Federal Court Cour fédérale

Date: 20151118

Docket: T-2076-14

Citation: 2015 FC 1287

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, November 18, 2015

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

NATHALIE NADEAU

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Attorney General of Canada [AGC] is seeking judicial review of a decision by a Public Service Labour Relations Board adjudicator [Adjudicator], dated September 11, 2014, allowing a grievance filed by the respondent, Nathalie Nadeau, on May 22, 2009.

[2] In her grievance, Ms. Nadeau challenges the decision of the Correctional Service of Canada [CSC] to refuse to pay her a clothing allowance, as well as the CSC's inability and refusal to provide her with a maternity uniform. Ms. Nadeau contests the CSC's interpretation of section 43.03 of the collective agreement, reproduced in an appendix to these reasons, between the Treasury Board and the Union of Canadian Correctional Officers-Syndicat des agents correctionnels du Canada-CSN (UCCO-SACC-CSN) [collective agreement] and relies on section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], also reproduced in the appendix, to argue that she was the victim of discrimination on one of the prohibited grounds of discrimination set out in subsection 3(1) of the CHRA.

[1] The Adjudicator concluded that the employer had discriminated against Ms. Nadeau on the basis of sex (pregnancy) by refusing to pay her a clothing allowance or provide her with a maternity uniform, and that it had not succeeded in raising a defence under section 15 of the CHRA (section 15, reproduced in the appendix). He therefore allowed Ms. Nadeau's grievance; ordered the CSC to pay her the clothing allowance provided for under section 43.03 of the collective agreement, prorated to the time worked during her assignment to administrative duties; and, relying on paragraph 53(2)(*e*) of the CHRA, ordered the CSC to pay her $1,500 for pain and suffering.

[2] The AGC's application for judicial review is limited to the Adjudicator's conclusion relating to the payment of the clothing allowance. He asks the Court to allow his application, set aside this conclusion by the Adjudicator and refer the matter back for redetermination by another adjudicator in light of the reasons of the Court.

[3] For the reasons that follow, the Court finds that the Adjudicator did not err in applying the *prima facie* case test for discrimination and that his decision is reasonable.

II. Background

[4] Ms. Nadeau has been working as a correctional officer at CSC since November 1998. As such, she is subject to the above-referenced collective agreement, and her position is classified at the CX-01 group and level.

[5] In her work, Ms. Nadeau is required to wear a uniform that is provided to her free of charge by her employer under section 7 of the National Joint Council's Uniforms Directive, which is reproduced in the appendix.

[6] On December 14, 2008, Ms. Nadeau learned that she was pregnant. She notified her manager of this and asked to remain at home until after her appointment with a doctor to determine her functional limitations. Mindful of the difficulties she had obtaining a uniform during her first pregnancy in 2006, Ms. Nadeau therefore requested a maternity uniform.

[7] On February 11, 2009, Ms. Nadeau met with her doctor and received a medical certificate confirming that she was 12 weeks pregnant and describing her functional limitations, including one not to work in contact with inmates for the duration of her pregnancy.

[8] On February 13, 2009, Ms. Nadeau's spouse placed the medical certificate in the mailbox of François Bénard, Correctional Manager. A few days later, Mr. Bénard informed Ms. Nadeau

that she was being reassigned to a job with the administrative assistant at Scheduling and Deployment, starting February 24, 2009.

[9] On February 24, 2009, Ms. Nadeau returned to work, but she still did not have a maternity uniform. Ms. Nadeau reports that, in the months from December to February, she and her spouse asked the employer many times to update them on the status of the request for an adapted uniform and to confirm the instructions for obtaining one.

[10] On March 3, 2009, at the request of her employer, Ms. Nadeau went to see the seamstress, Linda Bédard, who noted that it was difficult to alter Ms. Nadeau's work clothes so that they would be suitable for a pregnant woman.

[11] At the end of March 2009, Jean Simard, Assistant Director of Operations at the institution, informed Ms. Nadeau that pregnant correctional officers did not have to wear a maternity uniform when they were reassigned to other areas, that she would not be provided with another uniform, and that she would therefore have to wear her own maternity clothes. Mr. Simard told Ms. Nadeau that CSC could pay her the clothing allowance provided under section 43.03 of the collective agreement, prorated to the duration of her reassignment. However, on April 29, 2009, Mr. Simard informed Ms. Nadeau that the temporary reassignment, even if it was for a pregnancy, had to be at least six months long for a correctional officer to be entitled to the allowance under section 43.03 of the collective agreement.

[12] On this point, it bears noting that the language of section 43.03 of the collective agreement does indeed require that the aforementioned reassignment be not less than six months *in a fiscal year*, that is, between April 1 in one year and March 31 in the following year. However, despite the clear wording of section 43.03, CSC agreed, in this case, to depart from the language of the provision and instead require that the reassignment be for not less than six months *regardless of the fiscal year*. It repeated this position at the hearing.

