Federal Court  Cour fédérale

Date: 20150507

Docket: T-1726-13

Citation: 2015 FC 599

Ottawa, Ontario, May 7, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

LESLIE HICKS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, the Attorney General of Canada, acting on behalf of Human Resources and Skills Development Canada (HRSDC) submitted this application for judicial review of a decision made by the Canadian Human Rights Tribunal (the Tribunal) in respect of the respondent, Leslie Hicks' claim for temporary dual residence assistance (TDRA) under the Treasury Board's relocation directive (RD).

[2] The applicant seeks an order setting aside the Tribunal decision, an order for its costs in this matter and such further and other relief as this Court may deem just or appropriate.

I. Background

[3] As an employee of the HRSDC, the respondent relocated from Sydney, Nova Scotia to Ottawa, Ontario, for a new position because his previous position as the principal advisor for the Coal Mining Safety Commission became redundant. The following is a timeline of events.

[4] On January 21, 2002, the respondent received a formal letter of offer dated January 14, 2002 for relocation. The letter states, "Relocation Expenses will be reimbursed at public expense according to the Treasury Board Relocation Directive."

[5] On February 18, 2002, a revised letter was sent to the respondent informing him of the condition of his deployment (February letter). The respondent accepted the revised offer by email on February 21, 2002.

[6] On February 27, 2002, a confirmation letter was sent to the respondent advising him that the deployment of his new position is full time indeterminate as an industrial safety engineer for the applicant's Labour Branch, Occupational Health and Safety and Injury Compensation Division. The new position would start as of March 4, 2002 in National Headquarters in Hull, Quebec (NHQ).

[7] On September 16, 2002, the respondent began work at NHQ. He officially relocated to Ottawa on October 17, 2002. His wife did not move with him due in part to her mother's ailing health; hence, the respondent and his wife maintained dual residences. During this time, his mother-in-law moved to an assisted living apartment in May 2002 and later moved to a full care nursing home on October 9, 2003.

[8] On September 22, 2004, the respondent made an expense claim for temporary dual residence assistance under the RD in the amount of $21,247, covering the first twelve months of the relocation period from October 1, 2002 to September 20, 2003. This claim was denied on November 23, 2004.

[9] On December 2, 2004, the respondent filed a grievance challenging this denial. His first level grievance was denied on February 10, 2005. The reason for denial is that the respondent was "not eligible for the Temporary Dual Residence Assistance since he was a renter and not the owner of a house in Sydney."

[10] On June 17, 2005, the respondent's grievance was denied at the second level. His claim for his mother-in-law could not be approved because she was not living with him in the principal residence and as such, could not be considered a dependant pursuant to the 1993 RD. Under the 1993 RD, "dependant" means a family member who is "permanently" residing with the employee.

[11] On March 15, 2006, the respondent's grievance was denied at the third level before the National Joint Council (NJC) for the same reasons as at the second level. On July 18, 2006, his grievance was then referred to adjudication before the Public Service Labour Relations Board (PSLRB).

[12] On July 19, 2006, the respondent filed the instant complaint with the Canadian Human Rights Commission (the Commission).

[13] On January 13, 2007, the respondent's mother-in-law passed away in the nursing home.

[14] On February 2, 2007, the PSLRB denied the respondent's grievance for the same reasons as at the third level.

[15] On October 26, 2007, the Commission advised the respondent that it would not deal with his complaint pursuant to paragraph 41(1)(c) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act or CHRA]. The respondent sought judicial review of the Commission's refusal from this Court and his application was allowed on September 19, 2008.

[16] On April 1, 2009 the definition of "dependant" under the RD was expanded from "permanently residing with the employee" to include "a person who resides outside the employee's residence and for whom the employee has formally declared a responsibility for assistance and/or support" (the 2009 Directive).

[17] After the Federal Court's decision, the Commission commenced investigation of the respondent's complaint and recommended conciliation in its investigation report of July 12, 2010. Conciliation took place but was unsuccessful.

[18] On November 9, 2011, the Commission referred the matter to the Tribunal.

II. Decision Under Review

[19] The hearing was held from April 15 to 17 and on May 7, 2013 in Ottawa, Ontario. The Tribunal's decision dated September 18, 2013 ruled in favour of the respondent, Mr. Hicks.

