages in the labour market.
- Women are significantly underrepresented in the trades and blue-collar work representing just 4% of all construction trades in Canada.
- Women typically carry greater responsibility for and devote more time to childcare than men, limiting their economic opportunities and return. Family responsibilities, explain, in part, their lower participation in occupations like the building trades.
- Traditional workplace practices such as hours and schedules are often not aligned with contemporary family life.

- Access to reliable, quality childcare is an important facilitator of women's employment. There is a shortage of regulated childcare spaces throughout Canada, including Fort McMurray. Childcare costs are so high that many mothers choose to withdraw from the workforce when children are young to provide unpaid care at home. It is particularly challenging to find childcare for non-standard work schedules.

- There is a strong consensus in published academic research that high levels of work-family conflict are linked to a number of negative outcomes including poor job and life satisfaction. Some recent studies show a linkage between mother's non-standard work schedules and lower outcomes for children 's academic outcomes due to decreased family time and reduced parental involvement in children's lives.

- Single mothers face unique constraints due to their need to earn income and provide care singlehandedly.

- Single mothers who work evenings or rotating shifts face greater difficulties and stress arranging childcare and heightened parental concern over their children's well-being.

These conclusions provide ample support for the broader recognition of childcare responsibilities as part of "family status".

Finally, it is interesting that SMS suggested that the Arbitrator should have been influenced by the fact that Cahill-Saunders did not ask the boys' fathers to assist with childcare, either financially or otherwise, or that she did not apply for child support or childcare subsidies. However, the Arbitrator noted that even if she had tried to obtain some financial support for the boys, she would still have been required to spend additional monies for childcare and this would not prevent the adverse effect of SMS' rule. SMS's argument actually helps make Cahill-Saunders' case as it demonstrates that she had extraordinary childcare responsibilities together with a significant legal obligation to support her family.

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