Federal Court  Cour fédérale

Date: 20230616

Docket: T-551-21

Citation: 2023 FC 856

Ottawa, Ontario, June 16, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

SEASPAN MARINE CORPORATION

Applicant

and

ANDREAS SMOLIK
AND
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Seaspan Marine Corporation [Applicant or Seaspan] seeks judicial review of the Canadian Human Rights Tribunal's [Tribunal] February 16, 2021 decision finding that Seaspan discriminated against its employee, Andreas Smolik [Mr. Smolik or Respondent], on the basis of

family status and did not reasonably accommodate Mr. Smolik to the point of undue hardship [Decision].

[2] The application for judicial review is dismissed.

II. Background

A. *Seaspan*

[3] Mr. Smolik is a marine engineer with a first-class marine engineer certification. In 1997, Mr. Smolik began working in this capacity for the Applicant, a marine transportation company, as a member of the Canadian Merchant Service Guild [Guild]. The Guild represents all licensed personnel in accordance with a collective agreement, dated October 1, 2013.

[4] The Applicant is one of many subsidiaries of Seaspan Unlimited Liability Corporation, including Seaspan Ferries Corporation [SFC]. The Applicant has a fleet of approximately 32 tugboats and a workforce of approximately 350 employees, 44 of whom were marine engineers at the relevant time.

[5] Three shift patterns are available to marine engineers. First, there are continuous operations tugs, which require employees to remain onboard for one to three weeks at a time. Crew members may not go home between shifts. Second, there is the Roberts Bank pager system, where employees work on a rotating cycle of 7 days on/7 days off, 7 days on/14 days off. Employees are on call 24/7, must report to work on four hours' notice, and may work a

maximum of 16 continuous hours. Lastly, there are shift tugs, which have five-week rotations of 7 days on/7days off, 7 nights on/14 days off. Employees are able to go home between shifts. In addition to the three shift patterns, the Applicant provides voluntary call-out work.

B. *Events Leading to the Complaint*

[6] Between 2003 and 2013, Mr. Smolik worked on two shift tugs chartered by the Applicant to SFC, occasionally working overtime.

[7] In 2011, Mr. Smolik's wife was diagnosed with cancer. In March 2013, Mr. Smolik took a leave of absence in order to support his wife's deteriorating condition. In May 2013, Mr. Smolik's wife passed away, leaving behind their daughter and son, aged nine and six at the time. Mr. Smolik subsequently went on bereavement leave.

[8] Before the Tribunal, Mr. Smolik testified that both children received counselling. Mr. Smolik's daughter became reclusive, while his son became emotionally dependant and anxious. By September 2013, Mr. Smolik believed that his children's emotional states had stabilized enough for him to return to work. He explained to Captain Steve Thompson and Guild Representative Jeff Sanders that, due to his childcare requirements, he needed a full-time paycheque and either structured work, similar to his previous job, or a flexible work schedule to pick up his children from school.

[9] Mr. Smolik testified that both his relatives and non-relatives were not reasonably accessible options to care for his children on an unpredictable schedule or for multiple weeks at a

time. He was of the view that his mother-in-law was not a suitable caregiver, and dismissed the idea of hiring a nanny after consulting a friend.

[10] During Mr. Smolik's bereavement leave, the Applicant sold the two vessels that Mr. Smolik previously worked on to SFC. The Applicant's remaining work for marine engineers largely consisted of continuous shifts and Roberts Bank pager shifts.

[11] In January 2014, after Mr. Smolik brought the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*] to the Applicant's attention, the Applicant presented a written work proposal consisting of call-out work on the basis of seniority for a period of one year at the Roberts Bank and Vancouver Harbour locations [Agreement]. The Agreement also set out the Applicant's expectation that Mr. Smolik make reasonable efforts during the term to return to his full and regular duties. Mr. Smolik accepted the Agreement. Captain Thompson testified that the Agreement was contrary to the collective agreement.

[12] Mr. Smolik testified that the Agreement provided far less work and income than originally anticipated. In 2014, Mr. Smolik only completed 15 call-outs. Despite meeting with Captain Thompson and Mr. Sanders to review the Agreement in June 2014, Mr. Smolik's workload only improved marginally in the latter half of the year, receiving eight call-outs and some dockside maintenance work. From January 2015 to April 2015, Mr. Smolik received an additional nine call-outs. Mr. Smolik asserted that he completed the majority of the call-out work offered to him.

[13] On January 5, 2015, the Applicant offered Mr. Smolik the position of marine dispatcher. Mr. Smolik testified that the Applicant did not provide any compensation information and gave him one day to respond to the offer. Mr. Smolik declined the offer, as it would not allow him to maintain his marine engineer certificate. In March 2015, Mr. Smolik requested a one-year leave of absence to seek full-time employment at another marine company.

[14] In or around August 2015, Mr. Smolik sought to return to Seaspan to perform call-outs. Captain Thompson reviewed the call-out sheets and concluded that, based on seniority, Mr. Smolik could not receive the required full-time hours. Although Mr. Smolik believed the contrary, he nonetheless advised the Applicant that he was not interested in part-time work. Rather, he proposed working an on-call Wednesday-to-Wednesday pager job, holiday relief work, or at SFC. Both the Applicant and SFC declined the proposals.

[15] In September 2015, Mr. Smolik filed a complaint with the Commission. In May 2016, following mediation, Mr. Smolik and the Applicant reached an agreement in principle that provided him with a biweekly right of first refusal, or “super seniority” rights, on call-out and relief work until he made his full-time hours [Settlement Agreement]. The Guild, who was not present at the mediation, expressed their concerns that the Settlement Agreement contravened the collective agreement.

[16] The Applicant did not undertake any further efforts to engage the Guild or accommodate Mr. Smolik. Rather, the Applicant granted Mr. Smolik an unpaid leave of absence to work at another marine company. Mr. Smolik is currently employed with Saam Smit on a full-time basis.

[17] The Commission referred the matter to the Tribunal for resolution pursuant to subsection 49(1) of the *CHRA*.

III. The Decision

[18] On February 26, 2021, the Tribunal issued its Decision. The Tribunal found that the Applicant discriminated against Mr. Smolik under section 7 of the *CHRA* on the basis of family status. The Tribunal further found that the Applicant did not establish that it had accommodated Mr. Smolik to the point of undue hardship.

[19] The Applicant objected to the Commission's participation in the matter. The Tribunal found that, pursuant to section 51 of the *CHRA*, the Commission was entitled to participate in the hearing in support of the "public interest", as it was clearly interested in how employers accommodated their employees with childcare obligations. While the Tribunal acknowledged that the term "public interest" is not defined in the *CHRA*, there is nothing in the legislation or jurisprudence that narrowly restricts the Commission's participation in human rights matters. Accordingly, such participation would include general issues of discrimination. However, the Tribunal noted that the Commission's role is subject to normal administrative law principles, including fairness, bias, and abuse of process.

[20] In considering whether Mr. Smolik established a *prima facie* case of discrimination on the basis of family status, the Tribunal recognized that Mr. Smolik was required to establish, on a balance of probabilities, that his circumstances met the four-stage test in *Canada (AG) v Johnstone*, 2014 FCA 110 [*Johnstone*]:

> [93] …(i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

[21] The Tribunal explained that Mr. Smolik was required to provide some evidence to substantiate his claim, but did not need to meet a high standard of proof (*Canadian National Railway v Seeley*, 2014 FCA 111 [*Seeley*]. In assessing each stage of this test, the Tribunal preferred the evidence of Mr. Smolik.

[22] The Applicant did not dispute the first element of the test. The Tribunal found that the two children were in Mr. Smolik's sole custody, care, and supervision.