[20] The Tribunal was asked to determine the respondent's claim under the prohibited grounds of family status and disability. The Tribunal cited sections 3, 7 and 10 of the Act and stated the nature of the complaint was whether the applicant's decision to decline payment of the TDRA was discriminatory. It determined subsection 7(b) applies to the instant complaint under the prohibited ground of family status discrimination.

[21] First, the Tribunal determined the distinctions under the 1993 RD between persons who are "permanently residing with the employee" and those who are not, were harmful to the respondent.

[22] Second, the Tribunal determined whether the adverse distinctions created by the 1993 RD were based on his family status. It noted although the term family status is not defined in the Act, legal jurisprudence recognizes this ground to protect the absolute status of being or not being in a

family relationship, the relative status of who one's family members are, the particular circumstances or characteristics of one's family and the duties and obligations that may arise within the family. For support, it cited *B v Ontario (Human Rights Commission)*, 2002 SCC 66, at paragraphs 39 to 41 and 57, [2002] 3 SCR 403 and *Canada (Attorney General) v Johnstone*, 2013 FC 113, at paragraphs 104 to 113, [2013] FCJ No 92 [*Johnstone*].

[23] The Tribunal noted the nature of the present complaint is not "a conflict between the Complainant's work and family obligations, but relates to the denial of a benefit." It examined the purpose of the benefit plan which was to assist transferred employees with relocating their lives and to recognize that efficiency must be balanced against detrimental effects. The Tribunal noted the respondent's mother-in-law was cared for by his wife. It determined the denial was based on a characteristic of the respondent's family; that is, he and his wife cared for his mother-in-law who, because of a permanent disability, could not live with them in the family home. It found eldercare duties fall within the protection against discrimination on the basis of family status and that the applicant's denial of the respondent's expenses claim under the TDRA constitutes a *prima facie* discriminatory practice because the TDRA was under-inclusive and discriminatory. The Tribunal referenced *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, [1989] SCJ 42 [*Brooks*]; and *Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566, [1996] SCJ No 55 [*Gibbs*].

[24] After being satisfied of the respondent's case in demonstrating *prima facie* discrimination on the ground of family status, the Tribunal proceeded to examine the applicant's arguments. It summarized the applicant's arguments for *bona fide* occupational requirement as follows: 1) the

respondent's mother-in-law could not be considered a "dependant" under the 1993 RD because she resided separately from the respondent; 2) she was considered as a permanently disabled person and not as a temporary ill person; 3) the applicant was a renter not an owner of his residence in Nova Scotia; and 4) the applicant prioritized in accordance with the efficient use of public resources.

[25] The Tribunal found the applicant's *bona fide* occupational defence did not stand because the applicant failed to provide reference to its renter owner distinction and did not provide evidence to substantiate its argument on the prioritization of resources. It quoted *Johnstone v Canada (Border Service Agency),* 2010 CHRT 20, at paragraphs 348 to 351, [2010] CHRD No 20 for support.

[26] Then, the Tribunal examined remedies requested by the respondent.

[27] First, the Tribunal found issue estoppel does not apply because the quantum of the respondent's TDRA claim has not been previously decided by the PSLRB.

[28] Second, with respect to the compensation for the respondent's expenses, the Tribunal acknowledged it did not have sufficient information to make an informed decision on the interpretation and application of the TDRA and to determine the actual quantum of the TDRA claim. It left the amount to the parties to determine and retained jurisdiction for three months in the event that the parties were unable to reach an agreement.

[29] Third, with respect to compensation for pain and suffering, the Tribunal noted the respondent provided substantiation for sick leave but did not file any medical report for his claim of stress, frustration and disappointment. The respondent claimed that his stress was caused by the unsettled nature of his problem with his employer and the ongoing struggle involved with filling a series of grievances. The Tribunal noted the respondent asked for $20,000 which is the maximum the Tribunal could award. It awarded $15,000 as a result of the discriminatory practice.

[30] Fourth, the Tribunal examined compensation under wilful or reckless discriminatory practice. It noted the respondent seeks $20,000 which is the maximum award reserved for the very worst cases. It observed that the applicant did not seem to have considered the CHRA in its adherence to a rigid application of the 1993 RD. Further, it found the applicant did not consider its duty to accommodate to the point of undue hardship when faced with a difficult family situation and a request for compassion. It found the applicant showed disregard and indifference for the respondent's family status and for the consequences of the denial for TDRA. Hence, the Tribunal awarded $20,000 based on these findings.