[13] On May 22, 2009, Ms. Nadeau filed a grievance regarding the interpretation or application of section 43.03 of the collective agreement. In that grievance, Ms. Nadeau challenged the fact that CSC refused to pay her a $600 clothing allowance or to provide her with a maternity uniform, and she reserved all other rights under the collective agreement, as well as the right to actual, moral or punitive damages, with retroactive effect and with interest at the legal rate, without prejudice to other vested rights.

[14] On August 14, 2009, Ms. Nadeau left her position to go on maternity leave, so her reassignment ended on that date. The reassignment therefore was for less than the required six-month period, even when allowing for the overlap of two fiscal years.

[15] On February 23, 2010, the Acting Assistant Commissioner rendered the final-level grievance reply. He concluded that [TRANSLATION] "management fully respected the provisions of your collective agreement" and dismissed Ms. Nadeau's grievance.

[16] On September 11, 2014, the Adjudicator allowed Ms. Nadeau's grievance and concluded that section 43.03 of the collective agreement was discriminatory. He ordered CSC to pay Ms. Nadeau the clothing allowance provided under section 43.03 of the collective agreement, prorated to the time she worked during her assignment to administrative duties, and to pay her $1,500 for pain and suffering, as is permitted under paragraph 53(2)(*e*) of the CHRA.

III. Issue

[17] The parties agree on the issue. The Court must therefore determine whether the Adjudicator erred in applying the *prima facie* case test for discrimination.

IV. Standard of review

[18] The Court agrees with the parties' position that the issue raised in this application for judicial review is a question of mixed fact and law and therefore must be analyzed in accordance with the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

V. Positions of the parties

A. *AGC's Position*

[19] The AGC submits that the Adjudicator's conclusion does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*). According to the AGC, the Adjudicator misapplied the legal test with regard to the allegations of

discrimination made under the CHRA. The Adjudicator erred, first of all, in assuming in fact and in law that the provision of the collective agreement has a disproportionate effect on pregnant women and, second, in finding without any factual foundation that the time-related distinction in the collective agreement is inherently discriminatory, without regard for the purpose or objective of the benefit.

[20] The AGC relies on the legal framework for dealing with discrimination complaints and submits that the Adjudicator committed three errors in applying it.

(1) Legal framework

[21] The AGC notes, citing *Ontario Human Rights Commission v Simpsons Sears Ltd*, 1985 2 SCR 536 [*O'Malley*]), that there are two types of discriminatory conduct that may violate human rights legislation: direct discrimination, on one hand, and adverse impact or indirect discrimination on the other hand. This distinction is important in determining what evidence is required, since circumstantial evidence may be sufficient in cases of direct discrimination, while "[i]n a case of adverse impact discrimination, on the other hand, the evidence offered is not circumstantial but rather centers on showing that the neutral rule, policy or requirement disproportionately negatively impacts members of the protected group. To prove this, statistical evidence is often required" (*Agnaou v Canada (Attorney General)*, 2014 FC 850 at para 131[*Agnaou*]). The AGC also notes that, in cases of indirect discrimination, a claimant's burden of proof is heavier (*Withler v Canada (Attorney General)*, 2011 1 SCR 396 at para 64).

[22] The AGC therefore submits that at the stage of making out a *prima facie* case of discrimination, the complainant must show (1) that she has a personal characteristic protected from discrimination; (2) that she experienced adverse differential treatment; and (3) that the protected characteristic was a factor in the adverse differential treatment. The complainant must therefore prove that there is a connection between the adverse differential treatment and the ground of discrimination (*Moore v British Columbia (Education)*, 2012 3 SCR 360 [*Moore*]). Once *prima facie* discrimination has been established, the onus is then on the respondent to justify the conduct or practice, either by giving a reasonable explanation that is not a pretext or by establishing a *bona fide* justification or occupational requirement under section 15 of the CHRA. If the conduct cannot be justified, the court will return a finding of discrimination.

(2) Three errors in applying the test

[23] According to the AGC, the Adjudicator made three errors in applying the above test: (1) he failed to consider the connection between the adverse differential treatment and the ground of discrimination; (2) he assessed the evidence improperly by relying on the claim that section 43.03 of the collective agreement has a disproportionately negative effect on pregnant women; and (3) he assumed that a time-related distinction is inherently discriminatory, without any supporting evidence and without regard for the objective of the collective agreement.

[24] As regards the first error, the Adjudicator failed to explain the connection between the adverse differential treatment, namely, CSC's refusal to grant Ms. Nadeau a clothing allowance, and the ground of discrimination, namely, Ms. Nadeau's pregnancy, and simply noted that she was pregnant and did not receive the clothing allowance.

[25] The Adjudicator also failed to assess whether Ms. Nadeau's pregnancy played a role in CSC's decision to deny her a clothing allowance. He concluded, without any evidence of this from Ms. Nadeau, that there was sufficient evidence to make out a *prima facie* case of discrimination on a balance of probabilities. In this sense, the Adjudicator failed to consider whether the requirement under the collective agreement that the assignment be for no less than six months, which is the factor that led CSC to refuse to grant Ms. Nadeau a clothing allowance, constitutes indirect discrimination, such that it would have disproportionate effect on persons belonging to a protected group, in this case, pregnant women.