[23] Turning to the second element of the test, the Tribunal found that Mr. Smolik's childcare obligations were a legal obligation and not a personal choice, as he was the sole parent and provider of two young children, who were mentally and emotionally affected by their mother's death. Mr. Smolik was not seeking a specific type of childcare based on his personal preference. Rather, as their father and sole parent, his assessment was that he was their only suitable caregiver at the time he was ready to return to work. The Tribunal noted that the Applicant did not challenge Mr. Smolik's assessment or ask for supporting medical evidence in their efforts to accommodate his return.

[24] On the third element, the Tribunal found that Mr. Smolik made reasonable efforts to meet his childcare obligations through alternative solutions and that no such solutions were reasonably accessible. The Tribunal accepted Mr. Smolik's evidence that his options among relatives and non-relatives were insufficient to meet his childcare obligations if he was away for one to three weeks at a time, and that he best met those obligations at the time he first indicated his readiness to return to work. The Tribunal further found that Mr. Smolik demonstrated his ability to secure childcare for several hours, including overnight, if he received a 12-hour shift or a 7 to 8 day on-call shift.

[25] Lastly, the Tribunal found that the Applicant's workplace rules, namely the available employment opportunities, work schedules, and work distribution, interfered with Mr. Smolik's childcare obligations in a manner that was more than trivial or insubstantial at the time of Mr. Smolik's return to work. The Applicant's continuous vessels were unfeasible, as Mr. Smolik could not secure alternative childcare for several weeks and his children were still emotionally fragile. Further, the irregular schedule and short notice for Roberts Bank pager system would have made it challenging for Mr. Smolik to arrange suitable childcare. Lastly, the Applicant's proposal for call-out work based on seniority did not produce the equivalent full-time income. Accordingly, it was nearly impossible for Mr. Smolik to return to work without accommodation.

[26] For the above-mentioned reasons, the Tribunal found that Mr. Smolik established a *prima facie* case of discrimination on the basis of his family status, contrary to section 7 of the *CHRA*.

[27] The Tribunal then considered whether the Applicant established a valid justification for its discriminatory actions. The Tribunal employed the three-step test to determine whether the Applicant demonstrated, on a balance of probabilities, that the discriminatory action was a *bona fide* occupational requirement [BFOR] (*British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 at para 54, [1999] SCJ No 46 [*Meiorin*]):

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[28] The first two prongs of the test were not in dispute. As such, the Tribunal limited its consideration to the Applicant's accommodation efforts as they related to the third prong of the test. The Tribunal noted that section 15(2) of the *CHRA* limits the consideration of undue hardship to "health, safety, or cost".

[29] The Tribunal first considered the Agreement, finding that the Applicant's efforts to provide call-out work to Mr. Smolik fell far short of its duty to accommodate. The Tribunal faulted the Applicant for its four-month delay and lack of urgency in presenting Mr. Smolik with a return to work plan that restricted him to call-outs based on seniority. Upon its implementation, Mr. Smolik received far less work than required to provide a full-time income. The Tribunal further noted that the Applicant did not attempt to calculate the amount of available call-out

work until August 2015. This analysis should have occurred prior to presenting Mr. Smolik with the Agreement.

[30] As for the seniority of the call-out work, the Tribunal raised various instances in which the evidence was unclear and contradictory. For instance, despite the Applicant's assertions, the collective agreement did not state that seniority rights apply to call-out work. Further, there was insufficient evidence to determine whether the Applicant provided Mr. Smolik with all available call-out work based on seniority. The Tribunal recognized Mr. Smolik's evidence that established numerous instances in which engineers with less seniority were offered call-out work instead of him, and the Applicant did not provide evidence to explain these occurrences. The Tribunal held that this lack of explanation undermined its defense.

[31] Secondly, the Tribunal considered the dispatcher position. While acknowledging that accommodation need not be perfect, the Tribunal found that there was insufficient evidence to determine whether the position offered by the Applicant was a reasonable accommodation. The Applicant provided Mr. Smolik with only one day to consider the offer, despite the possibility that the position could result in the loss of his marine certification, and despite being unaware of the compensation. The Tribunal further noted that the Applicant did not persuade Mr. Smolik to accept the dispatcher position, nor did the Applicant inform him that it viewed the position as a reasonable accommodation and that his refusal would be deemed as not cooperating with the accommodation process.

[32] Beyond this, the Tribunal required the Applicant to demonstrate that it exhausted all attempts to accommodate Mr. Smolik in his own job as a marine engineer prior to considering the dispatcher position as a reasonable accommodation. For instance, the Applicant refused to consider several options advanced by Mr. Smolik, including working the Roberts Bank pager shifts, holiday relief shifts, or transferring to SFC. The Applicant also maintained an overly restrictive position in initially prohibiting Mr. Smolik from working for a competitor.

[33] Thirdly, the Tribunal considered the failed mediation attempt between the parties, finding that the Applicant did not produce any clear evidence that the proposed agreement would have caused undue hardship. Despite claiming that an employer is not required to give an employee seeking accommodation more rights than other employees, the Applicant was prepared to do just that. When the Guild, who did not participate in the mediation, objected to the Settlement Agreement as an unenforceable side agreement, the Applicant did not attempt to engage the Guild to find a resolution. Indeed, the Applicant did nothing further to meet its duty to accommodate, despite clear guidance that the search for accommodation is a multi-party process.

[34] Regarding the Guild's concerns, the Tribunal held that the collective agreement did not absolve an employer's duty to accommodate. Not only this, but there was insufficient evidence that the Settlement Agreement would have substantially impacted the collective agreement or the rights of other employees, and that the Guild's threats to file grievances were speculative. The Tribunal held that the Applicant's failure to act based on their belief that grievances were forthcoming did not satisfy its duty to accommodate.

[35] Based on the totality of evidence, the Tribunal concluded that the Applicant failed to establish that it accommodated Mr. Smolik to the point of undue hardship.

IV. Preliminary Issue

[36] On August 22, 2022, Justice Pamel dismissed the Applicant's interlocutory motion for an Order striking the Commission's Memorandum of Fact and Law on the basis that the Commission is tantamount to the Tribunal and thus should not be participating in the present application for judicial review (*Seaspan Marine Corporation v Smolik*, 2022 FC 1242 at para 1 [*Seaspan FC*]). Justice Pamel was not persuaded that the Memorandum should be struck at that stage pursuant to either the *CHRA* or the common law (at para 2).

[37] In two letters dated October 26, 2022, and November 25, 2022, respectively, the Applicant advised that it intended to pursue its motion to strike at the hearing, asserting that Justice Pamel left the issues for the presiding judge to fully consider:

> [15] It seems to me that the issue as to whether the principles set out in Ontario (Energy Board) and Quadrini – which by the way involve unique situations, unlike the case here, where administrative tribunals actually have the statutory right to appear before the Court on review of their own decisions – even apply in this case, given that the Commission is not the actual adjudicative body which rendered the decision which is the subject matter of the underlying application for judicial review, is best left to be considered by the judge hearing the underlying application on the merits. Although the issue sought to be determined on the present motion is not the role of the Commission when appearing before the Tribunal – that is an issue in the underlying application – but rather the Commission's role and whether its memorandum is to be struck within the context of the underlying application itself, it seems to me that there is considerable overlap with the arguments made by Seaspan on the merits of the underlying application; the present motion is very much grounded upon common law

> principles regarding the proper participation of an administrative decision-maker in a judicial review application of its own decision.
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> [16] For my part, I do not accept Seaspan's argument that leaving this issue to the judge on the merits would be tantamount to closing the barn door after the horses have fled, nor have I been convinced that I should exercise my discretion and strike the Commission's memorandum; it would seem to me rather strange for the issues of the Commission's statutory function, role, mandate or duty that caused it to participate in the hearing before the Tribunal to be left, as suggested by Seaspan, to Mr. Smolik to address before the judge hearing the underlying application, in support of the Tribunal's decision; it seems to me that the Commission is the party best placed to address those issues and speak to the public interest drivers behind the position the Commission took before the Tribunal, to the degree necessary for the judge hearing the underlying application to fully consider the matter.
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> …
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> [18] …For my part, it may well be that the principal issues raised by Seaspan in the present motion prove to have little substance; however, I have left those issues to be addressed by the judge hearing the application. In any event, in line with my discretion in the awarding of costs, I award costs payable by Seaspan to both the Commission and Mr. Smolik each in the lump sum amount of $2,500, payable forthwith notwithstanding appeal.
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> [Emphasis added.]