[31] Lastly, the Tribunal awarded interest in accordance with Rule 9(12) of the Tribunal's Rules of Procedure, which is simple interest calculated on a yearly basis at the Bank of Canada rate.

III. Issues

[32] The applicant raises the following issues:

1. Did the Tribunal err in holding that the prohibition against discrimination on the basis of family status includes "family characteristics discrimination"?
2. If the prohibition against discrimination on the basis of family status includes "family characteristics discrimination", did the Tribunal err in holding that HRSDC denied the respondent's claim for TDRA because of a family characteristic and that it breached the Act because of the applicant's failure to take into account the respondent's family circumstances?
3. If the applicant's decision to deny the respondent's claim for TDRA constitutes a discriminatory practice, did the Tribunal err in awarding compensation for pain and suffering on the higher end of the scale and in awarding compensation for wilful and reckless conduct?

[33] The respondent raises the following issues:

1. What is the appropriate standard of review?
2. Did the Tribunal err in understanding the nature and scope of the respondent's human rights complaint?
3. Did the Tribunal repurpose the Relocation Directive by ignoring the fact that a dependant must be suffering from a "temporary illness" as a condition to the receipt of the TDRA?
4. Did the Tribunal err in concluding that the prohibition against family status discrimination bars differential treatment based on family characteristics?
5. Did the Tribunal err in concluding that the employer denied the respondent's TDRA claim because of his family's characteristics?

6. Did the Tribunal err in concluding that the employer failed to establish undue hardship?
7. Did the Tribunal err in awarding the respondent $15,000 for pain and suffering?
8. Did the Tribunal err in awarding the respondent $20,000 for the employer's reckless conduct?

[34] In my view, there are five issues:

A. What is the standard of review?
B. Did the Tribunal commit a reviewable error in concluding that family status includes eldercare obligations?
C. Did the Tribunal commit a reviewable error in identifying the legal test for finding a *prima facie* case of discrimination on the ground of family status?
D. Did the Tribunal commit a reviewable error in applying the legal test to the facts in the instant case?
E. Were the Tribunal's remedy awards reasonable: a) award for pain and suffering, and b) award for wilful and reckless conduct?

IV. Applicant's Written Submissions

[35] The applicant submits the proper standard of review applicable to the determination of the scope of family status as a protected ground of discrimination was correctness prior to *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]; but post *Dunsmuir*, this issue has been reviewed under the standard of reasonableness with a narrow range of acceptable and defensible outcomes (see *Canada (Canadian Human Rights Commission) v*

Canada (Attorney General), 2011 SCC 53 at paragraphs 23 and 24, [2011] 3 SCR 471). It states the test for *prima facie* discrimination is correctness (see *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392). It submits the Tribunal has less room to manoeuvre where the matter involves equality law (see *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75 at paragraph 14, [2013] FCJ No 249 [*CHRC*]) and hence, there should be a reduced level of deference by this Court in examining this matter.

[36] The applicant first reviews the purpose and scope of the RD. It highlights the following information. The purpose of the RD is to help relocate employees in the most efficient fashion; that is, at the most reasonable cost to the public yet having a minimum detrimental effect on the transferred employee and family. The RD provides for TDRA in respect of employees' dependants in order to achieve this purpose. Under the eligibility criteria for TDRA, section 2.11.3 states assistance is not given "for the voluntary separation of the family for personal reasons." The applicant acknowledges that on April 1, 2009 a new RD expanded the definition of "dependant" to include "a person who resides outside the employee's residence and for whom the employee has formally declared a responsibility for assistance and/or support."

[37] Under the applicant's first issue, it submits the following arguments: i) the Tribunal conducted a flawed legal analysis on the interpretation of "family status" in the context of the CHRA; and ii) family status excludes family characteristics.

[38] Here, the Tribunal found the RD neither distinguished on the basis of the respondent's absolute status of being in a family relationship nor the relative status of who his family

members are; rather the RD turns to whom the respondent can claim TDRA, requiring his mother-in-law, the dependant, to reside with him for reasons of temporary illness.

[39] The applicant submits although the respondent only made his claim under the definition of dependant in the RD, the Tribunal erroneously extended his claim to family characteristics. It argues the Tribunal allowed the respondent to amend his complaint to include the ground of temporary illness which was conceptually unrelated to a complaint under the definition of dependant. Then, the Tribunal rewrote the RD to permit TDRA claims for the purpose of subsidizing the cost of maintaining a second home for someone who is chronically ill, where the RD's originally stated aim is to offset the cost of maintaining a second residence when one of the residences is occupied by a dependant for reasons of temporary illness.

