Federal Court of Appeal  Cour d'appel fédérale

Date: 20140502

Docket: A-90-13

Citation: 2014 FCA 111

CORAM: **PELLETIER J.A.**
MAINVILLE J.A.
SCOTT J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

DENISE SEELEY AND CANADIAN HUMAN RIGHTS COMMISSION

Respondents

and

FEDERALLY REGULATED EMPLOYERS - TRANSPORTATION AND COMMUNICATION

Intervener

ONTARIO HUMAN RIGHTS COMMISSION

Intervener

Heard at Toronto, Ontario, on March 12, 2014.

Judgment delivered at Ottawa, Ontario, on May 2, 2014.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: PELLETIER J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment reported as 2013 FC 117 of Mandamin J. of the Federal Court (Federal Court Judge) dismissing the judicial review application of the Canadian

National Railway Company (CN) challenging a decision reported as 2010 CHRT 23 of the Canadian Human Rights Tribunal (Tribunal).

[2] The Tribunal found that CN had discriminated within the meaning of sections 7 and 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 against the respondent Denise Seeley on the ground of family status by refusing to accommodate her childcare needs following her assignment from Jasper to Vancouver to protect a labour shortage.

[3] For the reasons set out below, I would dismiss this appeal.

[4] This appeal was heard immediately after an appeal involving similar legal issues between the Attorney General of Canada, representing the Canadian Border Services Agency, and Ms. Fiona Johnstone. The reasons for the judgment of this Court in *Canada (Attorney General) v. Johnstone et al.*, 2014 FCA 110 ("*Johnstone*") are released concurrently with these reasons. For the purposes of clarity and brevity, extensive references to *Johnstone* will be made throughout these reasons.

Background and context

[5] The full background is extensively set out in the Tribunal's decision and need not be repeated. For the purposes of this appeal, the salient facts may be summarized as follows.

[6] CN has more than 15,000 employees in Canada, of which over 4,000 are operating employees, also known as "running trade" employees, consisting of conductors and locomotive

engineers. Running trade employees work either “road” or “yard”. Road work requires employees to get on a train at a terminal and take the train to another terminal. They then layover and come back to their home terminal. A yard employee typically works in a rail yard, switching box cars and making up trains. The yard employees do not leave the terminal. A little over 3% of CN’S running trade employees are women.

[7] Due to the nature of CN’s operations, running trade employees must be able to work where and when required. As a result, elaborate recall and mobility rules based largely on senority rights apply at CN. Of particular relevance for this appeal is section 148.11 of the applicable collective agreement, which provides that employees hired after June 29, 1990 can be forced to cover work at another terminal in the Western Region (*i.e.* from Vancouver to Thunder Bay) and are obligated to report for work at that terminal within 30 days unless they can submit satisfactory reasons justifying their failure to report.

[8] Running trade employees who are laid off remain on a recall list indefinitely, and continue to accumulate seniority while laid off. Section 115 of the applicable collective agreement provides that employees who are laid off will be given preference for re-employment when staff is increased in their seniority district, and will be returned to work in order of seniority. The provision adds that if an employee is employed elsewhere at the time of recall, he may be allowed 30 days in which to report. If he fails to report for duty or to give satisfactory reasons for not reporting, he will forfeit all his seniority rights.

[9] Ms. Seeley was hired by CN on July 2, 1991, and she qualified as a conductor in 1993. Her home terminal was Jasper, Alberta. Her husband is also employed by CN as a locomotive engineer with well over 30 years of service. Ms. Seeley worked from 1991 to 1997, when she was laid off. She however remained on the seniority list during lay-off and performed a few hours of work on emergency calls between 1997 and 2001.

[10] Ms. Seeley and her husband had a first child in January 1999, and they then moved from Jasper to Brule, Alberta, a small community located approximately 98 kilometers from Jasper. Their second child was born in 2003.

[11] In 2005, CN was experiencing a severe shortage of running trade employees at its Vancouver terminal. In February of 2005, CN decided to recall conductors from the Western Region to protect the shortage in Vancouver. For this purpose, 47 conductors were recalled on a seniority basis. Of these, 12 reported for work in Vancouver and are still employed by CN, 30 were administratively terminated by CN in accordance with the terms of the collective agreement or chose to resign their position, and 5 were relieved from their obligation to report to Vancouver and remained in the employ of CN, including some who were accommodated due to attending to ill parents.