[26] The AGC adds in cases of discrimination by adverse effect, there is no presumption that the provision of the collective agreement wholly caused or contributed to the adverse differential treatment (*Moore*; *Symes v Canada*, 1993 4 SCR 695 at para 134).

[27] In relation to the second error, the AGC submits that the Adjudicator assessed the evidence improperly, that Ms. Nadeau did not present any evidence that pregnant women tend not to receive the clothing allowance under section 43.03 of the collective agreement, and that this section has a disproportionate adverse effect on persons who belong to the protected group, that is, pregnant women. What is more, according to the AGC, the Adjudicator did not explain how the time-related restriction in section 43.03 has a differential effect on pregnant women, as opposed to men or non-pregnant women. The AGC notes that no statistical evidence was mentioned.

[28] Regarding the third error, the AGC submits that the Adjudicator had to consider whether the six-month threshold under section 43.03 of the collective agreement places pregnant women at a disproportionate disadvantage, which was not done. Evidence that some women may not meet the time-related requirement because of the timing of their pregnancy is not enough to make out a *prima facie* case of indirect discrimination. The AGC submits that the case law in general instructs us that a time-related distinction is not necessarily based on a ground of discrimination and is therefore not discriminatory, although it is necessary to examine the reasons behind a time-related distinction to make sure that it is not discriminatory (see *Nova Scotia (Workers' Compensation Board) v Martin;* 2003 2 SCR 504 at para 73; *Guild v Canada (Attorney General),* 2006 FC 1529, at paras 18-19; *Anderson v Saskatchewan Teachers' Superannuation Commission*, (1995) 130 DLR (4th) 602 at paras 3-4; *Canada (Attorney General) v Hislop*, 2007 1 SCR 429 at para 37).

[29] The purpose of section 43.03 of the collective agreement is to ensure that correctional officers who wear uniforms and those who do not receive equitable treatment. The allowance is designed to ensure that an employee in a position at the CX level who does not have a uniform is not at a disadvantage in relation to an employee in a position at the CX level who has one. However, the Adjudicator did not consider the purpose of section 43.03 in making his decision. The Adjudicator mentioned that the purpose of section 43.03 was to cover the cost of civilian clothes worn by correctional officers in certain circumstances but was actually identifying the means to that end, namely, the equitable treatment of correctional officers.

[30] According to the AGC, the parties to the collective agreement were of the view that an assignment to a non-uniformed position for a period of six months or less would not unduly penalize correctional officers financially, whereas those who are reassigned to a position for more than six months are more likely to be impacted by not being able to wear a uniform. The AGC therefore submits that the parties made a reasonable choice. The Court also notes in passing that the AGC makes no mention here of the limitation in section 43.03, which states that the reassignment must be for a period that is not less than six months per fiscal year.

[31] A confluence of circumstances determines whether a pregnant woman meets the six-month time requirement in section 43.03. In Ms. Nadeau's case, she allowed two months to go by between the date she informed her manager of her pregnancy (December 14, 2008) and the date she submitted the medical confirmation of her pregnancy and the related functional limitations (February 13, 2009). Since Ms. Nadeau was reassigned for only five months and three weeks, she could not meet the six-month time requirement (see *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at para 79 [*Miceli-Riggins*]).

[32] The AGC cites the Supreme Court's judgment in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, 1999 3 SCR 3 [*Meiorin*], in support of his argument that the mere fact that a standard affects women and men differently is on its own not enough to establish that section 43.03 is *prima facie* discriminatory. He maintains that there is no evidence that very few pregnant women receive the clothing allowance. Section 43.03 of the collective agreement affects all employees who are assigned to other duties for a period of less than six months in the same manner, be they men or women, pregnant or not. CSC's refusal in

this case thus had nothing to do with the fact that Ms. Nadeau was pregnant; rather, it was based on the length of her reassignment.

[33] The applicant therefore submits that the Adjudicator decision with regard to the discriminatory effect of the clothing allowance provided under section 43.03 of the collective agreement is unreasonable.

B. *Position of Ms. Nadeau*

[34] Ms. Nadeau submits that the Adjudicator's decision is reasonable because he did not err in applying the legal test for discrimination, the *prima facie* case test.

[35] Ms. Nadeau also began by setting out the applicable legal framework and then analyzed whether the Adjudicator erred in applying it.

(1) Legal framework

[36] Ms. Nadeau submits that the statutory provisions prohibiting discrimination, such as section 7 of the CHRA, which is raised in this case, protect citizens against three types of discrimination: direct, indirect (see *O'Malley*) and systemic (see *CN v Canada (Canadian Human Rights Commission)*, 1987 1 SCR 1114 at para 34 [*CN v Canada*], and that these concepts were defined without these judgments.