[38] The Applicant asserts that the issues raised in the motion can be joined with the issue relating to the Commission's participation before the Tribunal, below.

[39] In its responding letters dated November 4, 2022 and November 28, 2022, respectively, the Commission objected to the Applicant's submissions. The Commission asserts that Justice Pamel found that the Commission is a proper Respondent and, as such, has a right to be heard before this Court:

> [17] …Here, the Commission is a proper respondent; it was a party before the Tribunal whose decision is the subject matter of the underlying application, and will be affected by the order sought by Seaspan in the underlying application. In fact, Seaspan itself sought to amend its own notice of application for judicial review to add the Commission as a respondent, without any objection or attempt to circumscribe the Commission's role as a party to the underlying application. I have not been shown any support for the proposition that I should exercise my discretion at this early stage and strike the memorandum of a respondent named as a party by an applicant which was filed in accordance with the Rules of this Court, and I see no need, nor any reason that it would be just, fair and equitable, to do so in this case.

[40] The Commission further submits that Justice Pamel found that no decision of the Commission is being challenged (at paras 13, 15). Accordingly, these issues have been disposed of. Rather, the narrow remaining issue is the application of certain common law principles, including those in *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 and *Canada (AG) v Quadrini*, 2010 FCA 246. While the Commission argues that this issue has not been properly placed before the Court, it is nonetheless prepared to address the Applicant's argument that the Commission is not independent from the Tribunal (*Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36).

[41] In my view, the Applicant's submissions must fail. Both the Applicant and the Commission point to various excerpts of Justice Pamel's Order in support of their respective positions. However, the question of striking the Commission's Memorandum was definitively answered in the negative. This is evident from the Order:

> 1. The present motion to have the Court strike in its entirety the memorandum of fact and law of the co-respondent, the Canadian Human Rights Commission [Commission] is dismissed.
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> [Emphasis added.]

[42] The remaining question that the Court is being asked to consider is the extent of the Commission's participation before the Tribunal. That will be addressed further on in this Judgment and Reasons.

V. Issues and Standard of Review

[43] After considering the parties' submissions, the issues are best characterized as:

1. Did the Tribunal reasonably find that the Commission was entitled to fully participate in the hearing according to its public interest mandate under the *CHRA*?
2. Did the Tribunal reasonably find that Mr. Smolik established a *prima facie* case of discrimination; and
3. Did the Tribunal reasonably find that the Applicant did not provide Mr. Smolik with reasonable accommodation short of undue hardship?

[44] The standard of review for all three issues is reasonableness. None of the exceptions outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] arise in this matter (at paras 16-17).

[45] The presumption of reasonableness applies to the Tribunal's interpretation of their enabling statute and the application of that statute to the facts before the Tribunal (*Vavilov* at para 25; *Keith v Canada (Human Rights Commission)*, 2019 FCA 251 at para 6, application for leave to appeal to SCC refused, 38956 (23 April 2020); *O'Grady v Bell Canada*, 2020 FC 535 at para 31 [*O'Grady*]).

[46] A reasonableness review requires a court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, bears the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at paras 15, 99). However, a reviewing court must exercise judicial restraint and show deference to specialized decision-makers (*Vavilov* at para 93; *Keith v Canada (Human Rights Commission)*, 2018 FC 645 at para 58). Absent exceptional circumstances, the Court must not interfere with the decision-maker's factual findings, nor should it reweigh and reassess the evidence considered by the decision-maker (*Vavilov* at para 125). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within the range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86). On the other hand, sufficiently serious shortcomings such that the decision "cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" may render the decision unreasonable (*Vavilov* at para 100).

VI. Parties' Positions

A. *Did the Tribunal reasonably find that the Commission was entitled to fully participate in the hearing according to its public interest mandate under the CHRA?*

(1) Applicant

[47] The Commission acted beyond its jurisdiction under section 51 of the *CHRA* in both its written and oral submissions before the Tribunal. The Commission's role is distinct from the role of counsel for the parties. Its role, like Crown counsel in criminal proceedings, is prompted by considerations of public interest (*Dhanjal v Air Canada*, [1996] CHRD No 4 at para 260, aff'd

[1997] FCJ No 1599, 139 FTR 37 [*Dhanjal*]; *Premakumar v Air Canada*, [2002] CHRD No 17 at para 22 [*Premakumar*]). This necessarily involves informing parties as to what public interest it is representing in each case (*Mowat v Canadian Armed Forces*, 2003 CHRT 39 at paras 45-46 [*Mowat CHRT*]).

[48] The Tribunal erred in allowing the Commission to assume an adversarial role on behalf of Mr. Smolik. The Commission objected to the Applicant's questions and proposed witnesses, and made the bulk of Mr. Smolik's submissions on his behalf. Most significantly, the Commission presented an editorialized version of the facts that did not accurately reflect the evidence in order to further Mr. Smolik's position. Such an approach is contrary to section 51 of the *CHRA*, risks the Commission revealing "universal human frailties" that arise when individuals are placed in adversarial positions, and discredits the impartiality of the Tribunal in future proceedings (*Northwestern Utilities Ltd and al v Edmonton*, [1979] 1 SCR 684 at 15, [1978] SCJ No 107 [*Northwestern Utilities*]).

[49] The Commission did not indicate what public interest it was representing before the Tribunal. It was insufficient for the Tribunal to find that the Commission "had a particular interest in how employers accommodated their employees who had childcare obligations" and was therefore able to advocate for Mr. Smolik (at para 11).

(2) Respondent Smolik

[50] The Tribunal reasonably found that the Commission acted within the scope of section 51 of the *CHRA*. Alternatively, if the Court concludes that the Decision was unreasonable, there is

no reason to quash the Decision entirely or remit the Decision to the Tribunal for reconsideration. To do so would significantly prejudice Mr. Smolik, who has waited seven years for the resolution of this matter.

[51] The Applicant does not argue that the Tribunal or Commission breached any specific requirements of natural justice or procedural fairness. Rather, absent any explanation as to how it was prejudiced, the Applicant asserts that the Tribunal allowed the Commission to advocate for Mr. Smolik in an adversarial manner when making submissions and raising objections. A party is entitled to do such things at a hearing. There is nothing in the *CHRA* or otherwise that prevents the Commission from doing so if it believes that position is in the public interest.

[52] The Applicant's submission that the Commission presented an "editorialized version of the facts" and that did "not accurately reflect the evidence at the hearing" is unfounded. All parties were not only aware of one another's respective positions prior to the hearing, but also presented evidence, tested the evidence on cross-examination, and made full submissions to the Tribunal.