[40] The applicant argues the Tribunal made a flawed legal analysis by re-introducing an expanded version of "family obligations discrimination" under the guise of "family characteristics discrimination" by concluding the latter ground also protects the duties and obligations within Mr. Hicks' family.

[41] Then, the applicant submits the ground of family status excludes family characteristics. It cites *Gonzalez v Canada (Employment and Immigration Commission)*, [1997] 3 FC 646, [1997] FCJ No 790, a case where this Court reviewed a provision of the *Unemployment Insurance Act* that entitles parents to five additional weeks of parental benefits if their child arrived home after reaching the age of six months and suffered from a condition requiring a longer period of parental care. In that case, this Court found the six-month rule constituted a discriminatory

practice. The applicant argues this Court, in that case, was not fully alive to the complex issues raised by the ground of discrimination under family status. It then references *Johnstone* and *Canada National Railway v Seeley*, 2013 FC 117, [2013] FCJ No 97 [*Seeley*] which were at the time, in front of the Federal Court of Appeal for appeal pertaining to the meaning and scope of family status. The applicant argues the proper statutory interpretation should not include family characteristics and Parliament did not intend family status to include family characteristics.

[42] In the applicant's further memorandum, it argues it is questionable to what extent the Federal Court of Appeal's interpretation of family status to encompass childcare obligations applies to eldercare.

[43] Insofar as the second issue is concerned, the applicant submits the denial of TDRA is not discriminatory and such an accommodation exceeds the scope of RD.

[44] First, for the rationale of denial, it argues HRSDC did not deny the respondent's TDRA claim on the basis of absolute status of family or on the basis of relative status. The applicant argues that not all distinctions made on the basis of a prohibited ground will amount to discrimination under human rights legislation (see *Gonzalez*; and *McGill University Health Centre (Montréal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at paragraph 49, [2007] 1 SCR 161). It argues that the requirement under the RD that the dependant permanently reside with the complainant and that she occupies one of his residences for reasons of temporary illness in order to be eligible for the TDRA is not arbitrary and has rational connection with the objectives of the RD. It cites *Alberta (Minister of Human*

Resources and Employment) v Alberta (Human Rights, Citizenship and Multiculturalism Commission), 2006 ABCA 235, 62 Alta LR (4th) 209 for support. In that case, a complainant was denied a shelter allowance while living with his mother and the Court found the government has discretion in establishing a social assistance scheme as long as there is sufficient foundation in reality and common sense.

[45] The applicant argues here the policy underlying the RD is both specific and limited. It argues employees do not need to maintain second residences to facilitate their relocation unless they have dependant family members residing with them in these residences. Here, the dependant did not reside with them and hence, did not need employees to maintain their former homes for them. The extra expenses in this case arose from the voluntary separation of the family for personal reasons and the assistance is rightly not given.

[46] Second, for the scope of the RD, the applicant submits the RD is not intended to facilitate medical and other caregiving arrangements for dependants; rather, it is to allow them to continue living in the employee's former residence for a specified period until able to relocate with the employee. It argues the Tribunal repurposed the RD by accommodating the respondent's family characteristics by providing him with TDRA and as such, is a different conception of the RD.

[47] Insofar as the third issue is concerned, the applicant submits the Tribunal's analysis is not thorough and even if it was, the award of pain and suffering should have been at the lower end of the range and the damage amount for special compensation was unjustified because its conduct in denial was not reckless.

[48] For the award of pain and suffering, the Tribunal should look for evidence of either physical or mental manifestations of stress caused by the hurt feelings or loss of respect as a result of the alleged discriminatory practice. The applicant argues the situation of the case at bar does not rise to the level of hurt feelings and loss of self-esteem contemplated in paragraph 53(2)(e) of the Act. In support, it cites *Morgan v Canadian Armed Forces*, [1989] CHRD No 5. Here, the denial did not result in the respondent suffering from any conflict between his family obligations and work-related requirements.