[37] Ms. Nadeau notes that no evidence of an intention to discriminate is required to prove an allegation of discrimination. The Supreme Court stated in *Meiorin* that the distinction between the different types of discrimination may have some significance from an analytical standpoint, but very little from a legal standpoint, since the main concern is the effect of the impugned provision. Accordingly, the approach to determining whether an allegation of discrimination is well founded is the same, regardless of the type of discrimination alleged, and consists of two steps. In the context of an employment relationship, the employee must first establish *prima facie* proof of discrimination. Once this has been established, it is then up to the employer to show that the standard is not actually discriminatory because it constitutes a *bona fide* occupational requirement (*Meiorin* at para 3).

[38] Ms. Nadeau cites *Ontario Human Rights Commission v Etobicoke*, 1982 1 SCR 202, and *O'Malley*, which set out the test to be used to determine whether there is *prima facie* discrimination, and the three components of a *prima facie* case, just as the AGC also described it (see paragraph 24 of this decision).

[39] Ms. Nadeau also cites *Canadian Human Rights Commission v Canada (Attorney General)*, 2005 FCA 154 at paras 27-28 [*CHRC v Canada 2005*], in support of her position that a *prima facie* case does not require a particular type of evidence to establish that a complainant has been discriminated against. A flexible legal test better advances the objective of the CHRA. According to Ms. Nadeau, statistical evidence is not necessary in all cases (*Halifax Employers Association v Tucker*, 2008 FC 516 at para 68; *Agnaou*; *Gaz métropolitain Inc v Commission des*

droits de la personne et des droits de la jeunesse, 2011 QCCA 1201 at paras 27, 47 [*Gaz métropolitain*]; *Radek v Henderson Development (Canada) Ltd*, 2005 BCHRT No 302).

[40] Ms. Nadeau also submits that the case law regarding section 15 of 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], should be applied with caution in cases concerning discrimination complaints under human rights legislation because the relevant legal framework for a section 15 analysis is much stricter, particularly in terms of the burden of proof (Jennifer Koshan, "Under the influence: Discrimination under human rights legislation and section 15 of the Charter" (2014) 3:1 Can J Hum Rights 115 at pp 139-142; Denise Réaume, "Defending the Human Rights Codes from the Charter" (2012) 9 JL & Equality 67 at pp 68-69).

(2) Adjudicator's application of the legal framework

[41] Ms. Nadeau submitted to the Adjudicator (Adjudicator's decision, para 94) that the six-month requirement under section 43.03 of the collective agreement, although facially neutral, had a prejudicial effect on her because of her pregnancy, and that her allegation was therefore one of indirect discrimination.

[42] Ms. Nadeau submits that the Adjudicator applied the three criteria set out in *O'Malley* to make out a *prima facie* case of discrimination and that he recognized that Ms. Nadeau bore the burden of proof; he therefore made no error.

[43] Ms. Nadeau offers a response to the applicant's arguments to the effect that the Adjudicator made three errors.

[44] As regards the first error alleged by the AGC, Ms. Nadeau submits that the evidence presented to the Adjudicator allowed him to conclude that there was a connection between the adverse differential treatment and the ground of discrimination because the evidence showed that the reasons for her reassignment lasting less than six months were directly linked to her pregnancy.

[45] This is the conclusion to be drawn from the uncontested evidence from the administrative process triggered when she notified her employer of her pregnancy, a process that led to delays. Thus, in terms of delays, it is necessary to consider, among other things, the time before the woman realizes she is pregnant; the time to arrange an appointment to obtain the medical certificate establishing the employee's functional limitations, if any; the employer's process for reassigning the employee; and the fact that the employee will have to go on leave before giving birth. It is therefore entirely reasonable to conclude that in many cases, the reassignment of a pregnant woman will inevitably be less than six months.

[46] Therefore, solely on the basis of the delays attributable to the administrative process, pregnancy is certainly one of the factors explaining why Ms. Nadeau did not meet the six-month time requirement.

[47] Furthermore, Ms. Nadeau submits that there is a second aspect to the connection between the excessive burden imposed by the six-month threshold under section 43.03 of the collective agreement. Since wearing a uniform is not prohibited when on reassignment, but the employer does not provide one suitable for pregnant women, these women must find an alternative to this uniform for the duration of their reassignment because of the physical changes intrinsically linked to pregnancy. By way of comparison, reassigned officers who wish to wear their uniforms until they qualify for the clothing allowance will generally be able to do so, since they are not subject to any prohibition in this regard.

[48] As regards the second error raised by the AGC, Ms. Nadeau argues that the Adjudicator correctly assessed the evidence presented in support of the claim that section 43.03 of the collective agreement affects pregnant women disproportionately.

[49] According to Ms. Nadeau, the evidence required by the AGC, that is, evidence showing that pregnant woman tend not to receive the allowance, would have been relevant in a context of direct discrimination, but it is less relevant in the current context of indirect discrimination. Ms. Nadeau further submits that no particular type of evidence is required and that statistical evidence is not necessary. Ms. Nadeau agrees with the AGC that the evidence of indirect discrimination is not circumstantial.