(3) Respondent Commission

[53] The Tribunal reasonably found that the Commission's full participation in the hearing was within its mandate under the *CHRA*. The Tribunal centered its analysis on the governing legislative provisions and properly recognized that the statutory language contemplates the Commission's active participation in Tribunal proceedings (*Quigley v Ocean Construction Supplies*, [2001] CHRD No 46 at para 7 [*Quigley*], citing *Vermette v Canadian Broadcasting*

Corporation, [1994] CHRD No 14, aff'd [1996] FCJ No 1274, 120 FTR 81). The Tribunal's finding reflects its institutional expertise and experience (*Vavilov* at para 93). The Commission's participation in human rights hearings is central to the *CHRA*, and is best assessed by Tribunal members who routinely preside over hearings in which the Commission is represented as a fully participating party.

[54] *Dhanjal*, relied on by the Applicant, is distinguishable from the present matter. In *Dhanjal*, the Tribunal found that the Commission's lawyer was an obstructionist. Nonetheless, the Tribunal acknowledged that Commission counsel may pursue their case "vigorously and effectively" in an atmosphere favourable to the proper administration of justice (at para 261). Further, the Supreme Court has held that the Crown can "act as a strong advocate within [the] adversarial process" and that "it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability" (*R v Cook*, [1997] 1 SCR 1113 at para 21, [1997] SCJ No 22).

[55] Similarly, *Premakumar* has been overruled by *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2011 SCC 53 [*Mowat SCC*], where the Supreme Court of Canada found that Parliament chose an active role for the Commission, including litigating on behalf of complainants (at para 51). Lastly, the Applicant's reliance on *Northwestern Utilities* is misplaced. In *Northwestern Utilities*, the deciding body sought to intervene in a review of its own decision (at 708).

[56] The Tribunal does not have jurisdiction to review the reasonableness of the Commission's opinion of the public interest, nor does it have jurisdiction to review the Commission's method of participation in a hearing, save for the general rules of procedural fairness (*Quigley* at para 7; *Mowat CHRT* at paras 11-14). Contrary to the Applicant's assertion, the Commission provided detailed and ample notice of its public interest position in its Statement of Particulars to allow the Applicant to defend itself (*Mowat CHRT* at paras 44-46).

B. *Did the Tribunal reasonably find that Mr. Smolik established a prima facie case of discrimination?*

(1) Applicant

[57] Mr. Smolik bore the onus of providing concrete evidence to establish that he met the *Johnstone* criteria on a balance of probabilities (*Quebec (Commissions des droits de la personne et des droits de la jeunesse) v Bombardier Inc*, 2015 SCC 39 at para 65 [*Bombardier*]).

[58] The Tribunal erred in its determination that Mr. Smolik's childcare obligations engaged a legal responsibility. Tribunals and Courts alike have dismissed complaints on the basis of family status where an employee fails to advance any evidence that their preferred means of childcare engaged a legal requirement or that they made meaningful efforts to seek childcare prior to accommodation (*Guilbault v Treasury Board*, 2017 PSLREB 1 at paras 81-82 [*Guilbault*]; *Ajax (Town) v Ajax Professional Fire Fights' Association, Local 1092 (Badame Grievance)*, [2019] OLAA No 238 at para 149, 306 LAC (4th) 1 [*Ajax*]; *Canadian National Railway v Unifor Council* 4000, [2015] CLAD No 213 [*Unifor Council 4000*]; *Edmonton (City) Police Service v Edmonton Police Association (Coughlan Grievance)*, [2019] AGAA No 4 at para 120, aff'd

2020 ABCA 182 [*Edmonton*]). Here, the Tribunal accepted no evidence beyond Mr. Smolik's subjective belief that his children required his personal care in finding that a legal responsibility was engaged.

[59] The Tribunal also erred in finding that Mr. Smolik was unable to find alternative childcare from relatives and non-relatives. Mr. Smolik again offered his subjective belief that his mother-in-law was not a suitable caregiver, and limited his consideration of hiring a nanny to the experience of a friend. To accept such evidence as sufficient would be contrary to the jurisprudence and significantly relax the threshold of the *Johnstone* test.

(2) Respondent Smolik

[60] The Tribunal reasonably found that Mr. Smolik established a *prima facie* case of discrimination. The Tribunal considered both the factual context based on the evidence and the legal framework in light of the relevant case law. The Applicant is improperly seeking to have this Court reweigh evidence.

[61] The jurisprudence cited by the Applicant as to whether Mr. Smolik's childcare options engaged a personal choice is distinguishable. The Tribunal cited jurisprudence in support of its well-reasoned finding that Mr. Smolik's childcare obligations engaged a legal obligation, not a personal choice (*Seeley*; *Whyte v Canadian National Railway Company*, 2010 CHRT 22; *Richards v Canadian National Railway Company*, 2010 CHRT 24 [collectively, *CN Trilogy*]).

[62] As for the third element of the *Johnstone* test, the Tribunal's findings that Mr. Smolik made reasonable efforts to find alternative childcare options and that none were accessible was also consistent with the jurisprudence (*CN Trilogy*). Contrary to the Applicant's assertions, Mr. Smolik provided evidence of his family situation and the difficulties he faced in finding reasonable childcare options for his children. The Applicant's argument that the Tribunal reached its conclusion without "any evidence" is baseless.

(3) Respondent Commission

[63] The Tribunal's adoption of the standard of proof in *Seeley* was reasonable in light of the principle of *stare decisis*. Having explained the similarities of Mr. Smolik's personal circumstances to those of the complainants in the *CN Trilogy*, the Tribunal reasonably found that Mr. Smolik met the required standard of proof under the second element of the *Johnstone* test.

[64] The Tribunal also carefully reviewed Mr. Smolik's evidence in reaching a reasonable conclusion on the third element of the *Johnstone* test. Specifically, the Tribunal considered the children's age; the significant toll of the mother's passing on the children; the children's behaviour following their mother's passing, including counselling; the relatives' circumstances; and the type of work available. Mr. Smolik was not required to establish his efforts to secure a nanny, as the Tribunal accepted his childcare obligations were best met by him at the time he first indicated he was ready to return to work. Lastly, the Applicant's assertion that Mr. Smolik's evidence was limited to his subjective belief is unfounded. The Tribunal reasonably concluded that a single parent whose professional circumstances required his absence from home for

several weeks could not reasonably expect a relative or non-relative to assume full parenting obligations during this prolonged period.

C. *Did the Tribunal reasonably find that Seaspan did not provide Mr. Smolik with reasonable accommodation short of undue hardship?*

(1) Applicant

(a) *Call-Out Logs and Relief Work*

[65] The Tribunal unreasonably found that Mr. Smolik identified instances where less senior engineers received call-out work. The Applicant does not keep records of when an employee turns down call-out work. Further, Mr. Smolik's evidence was that he accepted a majority of the call-outs provided to him. For each instance at issue, Mr. Smolik did not provide evidence of whether he recalled receiving a call-out, he was in the Lower Mainland, or he had already worked during the call-out period.

[66] The Tribunal also unreasonably found that the Applicant was not required to assign call-out work by seniority because this process was not expressly set out in the collective agreement. In ending the analysis here, the Tribunal failed to consider existing past practices as justifying the application of the doctrine of estoppel (*Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at paras 47-50 [*Nor-Man*]; *West Fraser Mills Ltd (Chasm Sawmills Division) v United Steelworkers, Local 1-417 (Guerin Grievance)*, [2010] BCCAAA No 116 [*West Fraser*]). The Applicant advanced evidence that all three parties

recognized that work assignments are based on the fundamental principle of seniority, and to derivate from this principle would breach the collective agreement.