[49] For the award of special compensation from wilful and reckless conduct, the applicant argues HRSDC in the instant case did not commit "some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour." It submits the objective of the Act is to remedy discrimination, not to punish the applicant in the case at bar. Here, HRSDC was neither devoid of caution in denying the respondent's application for TDRA, nor was the denial made without regard to the consequences of that decision. The applicant submits it was made within the normal standards of management.

V. Respondent's Written Submissions

[50] The respondent submits the standard of review for a decision of a human rights tribunal on questions of law concerning anti-discrimination provisions of the Act is reasonableness (see *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paragraphs 166 to 168, [2013] 1 SCR 467; and *CHRC* at paragraphs 10 to 14). He further submits there should not be a "reduced deference" to the Tribunal's determination of legal issues because a varying degree of deference is against the Supreme Court's conclusion in *Dunsmuir* (see *Canada (Attorney*

General) v Almon Equipment Limited, 2010 FCA 193 at paragraphs 32 and 33, [2011] 4 FCR 203).

[51] However, in the respondent's further memorandum, he submits, pursuant to the recently released Federal Court of Appeal decision *Johnstone v Canada (Border Services)*, 2014 FCA 110 at paragraphs 36 to 52, [2014] FCJ No 455 [*Johnstone FCA*], the meaning and scope of family status as a prohibited ground of discrimination and the legal test for *prima facie* discrimination under that ground is reviewable on a standard of correctness.

[52] In response to the applicant's argument on the Tribunal's unilateral amendment of the respondent's complaint, he argues the Tribunal did not amend his complaint. He argues since he challenged the HRSDC's response denying the TDRA, he was at issue with the rationales for denial on both the temporary illness and the definition of dependant.

[53] Then, the respondent submits the Tribunal did not repurpose the RD. He argues that the "temporary illness" limitation was imposed as a method of achieving the express purpose of relocating employees efficiently, at minimal cost and with a minimum detrimental effect on the employee and his/her family and this method is under-inclusive on the grounds of family status.

[54] Next, the respondent submits the ground of family status includes family characteristics. He cites the following cases for support: *Gonzalez*; *Johnstone*; *Seeley* and *Patterson v Canada (Revenue Agency)*, 2011 FC 1398 at paragraphs 34 to 35, [2011] FCJ No 1706.

[55] In his further memorandum, the respondent argues the analysis in the Federal Court of Appeal decisions *Johnstone FCA* and *Canadian National Railway Company v Seeley*, 2014 FCA 111, 458 NR 349 [*Seeley FCA*] should apply to eldercare obligations. He argues the term "family status" should be interpreted broadly (*Johnstone FCA* at paragraphs 61, 62, 67 and 70). Also, eldercare is an example of family circumstances protected by the prohibition on family status discrimination (*R v Peterson*, [2005] OJ No 4450 [*Peterson*]). He submits although these two cases did not address eldercare, the Court of Appeal did state that the test should remain flexible in order to address unique circumstances as they arise. He provides further analogy to religious accommodations and argues it should not be more onerous to demonstrate a *prima facie* case of family status discrimination than religious discrimination.

[56] In response to the applicant's argument of rational basis for limiting the availability of TDRA, the respondent submits that the same disruptive impact may result on an employee's family irrespective of whether i) the dependant resides with an employee; ii) the dependant is suffering from a temporary or chronic illness; and iii) the dependant is well enough to relocate with an employee. He points out that even the 2009 Directive now has an amendment to provide coverage for a dependent who resides outside of the employee's residence. He argues therefore, the Tribunal was correct to find the TDRA is under-inclusive and hence discriminatory. In support, he cites the same two cases referenced in the Tribunal's decision: *Brooks* and *Gibbs*.

[57] In the respondent's further memo, he argues the care for his mother-in-law until she was accepted into a nursing home arose from a family-based moral obligation, rather than a personal choice. In the alternative, he argues his wife had a legal obligation to support her mother

pursuant to Nova Scotia's *Maintenance and Custody Act*, RSNS 1989, c 160, sections 15 to 17 (see *Barrington v Shand*, [1984] WDFL 1393 at paragraphs 20 and 21, 65 NSR (2d) 153).

[58] As for the scope of the RD, the respondent submits the purpose of the RD is to subsidize the cost of caring for ill family members and the RD makes it clear that it was intended to apply to dependants who are sick. By limiting the application of the benefit to dependants who are only temporarily sick or who are living with the relocated employee, the Tribunal was reasonable to conclude that this was an under-inclusive benefit. He argues the Tribunal was reasonable to find that the employer did not meet the onus to justify employment-related discrimination on the basis of undue hardship. This is further evidenced by the RD's 2009 amendment.

