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Accommodation for Family Status Required by Federal Human Rights Tribunal for Three Alberta Women

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Cases Considered:

Cindy Richards v Canadian National Railway, 2010 CHRT 24 http://chrt-tcdp.gc.ca/search/files/t1356_8608de.pdf*; Kasha Whyte v Canadian National Railway, 2010 CHRT 22* http://chrt-tcdp.gc.ca/search/files/t1354_8408de.pdf*; Denise Seeley v Canadian National Railway, 2010 CHRT 23* http://chrt-tcdp.gc.ca/search/files/t1355_8508de.pdf

Family status was added in 1996 as a protected ground under Alberta's human rights legislation (currently the *Alberta Human Rights Act*, RSA 2000, c A-25.5, (*AHRA*)). Under the *AHRA*, family status is defined as: "the status of being related to another person by blood, marriage or adoption" (section 44(1)(f)). Family status is also a protected ground in several other jurisdictions, including federally. Three recent and related decisions of the Canadian Human Rights Tribunal indicate that under the ground of family status, employers will be required to accommodate parental responsibilities.

Denise Seeley, Cindy Richards and Kasha Whyte (the Complainants) complained to the Canadian Human Rights Commission under the *Canadian Human Rights Act*, RSC 1985, c. H-6 (*CHRA*) about being fired by the Canadian National Railway ("CNR") for refusing to accept transfers due to parental responsibilities. All three Complainants lived near their home terminal in Jasper, Alberta. Kasha Whyte was a single parent with sole custody of her (then) five year old son, while the child's father had visitation rights. Cindy Richards was the divorced parent of two children, then aged 12 and 11. They had primary residence with Ms. Richards. Finally, Denise Seeley was married with two children, then aged six and twenty-one months. Her partner also worked for CNR as an engineer, with an unpredictable work schedule and long absences from home. They lived in a small town, near Jasper, and had no immediate family nearby. There was no daycare in their town, but Ms. Seeley could have arranged childcare if she worked out of Jasper.

In February 2005, CNR experienced a severe shortage of employees in its Vancouver terminal. CNR recalled 47 conductors from lay-off status to cover the shortage. The complainants were asked to work in Vancouver pursuant to Article 148.11 of their Collective Agreement, which provided that "non-protected employees" could be required to work at another terminal in the Western region upon 30 days' notice, unless there was a satisfactory reason for them to fail to do so. The Complainants would have been required to move to Vancouver for the duration of the shortage, which was to be of unknown length.

Each Complainant received a recall notice, which provided that they had 15 days to report to Vancouver. Each complainant then contacted CNR communicating her inability to cover the

Vancouver shortage due to parental responsibilities. They each asked to be excused from the transfer on a compassionate basis. CNR then sent a letter to each of the Complainants, ordering them to report to the Vancouver terminal by July 2, 2005 (which was longer notice than was originally provided for the in Collective Agreement) or they would forfeit their seniority rights with CNR and their employment would be terminated. All three Complainants failed to report to Vancouver and each was fired on July 4, 2005.

The Union filed grievances for Whyte and Richards, unsuccessfully challenging their dismissals. The Arbitrator, Michel Picher, held that the onus was on Whyte and Richards to "ensure that familial obligations [did] not interfere with basic obligations of the employment contract" (*Whyte*, para. 136).

The Complainants next filed complaints with the Canadian Human Rights Commission that the CNR had discriminated against them under sections 7 and 10 of the *CHRA*. Michel Doucet, a member of the Canadian Human Rights Tribunal (CHRT), upheld the complaints. In each case, the remedy included reinstatement without loss of seniority, payment of lost wages, $15,000 for hurt feelings, $20,000 for willful discrimination (under *CHRA* s. 53(3)) and implementation of non-discriminatory policies.

While the CHRT wrote three separate judgments, and the facts and evidence presented at the hearings varied for each person, the legal analysis for each of the cases was the same. This post will refer to the reasons given in the *Seeley* decision.

The most significant finding of the CHRT is its interpretation of "family status". In addition, the CHRT considered whether the CNR had acceptably accommodated the Complainants' situation.

Two lines of cases had developed regarding what the ground of "family status" entails. The British Columbia Court of Appeal in *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*, 2004 BCCA 260, [2004] BCJ No 922 (at para. 39) said 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 family duty or obligation of the employee." Thus, there needs to be more than a conflict between work requirements and regular parental obligations in order to establish a *prima facie* case of family status discrimination. In the *Campbell River* case, a legitimate change in hours of work was going to affect the complainant's ability to care for her disabled son. While the court found that the employer had *prima facie* discriminated against the complainant on the basis of family status, the matter was remitted to the arbitrator to determine whether the employer had met its duty to accommodate her to the point of undue hardship.