(b) *Mr. Smolik's Actions Exhausted Accommodation Efforts*

[67] The Tribunal unreasonably found that the Applicant ought to have persuaded Mr. Smolik to accept the dispatcher position, or that it ought to have informed Mr. Smolik of their view of the reasonableness of the position and the impact of his refusal. It is trite law that accommodation is a multi-party process, and the employer does not bear the onus to demonstrate that it tried to force Mr. Smolik to accept reasonable accommodation. Further, an employer is in the best position to find suitable accommodation, which includes accommodation in different positions in order to minimally impact its business operations (*Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 at 994-95, [1992] SCJ No 75 [*Renaud*]).

[68] The Tribunal also unreasonably found that the Applicant was required to demonstrate that it had exhausted all attempts to accommodate Mr. Smolik as a marine engineer. Again, where less-intrusive accommodation options are available and meet the employee's identified needs, an employer is not obligated to implement more-intrusive accommodation options (*Renaud*; *Nash v Deputy Head (Correctional Services of Canada)*, 2017 PSLREB 4 at para 100 [*Nash*]). Further, an employee is not entitled to refuse reasonable accommodation on the ground that a favourable alternative solution might be available (*Culic v Canada Post Corporation*, 2007 CHRT 1 at para 256; *Smith v Canadian National Railway*, 2008 CHRT 15 at para 287 [*Smith*]; *Edmonton* at para 126). Mr. Smolik was only prepared to contemplate a proposal from the Applicant as a marine engineer in order to preserve his marine certification.

(c) *Undue Hardship*

[69] Several of the Tribunal's findings of fact are unreasonable. Firstly, the Tribunal unreasonably found that the Applicant did not accept Mr. Smolik's suggestion of holiday relief work and that 45 hours of such work was available. Mr. Smolik's own evidence was that he was uncertain how much relief work was available or how it was calculated. In response, the Applicant's witnesses explained that there was little relief work available and that relief work went to senior engineers in red day situations in accordance with the collective agreement. A red day situation refers to instances where an employee owes the Applicant time that an employee has already been paid for. The Tribunal failed to consider this evidence.

[70] Secondly, the Tribunal unreasonably found the Applicant liable for the actions of a different corporate legal entity for which the Applicant had no decision-making authority. The Applicant contacted SFC to approve Mr. Smolik's employment, but SFC would not hire Mr. Smolik. SFC was not named as a party to these proceedings. Accordingly, the Tribunal should not have considered its actions.

[71] Lastly, the Tribunal unreasonably found that departing from the Settlement Agreement would not have substantially impacted the collective agreement or the rights of other employees. This finding is contrary from the jurisprudence concerning the balance between accommodation and collective agreement obligations, the cornerstone of which is seniority (*Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 at para 130, citing *Re United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd* (1964), 15

LAC 161 at 162). Notably, an employer is not required to displace a senior employee in an effort to accommodate a junior employee (*Carter v Human Rights Tribunal of Ontario*, 2019 ONSC 142 at para 28; *Rafuse v British Columbia (Ministry of Tourism)*, 2000 BCHRT 42 at paras 78-79). Where a union refuses to subvert seniority in assessing accommodation options, undue hardship is established (*King v Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 122 at para 97 [*King*]; *Re Chatham-Kent Children's Services and OPSEU, Local 148 (Bowen)*, [2014] OLAA No 424 at paras 20-21, 121 CLAS 78).

[72] Similarly, it is unclear how the Tribunal found that the letter from the Guild, in which it explicitly stated that it was "certain" its members would grieve the Settlement Agreement, could amount to speculation.

[73] Lastly, the Tribunal unintelligibly found that Mr. Smolik could not have worked the unstructured Roberts Bank pager position while also finding that the Applicant should have considered providing relief work in the Roberts Bank pager position.

(2) Respondent Smolik

(a) *Call-Out Logs and Relief Work*

[74] The Tribunal properly held that the burden was on the Applicant to demonstrate, on a balance of probabilities, that the discriminatory action was a BFOR. The Tribunal considered the parties' evidence and reasonably found that the Applicant did not provide sufficient evidence to explain the numerous instances in which engineers with less seniority received call-out

assignments instead of Mr. Smolik. The Tribunal found this failure relevant to the Applicant's defences (1) that there was not enough work available to Mr. Smolik based on seniority, and (2) that providing Mr. Smolik with work over more senior employees would create undue hardship.

[75] The Tribunal correctly noted that the call-out work provisions in the collective agreement did not refer to seniority. The burden was on the Applicant to provide the Tribunal with the necessary factual evidence of long-standing practices to establish estoppel, and it is unclear what evidence the Applicant claims was before the Tribunal to support its argument. The Tribunal reasonably concluded that the evidence presented by both sides was unclear and contradictory. For instance, Captain Thompson testified that the Applicant deviated from its claimed "long-standing" seniority practice in contacting employees who live close to the vessels.

(b) *Mr. Smolik's Actions Exhausted Accommodation Efforts*

[76] The onus was on the Applicant to prove that the dispatcher position was a reasonable accommodation that Mr. Smolik ought to have accepted. The Tribunal clearly considered the circumstances surrounding the offer in concluding that there was insufficient evidence to determine whether the job was in fact a reasonable accommodation. If the dispatcher position was a reasonable option, one would think that the employer would do more to convince their employee of that fact, for instance by providing sufficient information and time to consider the offer.

[77] Contrary to the Applicant's assertions, the four-step process for accommodation remains applicable. It begins with asking whether an employee can do their own job, with or without

modification, before asking whether they can do a different job (*Seaspan ULC v International Longshore and Warehouse Union, Local 400 (GH Grievance)*, 2014 BCCAAA No 108 at para 100 [*GH Grievance*]; *Skedden v ArcelorMittal Dofasco*, 2019 HRTO 627 at paras 121-22 [*Skedden*]). In any event, the Tribunal's findings about the reasonableness of the dispatcher position were not contingent on this basis. Rather, the Tribunal concluded that the Applicant failed to demonstrate the dispatcher position was a reasonable accommodation in the circumstances.

(c) *Undue Hardship*

[78] Pursuant to subsection 15(2) of the *CHRA*, alleged disruptions to a collective agreement are expressly excluded from consideration unless they can be shown to impact health, safety, or cost.

[79] Mr. Smolik did not seek or expect an accommodation that would result in an employee with more seniority losing their job. Rather, his various proposals could have impacted their access to extra, voluntary work. Further, the evidence before the Tribunal illustrated the Guild's concern over the process in which the Settlement Agreement was reached, not its outright disagreement.

[80] The Tribunal did not find that the Settlement Agreement would not impact the collective agreement, but that "since the [Settlement Agreement] affected seniority rights in the collective agreement and established work practices at Seaspan, the consent of the Guild was required." The Tribunal reasonably faulted the Applicant's lack of effort to further resolve issues

surrounding the Settlement Agreement as an accommodation, and reasonably found that the Applicant failed to produce clear evidence that this accommodation would have caused undue hardship.

(3) Respondent Commission

[81] The Tribunal properly held that the burden was on the Applicant to demonstrate, on a balance of probabilities, that the discriminatory action was a BFOR. The Tribunal's reasons should be viewed through the lens of its preference of Mr. Smolik's evidence, and this weight should not be disturbed (*O'Grady* at para 63).

(a) *Call-Out Logs and Relief Work*

[82] The Applicant's submissions are an invitation for the Court to reweigh evidence and perform a "line-by-line treasure hunt for error" (*Vavilov* at paras 102, 125). The Decision is reasonable and presents a clear line of analysis to support the Tribunal's conclusion. The Tribunal preferred Mr. Smolik's evidence that he did not recall turning down any call-out work. The Applicant ought to have established its assertion that Mr. Smolik did not accept all call-out work at the hearing.