[50] In this case, the proof of the disproportionate effect of section 43.03 of the collective agreement on pregnant women was established through the testimonies of Ms. Nadeau and Ms. Ross and was corroborated by the employer's witness. These testimonies establish that the

delays related to pregnancy make it especially difficult for pregnant women to meet the six-month time requirement.

[51] As regards the third error raised by the AGC, Ms. Nadeau agrees that it should not be assumed that a time-related provision is inherently discriminatory. However, she submits that the Adjudicator did not make such an assumption and that his finding was, on the contrary, based on an analysis leading to the conclusion that the time-based provision created a disproportionate hardship.

[52] Ms. Nadeau also argues that there is no need to consider the purpose or objective of the benefit at the stage of making out a *prima facie* case of discrimination, but that the purpose or objective becomes a consideration at the stage where the employer must provide justification (*Meiorin* at paras 54, 57).

[53] If such were not the case and the objective of the benefit had to be evaluated at the *prima facie* determination stage, Ms. Nadeau submits that it then becomes even clearer that the six-month threshold is discriminatory.

[54] The applicant states that section 43.03 of the collective agreement ensures that employees do not have to spend money on clothing for work. Correctional officers usually wear a uniform, and there is nothing prohibiting them from wearing one on reassignment; however, because of the physical changes intrinsically linked to pregnancy, pregnant women cannot wear their usual work uniforms when they are reassigned.

[55] Thus, section 43.03 of the collective agreement generally allows reassigned employees to wear their work uniform for the first six months, when they do not receive the clothing allowance, while pregnant women cannot wear their uniforms for the first six months of their reassignment and are therefore disadvantaged.

[56] In the alternative, Ms. Nadeau submits that even if the Court finds that the Adjudicator made one or more errors in applying the legal framework concerning *prima facie* proof of discrimination, none of these errors makes the decision unreasonable.

VI. Analysis

[57] The Court, like the parties, will briefly summarize the applicable legal framework in this case and will then turn to determining whether the Adjudicator erred in applying it as the AGC claims.

A. *Legal framework*

[58] Section 7 of the CHRA, reproduced in the appendix, tells us that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Earlier on in the CHRA, we find the prohibited grounds of discrimination set out in subsection 3(1), and subsection 3(2) states that where the ground of discrimination is pregnancy, the discrimination shall be deemed to be on the ground of sex. The Supreme Court has stated in *O'Malley* and *CN v Canada* that the CHRA must be interpreted as addressing direct, indirect and systemic discrimination.

[59] The parties have firmly established that under *Meiorin*, an allegation of discrimination must be evaluated in two steps. In the context of an employment relationship, the employee must first make out a *prima facie* case of discrimination. If this is established, the burden of proof then shifts to the employer, who must justify the practice, either by giving a reasonable explanation that is not a pretext or by establishing a *bona fide* justification or occupational requirement under section 15 of the CHRA, which is reproduced in the appendix.

[60] Furthermore, the Supreme Court confirmed in paragraph 18 of *O'Malley* that a *prima facie* case of discrimination does indeed depend on the three conditions named by the parties: (1) the complainant must prove that she has a special personal characteristic that falls within one of the prohibited grounds of discrimination; (2) the complainant had to experience adverse differential treatment; and (3) the complainant's special personal characteristic that falls within a prohibited ground of discrimination was a factor in the adverse differential treatment.

[61] In this case, the first two conditions have been met and are not in issue. First, Ms. Nadeau was pregnant and therefore had a personal characteristic that falls within one of the prohibited grounds of discrimination under subsection 3(1) of the CHRA, namely, sex. Furthermore, Ms. Nadeau was denied the benefit provided under section 43.03 of the collective agreement.

[62] The third condition must therefore be analyzed in this case to determine whether pregnancy has been proven to be a factor in the adverse differential treatment.

[63] Regarding the required proof, *Agnaou* reiterates, at paragraphs 130-131, that circumstantial evidence is relevant in the context of direct discrimination, but not in a case of indirect discrimination.

B. *The Adjudicator's decision is reasonable*

[64] The AGC submits that the Adjudicator failed to consider whether Ms. Nadeau's pregnancy played a role in CSC's decision to deny her a clothing allowance and cites a passage from the decision that does indeed appear to give that point only cursory treatment.

[65] However, having reviewed the entire decision, and in particular paragraphs 30 to 40, 51, 55, 60, 69, 74 to 76 and 81 and not simply the passage cited by the AGC, the Court is satisfied that the Adjudicator examined the connection between Ms. Nadeau's pregnancy and the minimum threshold for the term of the reassignment (not less than six months) that must be met to qualify for the allowance. Moreover, the evidence presented allowed the Adjudicator to conclude that Ms. Nadeau could not meet the minimum threshold, when allowing for the overlap of two fiscal years, because of her pregnancy.