[59] Insofar as the remedy award for pain and suffering is concerned, the respondent submits although each case is fact-dependent, five prior cases support the finding of $15,000 arising out of family status discrimination: *Johnstone* for the amount of $15,000; *Hoyt v Canadian National Railway*, 2006 CHRT 33, at paragraphs 140 to 142, [2006] CHRD No 33 for the amount of $15,000; *Richards v Canadian National Railway*, 2010 CHRT 24, at paragraph 245, [2010] CHRD No 24 for the amount of $15,000; and *Whyte v Canadian National Railway*, 2010 CHRT 22 at paragraph 253, [2010] CHRD No 22 for the amount of $15,000. Therefore, the award here is reasonable and falls within the range of possible, acceptable outcomes.

[60] Insofar as the remedy award for HRSDC's wilful and reckless conduct is concerned, the respondent submits the award under subsection 53(3) of the Act is intended to be punitive (*Johnstone* at paragraph 155). He argues the Tribunal was in the best position to evaluate the

evidence in fixing the quantum of damages arising from the employer's reckless conduct. Here, the Tribunal based its conclusion in part on the following evidence: i) the employer failed to treat Mr. Hicks' claim with the seriousness it deserved; ii) the employer did not inquire into Mr. Hicks' needs in relation to his family situation; iii) the employer failed to consider whether human rights principles supported Mr. Hicks' claim; iv) any deviation from the text of the 1993 RD was viewed as unimaginable; and v) the employer showed disregard and indifference to Mr. Hicks' family status and the consequence of its decision.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[61] Where the jurisprudence has satisfactorily resolved the standard of review, the analysis need not be repeated (*Dunsmuir* at paragraph 62).

[62] Two of the recent Federal Court of Appeal decisions have clarified the proper standard of review for questions of the Tribunal's findings of law. In *Johnstone FCA* at paragraph 44 and *Seeley FCA* at paragraph 36, the Federal Court of Appeal found the presumption of reasonableness is rebutted and the proper standard of review applicable to the legal interpretation of the human rights statute is the standard of correctness. The Federal Court of Appeal provides the following reasons in *Johnstone FCA* at paragraph 51:

> The two principal legal issues raised in this appeal concern questions of fundamental rights and principles in a human rights context. These are not issues about questions of proof or mere procedure, or about the remedial authority of a human rights tribunal or commission. As such, for the sake of consistency between the various human rights statutes in force across the

> country, the meaning and scope of family status and the legal test to find *prima facie* discrimination on that prohibited ground are issues of central importance to the legal system, and beyond the Tribunal's expertise, which attracts a standard of correctness on judicial review: *Dunsmuir* at para. 60.

[63] In this case, the issue on the interpretation of family status and the issue on the legal test for finding a *prima facie* case of discrimination are therefore examined under the standard of correctness (*Johnstone FCA*).

[64] As for the rest of the issues concerning the findings of the Tribunal with respect to questions of fact and of mixed fact and law, these are reviewed on a standard of reasonableness.

[65] The standard of reasonableness means that I should not intervene if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir* at paragraph 47). Here, I will set aside the Tribunal's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). As the Supreme Court held in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*] at paragraph 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the Tribunal commit a reviewable error in concluding that family status includes eldercare obligations?*

[66] The present case, although it is not about parental obligations, is similar in the principle to *Johnstone FCA* because I am asked to determine whether or not a family obligation should be encompassed under the prohibited ground of family status discrimination pursuant to the Act. I agree with the respondent that an analysis under the prohibited ground of family status should remain flexible in order to address unique circumstances. Here, I find the Tribunal did not commit a reviewable error in concluding that family status includes eldercare obligations.