[83] In the labour law context, a party cannot establish estoppel by simply asserting it exists. Rather, they must establish that the other party conducted itself in such a way as to unequivocally represent that it did not intend to rely on its rights under the collective agreement. This necessarily requires evidence of a consistent and long-standing practice that results in

detrimental reliance on the part of the party relying on the estoppel (*Re Terminal Forest Products and USWA, Local 1 (Sandher)*, [2016] BCCAAA No 42 at para 100 [*Terminal Forest*]). Here, the Applicant provided contradictory evidence about the purported consistency of its practice in stating that it would not have provided Mr. Smolik with relief work over more senior employees, but that dispatchers would occasionally contact less senior employees for relief work. This contradiction reasonably supports the Tribunal's conclusion that there was insufficient evidence to find undue hardship based on the collective agreement.

[84] As for the Guild's objection to the Settlement Agreement, the Tribunal observed that no representatives of the Guild were called to testify. The Tribunal reasonably determined that the opposition of the Guild alone, absent clear evidence of undue hardship, was insufficient to establish undue hardship.

(b) *Mr. Smolik's Actions Exhausted Accommodation Efforts*

[85] The Tribunal acknowledged that accommodation need not be "perfect" and that complainants must cooperate in the accommodation process by accepting reasonable solutions. Contrary to the Applicant's submissions, the Tribunal did not assert that an employer must demonstrate that it forced an employee to accept reasonable accommodation in order to make out a defence. Rather, the Tribunal held that an employer must inform an employee about the accommodation they believe to be reasonable to allow the employee to assess the legal implication of their choice.

[86] The record clearly indicates that the Applicant did not offer Mr. Smolik the marine dispatcher position. Additional evidence not included in the Decision illustrates that Captain Thompson only briefly discussed the dispatcher position with Mr. Smolik, that candidates would first be required to undergo an aptitude assessment, and that the Applicant would only consider training if the candidate passed the assessment. Accordingly, the Tribunal reasonably concluded that there was insufficient evidence to find whether the dispatcher position was a reasonable accommodation.

[87] The Tribunal also reasonably relied on the well-entrenched four-step accommodation process (*GH Grievance* at para 100; *Skedden* at paras 121-22).

(c) *Undue Hardship*

[88] The Tribunal reasonably concluded that there was insufficient evidence that the Settlement Agreement would have substantially impacted the collective agreement or the rights of other employees, and that the Guild's threats to file grievances were speculative. A party must provide clear and cogent evidence to support its assertion that it could not accommodate an employee short of undue hardship; speculative or unsubstantiated concerns that adverse consequences "might" or "could" result will not suffice (*FH v McDougall*, 2008 SCC 53 at paras 29, 46; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 41, [1999] SCJ No 73).

[89] The Decision accurately reflects the prevailing jurisprudence. That is, one must ask whether the proposed accommodation substantially interferes with the collective agreement or

rights of other employees such that it amounts to undue hardship based on health, safety, or cost. In other words, disruption to a collective agreement can only be considered if it bears directly on heath, safety, or cost (*Renaud*). The Applicant's failure to advance persuasive evidence of undue hardship to this effect was fatal to its defence.

VII. Analysis

A. *Did the Tribunal reasonably find that the Commission was entitled to fully participate in the hearing according to its public interest mandate under the CHRA?*

[90] In my view, the Tribunal reasonably found that the Commission was entitled to fully participate in the hearing pursuant to section 51 of the *CHRA*.

[91] Section 51 of the *CHRA* provides for the role of the Commission in appearing at a hearing:

Duty of Commission on appearing	**Obligations de la Commission**
51 In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.	51 En comparaissant devant le membre instructeur et en présentant ses éléments de preuve et ses observations, la Commission adopte l'attitude la plus proche, à son avis, de l'intérêt public, compte tenu de la nature de la plainte.

[Emphasis added.]

[92] A plain reading of the provision confirms that where the Commission appears before the Tribunal, it is statutorily mandated to represent the public interest. As the Tribunal recognized,

the term “public interest” is not defined in the *CHRA*, nor does the legislation or jurisprudence restrict this term. The provision’s sole additional guidance is that the Commission must take such public interest position “having regard to the nature of the complaint”. This indicates some discretion on the part of the Commission.

[93] The Tribunal has noted that the Commission is best placed to determine how to represent the public interest in the context of a particular case (*Quigley* at para 7; *Mowat CHRT* at para 11). The Supreme Court and the Tribunal have also recognized that “Parliament chose an active role for the Commission, which could include litigating on behalf of complainants…” and pursuing the case “vigorously and effectively” (*Mowat SCC* at para 51; *Dhanjal* at para 261).

[94] Further, as the Tribunal explained in the present matter, the Tribunal’s review of the Commission’s jurisdiction and conduct is limited to issues of procedural fairness, the rights of the other parties to the proceeding, and the Tribunal’s Rules of Procedure (*Quigley* at para 7; *Mowat CHRT* at paras 12-14). This may include the Commission’s ability to ask leading questions during direct examination, call inadmissible or irrelevant evidence, and make submissions that refer to facts not in evidence, among others.

[95] Here, the Tribunal found that the Commission did not breach administrative law principles of fairness, bias, or abuse of process. The Tribunal further noted that, during a hearing, “one would expect the Commission to raise evidence of possible discrimination as their mandate includes trying to eliminate discrimination” (at para 10). In my view, the Tribunal’s conclusion is reasonable. The Applicant has not pointed to anything to indicate that the Commission

overstepped its role or that counsel for the Commission acted in an obstructionist manner. In my view, the Applicant simply disagrees with the discretionary approach taken by the Commission in determining how it would advocate for the public interest.

[96] Similarly, while the Applicant asserts that the Commission presented an editorialized version of the facts not reflected by the evidence, it has not identified any specific instances of such occurrence. In the absence of any evidence in the record to support its view, I am also unable to agree with such an assertion.

[97] I agree with the Commission that *Northwestern Utilities* is distinguishable from the present matter. Although the Applicant acknowledges that *Northwestern Utilities* concerned the acceptable scope of a Tribunal's participation on appeal of its own decision, I disagree that the same principles apply to the Commission's role in appearing as a party in a proceeding before the Tribunal. Here, as the Tribunal properly recognized, the Commission has not rendered its own decision, but rather requested that the Tribunal institute an inquiry into the complaint (*CHRA*, s 49(1)). Indeed, to accept such limitations to the Commission's role would place *Northwestern Utilities* at odds with the Supreme Court's subsequent decision in *Mowat SCC*.

[98] The Applicant also relies on *Mowat CHRT* for the proposition that the Commission must inform parties as to what "public interest" it is representing in each case (at paras 45-46). In *Mowat CHRT*, the Canadian Armed Forces objected to the Commission's intention to limit its submissions to an opening statement, in part because the Commission did not provide the parties with the details of its position in advance of the hearing (at para 5). The Tribunal held that

"parties are entitled to know what the Commission views as the public interest in a particular case, so as to enable the party to lead the necessary evidence and make the necessary arguments to address interest, as the party may see fit" (at para 45). Were it not for the intervention of the Tribunal, the parties would have had no indication of the Commission's view of the public interest until the first day of the hearing (at para 46).

[99] In the present matter, however, the Commission set out its public interest position in a 13-page Statement of Particulars, dated December 3, 2018, for the Tribunal hearing held from June 12-14, 2019. In other words, unlike *Mowat CHRT*, the Applicant was provided with six months' notice to prepare its evidence and arguments. Accordingly, the Applicant's argument cannot stand.