[66] The administrative process that is triggered when a woman learns that she is pregnant is well substantiated. In addition, the length of a pregnancy and the fact that a woman is not necessarily aware of her condition in its early days are well known. There is nothing here that would indicate that the time taken to arrange an appointment with the doctor was abnormally long, so it is reasonable to conclude that Ms. Nadeau did not complete more than the six months on reassignment required to receive a clothing allowance because of her pregnancy. Furthermore,

contrary to what the AGC argues, the Court cannot conclude that Ms. Nadeau's ineligibility for the clothing allowance was due to circumstances unique to the her and not shared by other women (*Miceli-Riggins* at para 79 *a contrario*).

[67] The AGC then goes on to submit that the Adjudicator improperly assessed the evidence supporting the argument that section 43.03 of the collective agreement has a disproportionately negative effect on pregnant women and, more specifically, that the required evidence, particularly statistical evidence, was not presented.

[68] In *Agnaou*, the Court noted that statistical evidence is often necessary in the case of an allegation of indirect discrimination to prove that a rule, policy or requirement has a disproportionately negative effect on individuals belonging to a protected group, in a context of direct discrimination. The Court then cited the example of a minimum height requirement for an occupation and stated that statistical evidence would therefore be needed to show that, on average, women are shorter than men, thereby establishing *prima facie* discrimination.

[69] However, statistical evidence is not always necessary (*Gaz métropolitain* at paras 27, 47), and no particular type of evidence is required to make out a *prima facie* case of discrimination (*CHRC v Canada 2005* at paras 27-28).

[70] The Court agrees with Ms. Nadeau's position that the present case involves indirect discrimination, as the parties have recognized; that circumstantial evidence is not appropriate;

and that statistical evidence is not necessary here because the temporal and physical imperatives of a pregnancy are well known.

[71] Therefore, and as stated above, the Court is satisfied that the Adjudicator did not err in assessing the evidence.

[72] Finally, regarding the third error raised by the AGC, the Court is satisfied that the Adjudicator did not assume that a time-based requirement is inherently discriminatory, without evidence and without regard for the objective of the collective agreement. The Court agrees with Ms. Nadeau's position that the passages cited by the AGC do not admit such a conclusion. The Court finds that the objective of section 43.03 of the collective agreement does not need to be considered at this stage (*Meiorin* at paras 54, 57).

Conclusion

[73] For all these reasons, the Court is satisfied that the Adjudicator's decision is reasonable, in that it falls within the range of acceptable outcomes which are defensible in respect of the facts and law, and that the Court's intervention is unwarranted. The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed without costs.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles

APPENDIX

Section 43.03 of the Agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada – CSN, Group: Correctional Services, expires on May 31st 2010.

43.03 Clothing Allowance

Those Correctional Officers I (CX-1) and Correctional Officers II (CX-2) employees who are not required to wear a uniform routinely during the course of their duties shall receive an annual clothing allowance of four hundred dollars ($400.00). This allowance will be payable March 31st of each year. Effective April 1, 2007, the allowance is increased to six hundred dollars ($600.00).

The provision applies to those CX-1 and CX-2 employees assigned to such duties for periods of time of not less than six (6) months per fiscal year.

Any employee receiving this allowance shall not be eligible to receive points toward a uniform issue.

As well, if a correctional officer is involved in an altercation and his or her personal clothing is damaged in the performance of his or her duties, the employee's claim for compensation will be handled according to the ex-Gratia Payment Policy.

Canadian Human Rights Act, RSC 1985, c H-6, s 7 and 15.

Article 43.03 de la Convention entre le Conseil du Trésor et Union of Canadian Correctional Officers – Syndicats des agents correctionnels du Canada – CSN, Groupe : Services correctionnels, Date d'expiration : le 31 mai 2010.

43.03 Indemnité d'habillement

Les employé-e-s Agents correctionnels I (CX-1) et Agents correctionnels II (CX-2) qui ne sont pas tenus de porter régulièrement un uniforme au cours de l'exercice de leurs fonctions reçoivent une indemnité d'habillement annuelle de quatre cents dollars (400 $). Cette indemnité est versée le 31 mars de chaque année. À compter du 1er avril 2007, cette indemnité est majorée à six cents dollars (600 $).

Les dispositions s'appliquent aux employé-e-s CX-1 et CX-2 affectés à des fonctions pour des périodes excédant six (6) mois par exercice financier.

Un-e employé-e recevant cette indemnité ne doit pas être admissible à recevoir des points portant sur la question de l'uniforme.

De plus, si l'agent correctionnel est impliqué dans une altercation et que ses vêtements personnels sont endommagés dans l'exercice de ses fonctions, la réclamation d'indemnisation de l'employée est traitée en vertu de la politique sur le paiement à titre gracieux.

Loi canadienne sur les droits de

7. It is discriminatory practice, directly or indirectly,

(*a*) to refuse to employ or continue to employ any individual, or

(*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

15. (1) It is not a discriminatory practice if

(*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

(*b*) employment of an individual is refused or terminated because that individual has not reached the minimum age, or has reached the maximum age, that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph;

(*c*) [Repealed, 2011, c. 24, s. 166]

(*d*) the terms and conditions of any pension fund or plan established by an employer, employee organization or employer organization provide for the compulsory vesting or locking-in of pension contributions at a fixed or determinable age in accordance with sections 17 and 18 of the Pension Benefits Standards Act, 1985;

(d.1) the terms of any pooled

la personne, LRC 1985, c H-6, art 7 et 15.

