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Update in the Area of Family Status Discrimination

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Cases Considered:

Canadian National Railway v Denise Seeley and Canadian Human Rights Commission, 2013 FC 117.

In 2010, the Canadian Human Rights Tribunal released three cases involving Alberta women who alleged they were being discriminated against on the basis of family status. In a previous post I wrote on the outcome (see "Accommodation for Family Status Required by Federal Human Rights Tribunal for Three Alberta Women," December 22, 2010 here) in which CNR was required to accommodate parental responsibilities of all three women. Canadian National Railway (CNR) applied for judicial review on the case of Denise Seeley. The decision of Justice Mandamin of the Federal Court presents an attempt to reconcile two lines of decisions that addressed what "family status" discrimination entails. On a larger scale, this case is one of several in which gender and family status discrimination are argued to be result of social construct or personal choice rather than the operation of law or the result of discrimination in an activity that is covered by human rights legislation (e.g., employment, tenancy, services, accommodation and publications).

For example, in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*Charter*) case of *Symes v Canada*, [1993] 4 SCR 695, the majority of the Supreme Court of Canada held that a female lawyer could not deduct the wages she paid to her nanny as a business expense in her personal income tax returns. They also noted that while women disproportionately incur the social costs of child care, this is not the result of the operation of law (e.g., the *Income Tax Act*, RSC 1985, c 1), and thus, *Charter* section 15(1) is not violated.

Likewise, in the *Canadian National Railway v Denise Seeley and Canadian Human Rights Commission, 2013 FC 117 (Seeley)* case, CNR argued that this case really dealt with the question of whether balancing family life and employment duties will be transferred from the home to the workplace. It argued that the CHRT had been mistaken when it equated family status with a parent's choice as to how to define and meet his or her childcare obligations (*Seeley* at para 55).

The Canadian Human Rights Tribunal and the Federal Court both noted that 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 at para 39, 240 DLR (4th) 479 (*Campbell River*) 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" (emphasis added). 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 CHRT 33, [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 (*Johnstone*); affirmed in 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 *Seeley* case, 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* at 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.

The CNR appealed the *Seeley* case. The CNR argued that CHRT had erred in finding that a case of family status discrimination had been made out, in finding that the CNR had not met its duty to accommodate, and in awarding extra damages based on CNR's reckless conduct. The Federal Court dismissed CNR's appeal.

Justice Mandamin of the Federal Court noted that the *Canadian Human Rights Act*, RSC 1985, c H-6 does not define "family status" (*Seeley* at para 59) and also suggested that the legal cases to date illustrated two distinct lines (*Seeley* at para 61). Some had taken a more broad approach and some had taken a more narrow approach. The Federal Court seems to have tried to reconcile these two approaches and noted that in order to have proper regard to "family" one must consider children and the relationship between parents and children (*Seeley* at para 68). Parents are obligated to care for their children and if Parliament had intended to exclude childcare obligations from "family status" it would have done so clearly (*Seeley* at para 68). This interpretation of "family status" as including childcare obligations is within the scope of the ordinary meaning of the words (*Seeley* at para 70). Thus, the CHRT's interpretation of the meaning of "family status" was reasonable.

In determining whether there was a *prima facie* case of discrimination based on family status, and in attempting to reconcile the two lines of cases, Justice Mandamin said that the following questions needed to be answered (*Seeley* at para 78):

> a. does the employee have a substantial obligation to provide childcare for the child or children; in this regard, is the parent the sole or primary care giver, is the obligation substantial and one that goes beyond personal choice;

> b. are there realistic alternatives available for the employee to provide for childcare: has the employee had the opportunity to explore and has explored available options; and is there a workplace arrangement, process, or collective agreement available to the employee that may accommodate an employee's childcare obligations and workplace obligations;
>
> c. does the employer conduct, practice or rule put the employee in the difficult position of choosing between her (or his) childcare duties or the workplace obligations?

Clearly, the contextual factors of the individual case were significant (as with most discrimination cases). The following factors were considered by Justice Mandamin to be relevant to a finding that there was discrimination on the basis of family status:

- Ms. Seeley is the primary caregiver for two children of tender age;
- her husband works full time and is the breadwinner;
- she had considered whether childcare was available in nearby Hinton, AB;
- CNR never provided necessary information for exploring whether childcare options were available or feasible in Vancouver; and
- a realistic assessment of her circumstances discloses she would have significant difficulty in fulfilling her childcare obligations in responding to an indefinite recall assignment for the Vancouver shortage (*Seeley* at para 90).

Thus, Ms. Seeley's specific parental childcare obligations and CNR's response to her request for an extension to address possible options all resulted in *prima facie* discrimination on the basis of family status (*Seeley* at para 95).

In addition, CNR never considered the question of accommodation under the collective agreement before firing Ms. Seeley (*Seeley* at para 100). Further, the CHRT's finding that CNR had not adequately responded to Seeley's request for accommodation was reasonable (*Seeley* at para 107). Finally, the CHRT's award of damages was also reasonable.

It appears, then, that childcare responsibilities are clearly part of "family status" and that this ground of discrimination should be given equal footing with the other grounds. The tribunal will consider the steps that the employee took to minimize the obligations that were imposed on his or her family responsibilities. The tribunal will also consider the individual circumstances of the complainant, the nature of the conflicting responsibilities and the barriers that are in place. The employer's duty to accommodate will be tempered by the three factors (listed above) that the tribunal will consider, which in turn seeks to balance the responsibility for childcare issues between the employer and the employee.

As for the larger issue of the role of social construct in this case, it would appear that the court is willing to at least consider that in many cases childcare obligations can be substantial and can go "beyond personal choice."

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