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At What Stage does the Duty of Self-Accommodation Arise in a Discrimination Analysis?

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Case Commented On: *United Nurses of Alberta v Alberta Health Services*, 2019 ABQB 255 (CanLII)

As noted in previous posts (see here), the definition of discrimination on the basis of family status has been extended recently to include recognition of childcare responsibilities (see e.g. *Canada (Attorney General) v Johnstone*, 2014 FCA 110 (CanLII), *SMS Equipment v Communications, Energy and Paperworkers Union*, 2015 ABQB 162 (CanLII), both cases discussed below). However, the point at which employers' duty to accommodate is triggered remains controversial. In particular, the question remains as to how a complainant's duty of self-accommodation should be dealt with in the discrimination analysis.

In *United Nurses of Alberta v Alberta Health Services* (*UNA v AHS*), Justice Michele H. Hollins wades through the conflicting case law on the issue in the context of a judicial review of a labour arbitration board decision. The case concerns a grievance brought by the United Nurses of Alberta (UNA) on behalf of Jane Daigle, a registered nurse employed by Alberta Health Services (AHS). At her request, Ms. Daigle had been working a four days on/four days off schedule of varying 12-hour shift work since 2011.

In May 2013, AHS changed her schedule to a four days on/five days off rotation in order to comply with the Collective Agreement (at para 3). This change disrupted her childcare arrangement for her twin daughters (her husband also worked a similar shift schedule). Although she and her husband looked at various alternative childcare arrangements, they found nothing feasible. As such, Ms. Daigle was forced to request reassignment to a casual position, which resulted in her losing her full-time benefits. UNA filed a grievance against AHS on behalf of Ms. Daigle, stating that AHS had discriminated against her on the basis of family status (at para 4).

The Test for Discrimination

In *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61 (Can LII), the Supreme Court of Canada established a two-part test for human rights discrimination. In the first step, the onus is on the complainant to establish *prima facie* finding of discrimination. This requires the complainant to prove three criteria:

1. The complaint has a characteristic that is protected from discrimination;
2. The complainant has experienced an adverse impact; and
3. The protected characteristic was a factor in the adverse impact. (*Moore* at para 33)

At the second step, the onus falls to the respondent to show that they met their duty to accommodate.

Decision of the Board

The Labour Arbitration Board dismissed UNA's grievance (*UNA v AHS* at para 5). Applying the test for discrimination as established in *Moore,* the majority of the Board held that there was no *prima facie* discrimination. This was based on the assessment that Ms. Daigle had not discharged her duty of self-accommodation (at para 5). Relying on *Canada (Attorney General) v Johnstone*, 2014 FCA 110 (CanLII), the majority of the Board held that the duty of self-accommodation ought to be considered in the first stage of the discrimination analysis, in establishing *prima facie* discrimination (*UNA v AHS* at paras 47, 48).

The dissenting member of the Board relied on another case, *SMS Equipment Inc v CEP, Local 707*, 2015 ABQB 162 (Can LII), in which Justice June M. Ross held that the duty of self-accommodation should be considered in the second part of the discrimination analysis. Based on this, the dissenting member held that Ms. Daigle had established *prima facie* discrimination, and that she had taken sufficient steps to self-accommodate the changes to her schedule and the resulting impact on her childcare responsibilities. With regards to *SMS Equipment*, the majority regarded Justice Ross's comments on the matter to be *obiter*, and therefore not binding (*UNA v AHS* at para 48).

ABQB Decision

UNA applied to the Alberta Court of Queen's Bench for judicial review of the labour arbitration board's decision. After considering the conflicting case law, Justice Hollins found the Board's decision to be unreasonable, and remitted the case to the arbitration board to be reheard.

Justice Hollins began by considering the applicable standard of review. On this issue of whether or not the grievance should be allowed or dismissed, both parties agreed that the standard of review is reasonableness, and Justice Hollins noted that there should be deference given to labour boards' expertise on human rights legislation (at para 12).

However, UNA argued that the question of the correct formulation of the test for discrimination should be reviewed on a correctness standard (at para 13). Justice Hollins ultimately relied on the Supreme Court's decision in *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 (CanLII) (*Elk Valley*), to find that unless a tribunal is attempting to change the basic elements of the three-part test for *prima facie* discrimination, the standard of review should be reasonableness (at para 21). Because the Board correctly stated the test for *prima facie* discrimination in this case, Justice Hollins concluded that the applicable standard of review should be reasonableness (at para 22).

She then turned to the line of conflicting case law that has dealt with the issue of self-accommodation in family status discrimination cases. She noted that in *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*, 2004 BCCA 260 (CanLII), the British Columbia Court of Appeal held that childcare responsibilities

are protected under family status as a ground of discrimination, but only where a condition of employment results in a "serious interference" with a parental obligation (at para 24).