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de discrimination illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu;

b) de le défavoriser en cours d'emploi.

15. (1) Ne constituent pas des actes discriminatoires :

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

b) le fait de refuser ou de cesser d'employer un individu qui n'a pas atteint l'âge minimal ou qui a atteint l'âge maximal prévu, dans l'un ou l'autre cas, pour l'emploi en question par la loi ou les règlements que peut prendre le gouverneur en conseil pour l'application du présent alinéa;

c) [Abrogé, 2011, ch. 24, art. 66]

d) le fait que les conditions et modalités d'une caisse ou d'un régime de retraite constitués par l'employeur, l'organisation patronale ou l'organisation syndicale prévoient la dévolution ou le blocage obligatoires des cotisations à des âges déterminés ou déterminables conformément aux articles 17 et 18 de la Loi de 1985 sur les normes de prestation de pension;

registered pension plan provide for variable payments or the transfer of funds only at a fixed age under sections 48 or 55, respectively, of the Pooled Registered Pension Plans Act;

(*e*) an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be reasonable;

(*f*) an employer, employee organization or employer organization grants a female employee special leave or benefits in connection with pregnancy or child-birth or grants employees special leave or benefits to assist them in the care of their children; or

(*g*) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would

d.1) le fait que les modalités d'un régime de pension agréé collectif prévoient le versement de paiements variables ou le transfert de fonds à des âges déterminés conformément aux articles 48 et 55 respectivement de la Loi sur les régimes de pension agréés collectifs;

e) le fait qu'un individu soit l'objet d'une distinction fondée sur un motif illicite, si celle-ci est reconnue comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne rendue en vertu du paragraphe 27(2);

f) le fait pour un employeur, une organisation patronale ou une organisation syndicale d'accorder à une employée un congé ou des avantages spéciaux liés à sa grossesse ou à son accouchement, ou d'accorder à ses employés un congé ou des avantages spéciaux leur permettant de prendre soin de leurs enfants;

g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.

(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de

impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

(3) The Governor in Council may make regulations prescribing standards for assessing undue hardship.

(4) Each regulation that the Governor in Council proposes to make under subsection (3) shall be published in the Canada Gazette and a reasonable opportunity shall be given to interested persons to make representations in respect of it.

(5) The Canadian Human Rights Commission shall conduct public consultations concerning any regulation proposed to be made by the Governor in Council under subsection (3) and shall file a report of the results of the consultations with the Minister within a reasonable time after the publication of the proposed regulation in the Canada Gazette.

(6) A proposed regulation need not be published more than once, whether or not it has been amended as a result of any representations.

(7) The Governor in Council may proceed to make regulations under subsection (3) after six months have elapsed since the publication of the proposed regulations in the Canada Gazette, whether or not a report described in subsection (5) is filed.

(8) This section applies in respect of a practice regardless of

personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

(3) Le gouverneur en conseil peut, par règlement, déterminer les critères d'évaluation d'une contrainte excessive.

(4) Les projets de règlement d'application du paragraphe (3) sont publiés dans la Gazette du Canada, les intéressés se voyant accorder la possibilité de présenter leurs observations à cet égard.

(5) La Commission des droits de la personne tient des consultations publiques concernant tout projet de règlement publié au titre du paragraphe (4) et fait rapport au gouverneur en conseil dans les meilleurs délais.

(6) La modification du projet de règlement n'entraîne pas une nouvelle publication.

(7) Faute par la Commission de lui remettre son rapport dans les six mois qui suivent la publication du projet de règlement, le gouverneur en conseil peut procéder à la prise du règlement.

(8) Le présent article s'applique à tout fait, qu'il ait pour résultat la discrimination directe ou la discrimination par suite d'un effet préjudiciable.

(9) Le paragraphe (2) s'applique sous réserve de l'obligation de service imposée aux membres des Forces canadiennes, c'est-à-

whether it results in direct discrimination or adverse effect discrimination.

(9) Subsection (2) is subject to the principle of universality of service under which members of the Canadian Forces must at all times and under any circumstances perform any functions that they may be required to perform.

Section 7 of the Treasury Board of Canada Secretariat National Joint Council Uniforms Directive

7. General

7.1 Uniforms and other items of identification shall be issued to employees free of charge when there is a requirement for identification of employees. There are four distinguishing conditions under which identification of the employee may be required:

a) when identification of the employee is required by management to provide a sign of vested authority in directing, inspecting or enforcing specific laws and regulations;

b) when identification of the employee is required by management to provide an appropriate identification of the employee's function;

c) when identification of the employee is required by management, either permanently or in an emergency, to control emergency equipment and direct persons during an emergency. Such employees must be readily identifiable by the local public;

dire celle d'accomplir en permanence et en toutes circonstances les fonctions auxquelles ils peuvent être tenus.