A less restrictive standard was set out by the CHRT in *Hoyt v Canadian National Railway*, [2006] CHRD No 33, and endorsed by the Federal Court of Canada in *Johnstone v Canada (Attorney General)*, 2007 FC 36, [2007] FCJ No 43; affirmed 2008 FCA 101, [2008] FCT No 427 (Fed CA). In *Johnstone*, the Federal Court of Canada held that the test in *Campbell River* was too stringent, and instead held that family status discrimination claims should be analyzed in the same way as other discrimination claims. The Court said that the *Campbell River* test effectively established a hierarchy of grounds of discrimination, thus making family status less important than the others. In particular, the requirement that the complainant must establish a "serious interference" with family status had the impact of relegating family status to an inferior type of discrimination.

In the case at bar, although CHRT member Michel Doucet declined to apply the *Campbell River* test, he nevertheless concluded that the complainants faced a "serious interference with [their] parental duties and obligations" if they were forced to work in Vancouver (*Seeley*, para. 109). This suggests that he would have found that there was a *prima facie* case of family status discrimination whether he followed the *Campbell River* or the *Johnstone* approach. Thus, childcare issues constitute a parental responsibility that falls within the ground of "family status" based on either test.

Once a Complainant has established a *prima facie* case of discrimination, the onus shifts to the employer to demonstrate that the discriminatory standard or action is a *bona fide* occupational requirement (BFOR). The Supreme Court of Canada adopted a three-part test for the BFOR in *British Columbia (Public Service Commission) v. B.C.G.E.U.*, [1999] 3 SCR 3 ("*Meiorin*"). This test requires the employer to establish on a balance of probabilities:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
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> (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. (*Meiorin,* paras. 54-55)

As is often the case, *Seeley*, *Whyte* and *Richards* focussed on the third aspect of the *Meiorin* test — whether the impugned standard was reasonably necessary for the employer to accomplish its purpose. At this stage the employer must establish that it cannot accommodate the complainants (and others affected by the discriminatory standard) without experiencing undue hardship.

CNR argued that it had accommodated the Complainants by providing a four-month extension to the time that they had to report to Vancouver in order to permit them to make the necessary childcare arrangements (*Seeley*, para 143). The CHRT noted that this accommodation was "not in any way a meaningful response to the Complainant's request" or to her personal family situation (*Seeley*, para. 145). Further, in order to meet the duty to accommodate, CNR had to demonstrate that it had "considered and reasonably rejected any accommodation that would have accommodated the needs of the Complainant" (*Seeley*, para. 156). The CHRT noted that the witnesses provided by CNR did not consider family status matters that involve parental responsibilities as a ground of discrimination that required *any* form of accommodation (*Seeley*, para. 151). Further, CNR did not apply its own comprehensive Accommodation Policy, which specified that accommodation "means making every possible effort to meet the reasonable needs of employees" (*Seeley*, para 158).

CNR also argued that it would have encountered undue hardship if it had accommodated the Complainants. Since the vast majority of their employees are parents, accommodating the Complainants would grant them "super seniority" based upon their status as parents. However, there was no evidence that CNR had multiple requests for accommodation (*Seeley*, para. 170). Further, undue hardship is supposed to be determined within the context of the individual accommodation being requested (*Seeley*, para. 171). To argue that accommodating a complainant

in one instance will open the floodgates to claims by other employees is "unacceptable" (*Seeley*, para. 172). The CNR had failed to provide evidence that accommodating the Complainants would cause undue hardship in the form of costs. In fact, CNR's Accommodation Policy said: "The costs incurred must be extremely high before the refusal to accommodate can be justified" (*Seeley*, para. 173). Thus, CNR was not able to rely on the BFOR defence and the CHRT found that the Complainants had been discriminated against on the basis of family status.

The effect of the three cases will be interesting to observe. One Alberta arbitration case, *Alberta (Solicitor General's Department) v A.U.P.E.*, 2010 CarswellAlta 742 that was decided before the three CNR cases seems to have referred to both the *Hoyt* and *Johnston* lines of cases and concluded that:

> 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 and worklife responsibilities. (para. 64)

The board held that the grievor (a divorced mother of an eleven-year-old son) had failed to establish discrimination on the basis of family status when she was asked to work the night shift. The grievor had failed to establish that there were no reasonable alternatives for childcare on the nights she would have been required to work.

The effect of these three CNR cases, especially in jurisdictions where the *Hoyt* line of cases with respect to family status is followed, is that employers cannot deal with childcare issues lightly and should approach family status the same way that all grounds of discrimination are treated.