In contrast (at para 26), in *Hoyt v Canadian National Railway*, 2006 CHRT 33 (CanLII) the Canadian Human Rights Tribunal rejected the "serious interference" requirement introduced in *Campbell River* on the basis that it was inappropriate to impose a stricter definition of discrimination for family status as a prohibited ground. In *Johnstone*, the Federal Court of Appeal also rejected the "serious interference" threshold for proving *prima facie* discrimination established in *Campbell River*. However, Justice Hollins noted that the Court still went onto consider the complainant's self-accommodation efforts as part of the *prima facie* discrimination analysis (at para 32).

Justice Hollins critiqued the approach taken in *Johnstone*, writing that:

> [C]reating a higher test cannot be neutralized simply by saying you have not created a higher test. Proving serious interference with childcare obligations and proving that you have taken all reasonable steps to accommodate the employer's changes to your schedule are factually inextricable, as shown by the actual analyses undertaken in *Campbell River & North Island Transition Society* and *Johnstone*. And even if they were not, imposing either additional requirement flies in the face of accepted case law that says to treat one prohibited ground differently from others is contrary to the objectives of human rights legislation. (at para 34)

Justice Hollins then turned to Justice Ross's decision in *SMS Equipment*. In that case, a labour arbitrator's decision was under review with regards to a case of family status discrimination similar to the case at hand. The arbitrator had considered both the *Campbell River* and *Hoyt* cases, but did not settle the debate, concluding instead that it did not matter whether the self-accommodation analysis took place in the first or second part of the discrimination analysis because either way, the complainant had discharged her duty to self-accommodate (at paras 42-43).

In her review of *SMS Equipment*, Justice Ross found the Board's decision to be reasonable. However, on an alternative standard of review of correctness, she considered the question of the correct formulation of the *prima facie* discrimination test. Relying on the Supreme Court decision in *Moore*, Justice Ross took issue with the *Johnstone* approach, and emphasized that it added additional elements to the *prima facie* discrimination analysis for only one prohibited ground of discrimination. Furthermore, she pointed to the Supreme Court's examination of the second part of the discrimination analysis in *Central Okanagan School District No. 23 v Renaud*, 1992 CanLII 81 (SCC), [1992] 2 SCR 970, in which the Court clarified that analysis of the employer's duty to accommodate was a "multi-party inquiry" involving both the employer and complainant. Based on this, she concluded that the self-accommodation analysis belonged in the second stage of the discrimination test, as part of this "multi-party inquiry" (see *UNA v AHS*, at paras 44-46).

As mentioned above, the majority of the Board in the present case chose not to rely on Justice Ross's interpretation of the self-accommodation debate in *SMS Equipment* on the basis that her

comments were *obiter* (at para 48). However, Justice Hollins took issue with this interpretation, arguing that *obiter* comments can still carry persuasive weight (at para 51). Furthermore, she reasoned that even if the Board found the *obiter* reasoning to be of little persuasion, the Board was still bound by the Supreme Court jurisprudence relied on in Justice Ross's decision, as well as cases like *Elk Valley*, in which the Supreme Court rejected attempts to integrate additional criteria into the *prima facie* discrimination test (at para 54).

As such, Justice Hollins concluded that the Board's decision was not reasonable:

> It is clearly possible to reject *obiter* statements of this court and still come to a reasonable decision. However, the Board's failure to even attempt to reconcile the *Johnstone* approach it favoured with any of the Supreme Court of Canada's jurisprudence to the contrary was not reasonable, transparent or intelligible. (at para 55; citation omitted)

As a remedy, the case was remitted to the Board to be reheard. Justice Hollins reasoned that because the Board considered self-accommodation in the first part of the discrimination test, and ultimately found that there was no *prima facie* discrimination, the second part of the discrimination test was never considered by the Board (at para 61).

Commentary

The *UNA v AHS* decision demonstrates that while human rights law must be given a "broad and liberal" interpretation, it must also be clear and consistent in its application. In particular, the law must remain clear about what the complainant must prove to establish *prima facie* discrimination at the first stage of analysis, and what the respondent must prove to defend the claim at the second stage. Conflating these two stages or adding additional elements would only add more confusion to an already complex analysis.

This case also highlights the gendered nature of family status discrimination. It is interesting to note that this case, and each case mentioned in the decision, all involved female complainants. Indeed, in *SMS Equipment*, evidence was presented about the gendered nature of the discrimination at issue (see here). *UNA v AHS* highlights the fact that women continue to bear the brunt of childcare responsibilities, and as a result, there are significant impacts on their ability to participate in the workforce. Without the protection of strong human rights legislation and case law that guards against family status discrimination, women like Ms. Daigle would be forced to choose between providing care for their children and maintaining full-time positions and benefits.

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