B. *Did the Tribunal reasonably find that Mr. Smolik established a prima facie case of discrimination?*

[100] The test for establishing discrimination requires that a complainant first make out a *prima facie* case. A "*prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (*Bombardier* at para 60, citing *O'Malley v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at para 28, [1985] SCJ No 74 [*O'Malley*]). Complainants must show that they have a characteristic protected from discrimination, that they experienced an adverse impact with respect to employment, and that the protected characteristic was a factor in the adverse impact (*Johnstone* at para 76; *Bombardier* at para 63, citing *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61 at paras 49-50).

Once a *prima facie* case has been established, the second part of the test requires the employer to show that the policy or practice is a BFOR and that those affected cannot be accommodated without undue hardship (*Johnstone* at paras 75-76).

[101] The requirements for establishing a *prima facie* case where workplace discrimination on the prohibited ground of family status is slightly more nuanced than the general test. As set out above, a complainant must show (*Johnstone* at para 93):

1. That a child is under his or her care and supervision;
2. That the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
3. That he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
4. That the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare option.

[102] The test is necessarily flexible and contextual so as to advance the broad purposes of the *CHRA*, and it does not result in a higher threshold than that required to establish a *prima facie* case for other prohibited grounds (*Johnstone* at paras 87-88, 98).

[103] Applicant takes issue only with the second and third elements of the *Johnstone* test. In my view, the Tribunal reasonably found that Mr. Smolik established a *prima facie* case of discrimination. Each element will be addressed separately below.

[104] First, I do not read *Bombardier* to suggest that Mr. Smolik was required to provide concrete evidence to establish a *prima facie* case (at para 65). The Tribunal reasonably noted, citing *Seeley*, which referred to *O'Malley*, that a high standard of proof was not required (*Seeley v Canadian National Railway*, 2013 FC 117 at paras 46, 89, aff'd 2014 FCA 111). Rather, the case must be complete and sufficient. I see no basis to disturb the Tribunal's finding on what is required to establish a *prima facie* case of discrimination.

[105] Turning to the second element of the *Johnstone* test, the Applicant challenges Mr. Smolik's lack of evidence beyond his subjective belief in engaging his legal childcare obligations. This prong requires demonstrating that "the childcare need at issue is one that flows from a legal obligation, as opposed to resulting from personal choices" (*Johnstone* at para 95). In my view, the Tribunal reasonably found that Mr. Smolik is the sole parent and provider for his children, thereby engaging his legal obligation. I agree that the cases cited by the Applicant, many of which were before the Tribunal, are distinguishable from the present matter based on their jurisdiction and factual matrix. Here, Mr. Smolik did not share childcare responsibilities with a spouse or former spouse, or seek a specific type of childcare arrangement (*Guilbault* at para 82; *Ajax* at paras 148-49; *Edmonton* at para 120; *Unifor Council 4000* at para 34). Rather, the Tribunal reasonably preferred Mr. Smolik's evidence that he was the only suitable caregiver at the time he was ready to return to work, noting that the Applicant did not challenge Mr. Smolik's assessment when they initially tried to accommodate his return.

[106] Beyond these considerations, the Tribunal also recognized the young ages of Mr. Smolik's children as well as their mental and emotional states in light of their mother's passing.

These circumstances point to more than Mr. Smolik's subjective belief. The circumstances also do not reflect personal choices being made by Mr. Smolik, such as participation of his children in extra-curricular activities (*Johnstone* at para 69). When viewed holistically, I can see no error in the Tribunal's reasoning on this element of the *Johnstone* test.

[107] As for the third element of the Johnstone test, the Applicant takes issue with Mr. Smolik's lack of reasonable efforts to obtain childcare among relatives and non-relatives. In assessing this prong, the Federal Court Appeal in Johnstone explained that, "the complainant must demonstrate that he or she is facing a bona fide childcare problem." This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances (at para 96, emphasis added). This includes demonstrating that an available childcare service or arrangement is not reasonably accessible so as to meet their work needs (Johnstone at para 96).

[108] Given the fact-specific nature of this assessment, I am of the view that the Tribunal considered all of the circumstances and context and reasonably concluded that, upon his initial return to work, Mr. Smolik made reasonable efforts to obtain childcare and that none were reasonably accessible. The Tribunal recognized that Mr. Smolik made efforts to secure childcare for call-out work, shift tugs, and 7-8 day pager shifts; accepted Mr. Smolik's belief that his childcare obligations were best met by him in light of his children's state and in the context of other prolonged or unpredictable shifts; and considered his limited childcare options among relatives and non-relatives. These circumstances were enough for the Tribunal to render its findings.

[109] While the initial Agreement expected Mr. Smolik to make reasonable efforts to return to his full and regular duties, the Tribunal noted that "[t]he evidence does not show whether the Applicant asked Mr. Smolik, at the conclusion of the one-year agreement if he could alter his childcare arrangements to allow him to work additional hours or different shifts" (at para 86). Conversely, there is nothing in the record indicating the specific efforts or inquiries Mr. Smolik made to reassess the childcare options among relatives and others. Nonetheless, the Tribunal's finding that Mr. Smolik had established a *prima facie* case, when considered in light of the record and the low legal burden, is reasonable.

C. *Did the Tribunal reasonably find that Seaspan did not provide Mr. Smolik with reasonable accommodation short of undue hardship?*

[110] The Tribunal reasonably found that the Applicant did not provide Mr. Smolik with reasonable accommodation short of undue hardship. The Tribunal recognized that the burden was on the Applicant, not Mr. Smolik, to demonstrate that the discriminatory action was a BFOR on a balance of probabilities (*Meiorin* at para 54).

(a) *Call-Out Logs and Relief Work*

[111] The Tribunal may have overstated matters when it explained that Mr. Smolik identified instances on the harbour work logs where more junior engineers received call out assignments instead of him. Although the Tribunal preferred Mr. Smolik's evidence that he did not recall turning down any call-out work, Mr. Smolik also testified that he completed the majority, but not all of the call-out work offered to him. Captain Thompson also advanced evidence that the

Applicant does not track how many call-outs are turned down. Accordingly, it is not entirely clear how one could conclude that more junior employees were selected before Mr. Smolik.

[112] However, in order to assess whether the accommodation was reasonable, and as acknowledged by the Tribunal, the burden was on the Applicant to advance evidence surrounding these occurrences in order to further its defense. I find the Tribunal's overstatement to be peripheral to the matter (*Vavilov* at para 100). In my view, the main reasons for the Tribunal's decision on this point are set out in the following paragraphs:

> [133] Seaspan did not present Mr. Smolik with a return to work plan until January 2014. The plan proposed Mr. Smolik receive call-out work based on seniority. Seaspan did no calculation before it was presented on whether this call-out work would provide a full-time income. The plan did not subsequent provide full-time employment for Mr. Smolik. He had to eventually work for other employers to obtain full-time work. Seaspan submitted that they granted him a leave to allowed him to work for others. That is not an adequate attempt at accommodation.
>
> [134] I find that Seaspan's efforts in providing call-out work for Mr. Smolik fell far short of their duty to accommodate.

[113] Turning to the Applicant's estoppel argument, the foundational principles of estoppel were set out by the Supreme Court in *Nor-Man* (at paras 19, 50; *Terminal Forest* at para 100; *West Fraser* at para 31):

> [19] Both arbitrators were alive to the foundational principles of estoppel. Essentially, they both found that the union was fixed with knowledge — constructive, if not actual — of the employer's mistaken application of the disputed clauses throughout the relevant time; that the union's silence amounted to acquiescence in the employer's practice; that this sufficiently fulfilled the intention requirement of estoppel; that the employer could reasonably rely on the union's acquiescence; that the employer's reliance was to its detriment; and that all of this had the effect of altering the legal relations between the parties.