[67] The Tribunal correctly identified the long standing jurisprudence on the broad interpretation of the ground of family status discrimination under *B v Ontario* at paragraph 39:

> The fact that the word "status" does not restrict the statute in the manner proposed by the appellants is clear from the way the term has been qualified in the case law, and in the submissions of the parties. The very issue in this appeal has been characterized as whether s. 5(1) of the Code includes complaints based on "relative status" as opposed to "absolute status". The essence of the appellants' argument is that the ordinary meaning of the word "status" refers to an absolute condition; the inclusion of relative status within the scope of the definition would require the addition of a qualification. We cannot agree. The word "status" is equally capable of encompassing both the absolute definition and the relative definition. Moreover, the terms "marital status" and "family status" are in themselves relative. That is, they require the existence or absence of a relationship with another person. To restrict its meaning to the absolute would ignore the very condition that brings the status into being in the first place.
>
> [Emphasis in original]

[68] The Federal Court of Appeal has determined that the ground of discrimination of family status should be interpreted broadly to include family circumstances (*Johnstone FCA* at paragraph 67):

> It is noteworthy that Parliament chose to use two distinct words for the word "status" in the French version of sections 2 and 3 of the

> *Canadian Human Rights Act*: "l'état matrimonial" for marital status and the much broader "situation de famille" for family status. The French word "situation" is broadly defined in *Le Nouveau Petit Robert* as "[e]nsemble des circonstances dans lesquelles une personne se trouve" (the whole of the circumstances in which an individual finds himself). In contrast, that same common dictionary defines "état" as "[m]anière d'être (d'une personne ou d'une chose) considérée dans ce qu'elle a de durable" (state of being of a person or thing considered in its enduring aspects). The distinction is important, and supports a much broader interpretation of "family status" that includes family circumstances, such as childcare obligations.
>
> [Emphasis added]

[69] The Federal Court of Appeal in *Seeley FCA* reiterated the principle identified in *Johnstone* on why the prohibited ground of discrimination of family status encompasses the childcare obligations at paragraph 41:

> As found by this Court in *Johnstone*, the prohibited ground of discrimination of family status encompasses the parental obligations whose non-fulfillment engages the parent's legal responsibility to the child. The childcare obligations contemplated by the expression family status are thus those that have immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and a child. As a result, the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability. This approach avoids trivializing human rights by extending human rights protection to personal choices.

[70] I find this similar rationale can be applied for the analysis of eldercare obligation in the instant case. The prohibited ground of discrimination of family status should encompass the eldercare obligation because whose non-fulfillment can attract not only civil responsibility (*Maintenance and Custody Act*), but also criminal responsibility if not exercised properly

(*Peterson*). Eldercare obligation is entrenched in Canadian societal values. It demonstrates the adult children's responsibility to their elderly parents.

[71] Therefore, I find eldercare is an example of family circumstances protected by the prohibition on family status discrimination and the Tribunal was correct to interpret as such.

C. *Issue 3 - Did the Tribunal commit a reviewable error in identifying the legal test for finding a prima facie case of discrimination on the ground of family status?*

[72] The Federal Court of Appeal reviewed the legal test for finding a *prima facie* case of discrimination on the prohibited ground of family status in *Johnstone FCA* at paragraph 75:

> … First, a *prima facie* case of discrimination must be made out by the complainant. Once that *prima facie* case has been made out, the analysis moves to a second stage where the employer must show that the policy or practice is a *bona fide* occupational requirement and that those affected cannot be accommodated without undue hardship.

[73] Here, the Tribunal correctly followed this test. It first satisfied itself of the respondent's case in demonstrating *prima facie* discrimination on the ground of family status and then proceeded to examine the employer's arguments for *bona fide* occupational requirement.

[74] Therefore, the Tribunal did not commit a reviewable error in identifying the legal test for finding a *prima facie* case of discrimination.

D. *Issue 4 - Did the Tribunal commit a reviewable error in applying the legal test to the facts in the instant case?*

[75] Insofar as the first stage of the test is concerned, I find the Tribunal was reasonable to find the respondent made out the *prima facie* case of discrimination.

[76] In determining whether a benefits scheme is *prima facie* discriminatory, if the benefits are ". . . allocated pursuant to the same purpose, yet benefits differ as the result of characteristics that are not relevant to this purpose, discrimination may well exist" (*Gibbs* at paragraph 33).

[77] The applicant and the respondent are at issue on whether or not the TDRA intends to cover the respondent's family situation and if the accommodation exceeds the scope of the RD. In light of the amendment under the 2009 Directive which provides coverage for a dependent who resides outside the employee's residence, I find the TDRA does intend to provide assistance to relocated employees irrespective of whether the dependant resides with an employee, the dependant is suffering from a temporary or chronic illness, or the dependant is well enough to relocate with an employee. Hence, by limiting the application of the benefit to dependants who are only temporarily sick or who are living with the relocated employee, the Tribunal was reasonable to conclude that this was an under-inclusive benefit to justify a finding of *prima facie* discrimination.