Article 7 de la directive du Conseil national mixte sur les uniformes

7. Généralités

7.1 Les uniformes et autres articles d'identification doivent être fournis sans frais lorsqu'il est nécessaire d'identifier les fonctionnaires. Il existe quatre conditions particulières en vertu desquelles il peut être nécessaire de prendre des mesures pour identifier le fonctionnaire :

a) lorsque la direction exige que le fonctionnaire soit identifié pour montrer l'autorité dont il est investi pour appliquer des lois et règlements précis, contrôler ou assurer leur respect;

b) lorsque la direction exige que le fonctionnaire soit identifié pour bien faire connaître ses fonctions;

c) lorsque la direction exige que le fonctionnaire soit identifié de façon permanente ou dans des situations d'urgence, pour manoeuvrer le matériel d'urgence et diriger les personnes en cas d'urgence. Il faut que le public soit en mesure de reconnaître ces fonctionnaires.

d) lorsque la direction exige que l'autorité du fonctionnaire soit reconnue pour se rendre dans une zone dont l'accès est limité et y travailler. (Des vêtements d'identification pourront être fournis en plus du principal

d) when identification of an employee's authority is required by management to access and work in a secure area. (Identification clothing may supplement the primary form of identification.)

7.2 Items of wearing apparel of the same pattern or material or colour are supplied free of charge for the following purposes:

• for occupational identification and worn as required by local management;

• for image distinctiveness and worn uniformly throughout a sector in accordance with orders.

7.3 Regular shoes of a specific type or colour, which serve only to provide co-ordination with clothing, are not considered essential to identify the employee. Departments shall not provide regular shoes free of cost, nor shall they demand that employees wear specific types or colours of shoes. Departments may, however, specify that the footwear be of a type generally considered as acceptable and to co-ordinate with the uniforms provided.

7.4 Departments may, however, utilize the provisions of 12.2 to make such footwear available to employees for purchase at cost.

7.5 Bulletins shall be issued to employees when the wearing of uniform clothing is required. Such bulletins normally will identify and enumerate clothing commodities, state the employee's responsibility for clothing received and specify the

moyen d'identification.)

7.2 Certains articles d'habillement de même modèle, tissu ou couleur sont fournis gratuitement aux fins suivantes :

• pour identifier la fonction du fonctionnaire et être portés selon les exigences de la direction locale;

• pour satisfaire aux exigences de l'image de marque et être portés dans l'ensemble d'un secteur conformément à des ordonnances.

7.3 Les chaussures d'une couleur ou d'un modèle particulier qui sont portées uniquement pour aller avec les vêtements ne peuvent être considérées comme essentielles à l'identification des fonctionnaires. Les ministères ne doivent pas fournir de chaussures gratuitement à leurs fonctionnaires ou leur demander de porter des chaussures d'une couleur ou d'un modèle particulier. Toutefois, les ministères peuvent spécifier que les chaussures portées par les fonctionnaires soient de type généralement considéré comme acceptable et qu'elles conviennent aux uniformes fournis.

7.4 Les ministères peuvent cependant se prévaloir des dispositions du paragraphe 12.2 pour mettre à la disposition de leurs fonctionnaires des chaussures de ce genre au prix coûtant.

7.5 Il faut remettre des bulletins d'information aux fonctionnaires tenus de porter des uniformes.

manner of accounting for clothing when the employee is no longer eligible to receive or retain it (e.g. on promotion, demotion, separation or due to a change in working conditions)

7.6 Normally, clothing which is issued to employees shall be worn only on duty and will not be worn away from the workplace. When employees are provided with specific items of clothing for wear on duty, substitute items shall not be worn. Clothing which is issued to employees may be worn in public to travel to and from work when the safe storage of personal clothing is not possible.

7.7 When, as a condition of employment, an employee receives any item of clothing as an individual issue, that employee will be expected to wear and maintain it in a clean, pressed and repaired condition, in accordance with departmental directives and in accordance with care labels permanently attached to each garment.

Ces bulletins définissent et énumèrent les articles d'habillement. Ils indiquent la responsabilité du fonctionnaire à l'égard des vêtements reçus et précisent comment en rendre compte quand il n'est plus admissible à les recevoir ou à les conserver (p. ex. par suite d'une promotion, d'une rétrogradation, d'un départ ou d'une modification des conditions de travail).

7.6 En règle générale, les vêtements fournis à un fonctionnaire doivent être portés exclusivement durant le service et au lieu de travail. Tout fonctionnaire qui reçoit des vêtements précis doit les porter durant le service et ne peut rien leur substituer. Ces vêtements peuvent se porter en public, pour se rendre au travail et en revenir, lorsqu'il est impossible de ranger des vêtements personnels en lieu sûr.

7.7 Lorsqu'un fonctionnaire reçoit, en vertu de ses conditions d'emploi et à titre particulier, un article d'habillement il doit le porter, et le faire nettoyer, le repasser et le raccommoder, selon les directives des ministères et les instructions d'entretien fixées à chacun.

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SOLICITORS OF RECORD

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