[114] The employer's practices must have been open, long-standing, and consistent (*West Fraser* at para 32; *Toronto Police Services Board v Toronto Police Association*, 68 CLAS 200 at para 19). Applying these principles to the present matter, I agree with the Respondents that the Applicant advanced insufficient evidence to establish estoppel, given Captain Thompson's testimony that the Applicant would occasionally deviate from seniority. The Tribunal reasonably concluded that the evidence presented by both sides was unclear and contradictory.

(b) *Mr. Smolik's Actions Exhausted Accommodation Efforts*

[115] The Applicant asserts that the Tribunal unreasonably found that the Applicant ought to have persuaded Mr. Smolik to accept the dispatcher position, or that it ought to have informed Mr. Smolik of their view of the reasonableness of the position and the impact of his refusal. The Applicant raised the principles in *Renaud* before both the Tribunal and this Court. In *Renaud*, the Supreme Court explained that the search for accommodation is a multi-party inquiry. Nevertheless, the employer is in the best position to determine how the complainant may be accommodated without undue interference with the employer's business. The Supreme Court went on to explain (at 994-95):

> When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *Simpsons-Sears Ltd.* The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.
>
> [Emphasis added.]

[116] The Tribunal, citing *Renaud*, accepted that accommodation need not be perfect, but it must be reasonable. The Tribunal found that the Applicant advanced insufficient evidence to determine whether the marine dispatcher job was reasonable. In arriving at this conclusion, the Tribunal noted the following:

> [113] Seaspan made no effort to persuade Mr. Smolik to accept this dispatcher position which they deemed a "perfect accommodation". It is not clear from the evidence that Seaspan even told Mr. Smolik that it viewed the dispatcher job as a reasonable accommodation or that by refusing to even being assessed for the position could be considered by Seaspan as not cooperating with the accommodation process.

[117] While I disagree that the Tribunal stated an employer ought to "force" an employee to accept reasonable accommodation, I agree that the Tribunal erred in faulting the Applicant for making no effort to persuade Mr. Smolik to accept the dispatcher position, given the collaborative nature of the accommodation process set out in *Renaud*. However, I again view this flaw as peripheral to the Tribunal's decision (*Vavilov* at para 100). The Tribunal centered its conclusion on the surrounding circumstances, including the Applicant's insufficient detail about the position and short response deadline. In this regard, the present matter is distinguishable from *Nash*, in which the Canada Public Service Labour Relations and Employment Board found that the employer demonstrated that it had reasonably accommodated the grievor by allowing him to telework on a flexible schedule (at para 98; see also *Smith* at para 287).

[118] I also disagree with the Applicant's assertion that the Tribunal erred in finding that the Applicant was required to demonstrate that it had exhausted all attempts to accommodate Mr. Smolik with marine engineer work. One must first ask whether an employee can do their own job, before asking whether they can do a different job (*GH Grievance* at para 100). Indeed, even

in the case of *Smith*, cited by the Applicant, the employer made efforts to return the employee to his pre-injury job (at para 15). Here, the Tribunal found that the evidence did not establish that the Applicant had met its burden of reasonably accommodating Mr. Smolik's request for marine engineer work.

(c) *Undue Hardship*

[119] The Tribunal did not err in its finding that the Applicant had not accommodated Mr. Smolik to the point of undue hardship. While I agree with the Applicant's submissions that Mr. Smolik was not entitled to "perfect" accommodation, that is not the test. I also find that, contrary to the Applicant's submissions, the onus rests with the Applicant to demonstrate its efforts at accommodating Mr. Smolik to the point of undue hardship. It was open to the Tribunal to find that the Applicant had not satisfied its burden with sufficient evidence. I see no reason to disturb the Tribunal's findings.

[120] The Applicant's contention with the Tribunal's reasoning surrounding the holiday relief work is an invitation for this Court to reweigh evidence, which is not the function of judicial review. While Mr. Smolik recognized that he does not know how the work was calculated, he disputed the Applicant's assertion that fewer weeks of holiday relief work were available.

[121] However, I agree that the Tribunal erred in holding the Applicant accountable for the actions of SFC, a separate legal entity. Mr. Smolik's own evidence explained that the Applicant contacted the Engineering Superintendent for SFC, and advised that the Applicant had no restrictions in allowing him to work for SFC. SFC declined this option. Nevertheless, in my

view, this error does not affect the remaining findings about the Applicant's responsibility toward Mr. Smolik.

[122] I disagree with the Applicant's assertion that the Tribunal unreasonably found that the Settlement Agreement would not have resulted in a substantial impact on the collective agreement or rights of other employees. While an employer is not entitled to use the duty to accommodate one employee as an opportunity to ride roughshod over the rights of other employees (*King* at para 97), the Applicant's arguments directly relate to what they were prepared to do in reaching the Settlement Agreement with Mr. Smolik. Namely, as recognized by the Tribunal, the parties reached an agreement in principle that provided Mr. Smolik with super seniority rights for call-out and relief work.

[123] The Guild's responsibility to Mr. Smolik is not in issue in this proceeding as it was not a party before the Tribunal. Suffice to say that the consideration of a collective agreement could be relevant in assessing the degree of hardship occasioned by the interference with the terms thereof, but a collective agreement in and of itself does not relieve an employer of its duty to accommodate (*Renaud* at 987). Here, the Guild raised concerns about their lack of knowledge surrounding the Settlement Agreement or potential alternatives, explaining that "[o]ur responsibilities preclude us from agreeing…without fully understanding all the relevant facts necessary to properly evaluate the proposed terms." I agree that the Tribunal reasonably faulted the Applicant's lack of effort to further resolve issues surrounding the Settlement Agreement as an accommodation, and reasonably found that the Applicant failed to produce clear evidence that such an accommodation would have caused undue hardship in relation to health, safety, or cost.

[124] I similarly disagree with the Applicant's assertion that the Tribunal's reasoning surrounding the Roberts Bank pager position is illogical. The Tribunal reasonably recognized that it would have been challenging for Mr. Smolik to work Roberts Bank pager shifts upon his initial return to work in 2013. However, the Tribunal also noted that, by August 2015, Mr. Smolik was prepared, and indeed suggested to the Applicant, that he work the Roberts Bank pager job. The Tribunal's reasoning is logical and took into account both the submissions and the evidence.

[125] Overall, viewed as a whole, I see no reason to disturb the Tribunal's determination on the issue of undue hardship.

VIII. Conclusion

[126] For the above reasons, the application for judicial review is dismissed.

[127] The Applicant has provided no submissions on costs. Mr. Smolik seeks an Order for costs against the Applicant. The Commission does not seek costs, but submits that the Court should not award costs against it because it has appeared in its capacity as a representative of the public interest.

[128] Under the circumstances, I will allow the Applicant to make fulsome submissions on costs. The Respondents can then provide submissions after reviewing the Applicant's submissions.

JUDGMENT in T-551-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The Applicant will serve and file its submissions on costs within 21 days of this Order. The Respondents may file reply submissions within 14 days of being served with the Applicant's costs submissions. The cost submissions will not exceed ten (10) pages.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-551-21
STYLE OF CAUSE:	SEASPAN MARINE CORPORATION v ANDREAS SMOLIK AND CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATES OF HEARING:	NOVEMBER 29 AND 30, 2022
JUDGMENT AND REASONS:	FAVEL J.
DATED:	JUNE 16, 2023

APPEARANCES:

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