[78] Insofar as the *bona fide* occupational requirement is concerned, I find the Tribunal's finding was reasonable. Here, the Tribunal found the applicant's *bona fide* occupational defence did not stand because the applicant failed to provide reference to its renter owner distinction and to provide evidence to substantiate its argument on the prioritization of resources. To me, this rationale is transparent and justifiable.

[79] Therefore, the Tribunal was reasonable to find there was a *prima facie* case of discrimination under the prohibited ground of family status discrimination and that the employer failed to meet its onus to establish a *bona fide* occupational requirement.

E. *Issue 5 - Were the Tribunal's remedy awards reasonable: a) award for pain and suffering, and b) award for wilful and reckless conduct?*

[80] With respect to the award for pain and suffering, the CHRA authorizes remedy for pain and suffering under paragraph 53(2)(e). Here, although the Tribunal found the respondent did not submit medical reports for his claim of stress, it accepted the respondent's evidence of sick leave. The applicant argues HRSDC's conduct did not rise to the level of hurt feelings and loss of self-esteem contemplated under paragraph 53(2)(e). In balancing the submissions from both sides and taking into consideration the sick leave evidence, the Tribunal determined $15,000 was an appropriate compensation for the respondent's pain and suffering. I am satisfied that the Tribunal did look for evidence of physical and mental manifestations of stress caused by hurt feelings resulting from the alleged discriminatory practice and the awarded amount is reasonable.

[81] Regarding the award for wilful and reckless conduct, the CHRA authorizes remedy for an employer's wilful and reckless conduct under paragraph 53(3). Here, the Tribunal acknowledged $20,000 is the maximum award reserved for the very worst cases. In its determination, it considered HRSDC's strict adherence to the 1993 RD. It found the HRSDC did not consider the CHRA in its rigid application of the RD and did not consider its duty to accommodate. It ultimately determined the applicant showed disregard and indifference towards the respondent's

family status. The Tribunal's rationale is transparent and justifiable. I am satisfied that its decision of the special award is reasonable.

[82] For the reasons above, I would deny this application, with costs to the respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed with costs to the respondent.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Canadian Human Rights Act*, RSC 1985, c H-6**

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.	(2) Une distinction fondée sur la grossesse ou l'accouchement est réputée être fondée sur le sexe.
…	…
7. It is a discriminatory practice, directly or indirectly,	7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	b) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
…	…

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

…

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(c) the complaint is beyond the jurisdiction of the Commission;

…

53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

…

41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

c) la plainte n'est pas de sa compétence;

…

53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte

dismiss the complaint if the member or panel finds that the complaint is not substantiated.

qu'il juge non fondée.

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) making an application for approval and implementing a plan under section 17;

(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

National Joint Council Relocation Directive

Dependant (personne à charge) - a person who resides full-time with the employee at the employee's residence, or a person who resides outside the employee's residence and for whom the employee has formally declared a responsibility for assistance and/or support, and who is:	La définition a été élargie afin d'inclure « une personne qui habite à l'extérieur de la résidence de l'employé et à l'égard de laquelle celui-ci a officiellement déclaré qu'il avait une responsabilité en matière d'aide ou de soutien ». Nota : Par déclaration officielle, on entend soit une déclaration écrite de l'employé, soit un document juridique.

Relocation Directive, October 1993

2.11.3 Assistance is not given:	2.11.3 On n'accorde pas d'aide dans les cas suivants:
- when the family or a dependant remains at the former place of duty in order to dispose of income-producing property or because of employment reasons;	- lorsque la famille ou une personne à charge reste à l'ancien lieu de travail d'un employé pour vendre un bien qui rapporte un revenu ou pour des raisons professionnelles;
- for a dependant who has been attending school and was not living at home prior to the employee's relocation, because expenses would not be increased by the relocation; or	- pour une personne à charge qui fréquentait un établissement d'enseignement, mais qui ne vivait pas chez l'employé avant sa réinstallation, étant donné que les dépenses de ce dernier n'augmenteront pas à cause du déménagement; ou
- for the voluntary separation of the family for personal reasons.	- lorsque la séparation de la famille est voulue pour des raisons personnelles.

FEDERAL COURT

SOLICITORS OF RECORD

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