[12] In the case of Ms. Seeley, she was recalled from lay off at the end of February, 2005 pursuant to section 115 of the collective agreement and assigned to cover the shortage in Vancouver pursuant to article 148.11 of that agreement. Various letters were then sent by Ms. Seeley to CN seeking an accommodation with respect to her childcare needs. She noted that it

would be difficult to take her children with her to Vancouver, and that because of childcare responsibilities, it was not feasible to leave them with her husband whose own work obligations with CN would cause the same difficulties with childcare. She requested that her situation be considered on a compassionate basis and that she be allowed to wait out until Vancouver no longer required her services or there was work available at the Jasper terminal or at the adjacent terminal of Edson. She noted that CN running trade employees with medical conditions had been accommodated in the past, and she sought similar consideration with respect to her childcare situation.

[13] CN authorized extensions of her recall date to Vancouver until June 30, 2005. Ms. Seeley continued to seek an accommodation that would address her childcare needs, but CN refused to deal with Ms. Seeley's requests. On July 4, 2005, CN informed Ms. Seeley that her seniority rights had been forfeited and her employment terminated because she had failed to cover the shortage in Vancouver.

[14] Ms. Seeley subsequently submitted a complaint pursuant to the *Canadian Human Rights Act* alleging that the CN had discriminated against her on the prohibited ground of family status.

[15] The provisions of the *Canadian Human Rights Act* that are particularly pertinent to the complaint are subsection 3(1) and sections 7 and 10, which read as follows:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an	**3.** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état

offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

[Emphasis added]

matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

[Je souligne]

7. It is a 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.

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction 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.

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

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

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

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

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

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

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

The decision of the Tribunal

[16] Relying on a previous decision of the Tribunal in *Brown v. Canada (Department of National Revenue)*, 1993 CanLII 683, the Tribunal found that the prohibited ground of discrimination of family status in the *Canadian Human Rights Act* includes the childcare obligations of a parent.

[17] With respect to the test for finding a *prima facie* case of discrimination on this ground, the Tribunal rejected the approach proposed by the British Columbia Court of Appeal in *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, 2004 BCCA 260, 240 D.L.R. (4th) 479 ("*Campbell River*"). Under the *Campbell River* test, "a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee": *Campbell River* at para. 39.

[18] The Tribunal instead followed the approach set out in its previous decisions of *Hoyt v. Canadian National Railway*, 2006 CHRT 33 ("*Hoyt*") and of *Johnstone v. Canada Border Services*, 2010 CHRT 20, as well as in the reasons of Barnes J. of the Federal Court in *Johnstone v. Canada (Attorney General)*, 2007 FC 36, 306 F.T.R. 271. Under that approach, in order to make out a *prima facie* case on the prohibited ground of family status, an individual should not have to tolerate some amount of discrimination to a certain unknown level before being afforded the protection of the *Canadian Human Rights Act*.

[19] The Tribunal found that Ms. Seeley had made out a case of *prima facie* discrimination since she had demonstrated that she was the parent of two children, she could not rely on her husband for the childcare needs of these children as a result of his own work schedule for CN, that she was told to temporarily move to Vancouver "with no information with regard to how long she would have to stay there or about housing arrangements once she arrived there", and that this temporary move "would disrupt her children's care and that it would be impossible for her to make arrangements for appropriate child care": Tribunal's decision at para. 123.

[20] The Tribunal further found that CN had not demonstrated that the accommodation sought by Ms. Seeley would cause it undue hardship under the third element of the three-step test set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*") at paras. 54 and 55. The Tribunal concluded from the evidence "that CN was not sensitive to the Complainant's situation" and "did not answer her many requests for some form of accommodation and did not even meet or contact her to discuss her situation…": Tribunal's decision at para. 150.

[21] The Tribunal further concluded that CN did not consider family status matters that involve parental obligations and responsibilities as a protected ground of discrimination that necessitated accommodation, and thus also found that CN had refused to seriously consider Ms. Seeley's situation, thus failing to meet the procedural component of the duty to accommodate: Tribunal's decision at paras. 151 to 165.

[22] The Tribunal also rejected CN's submission that accommodating Ms. Seeley would result in undue hardship since she would in effect be provided with a "super seniority" based on the simple fact of her status as a parent. The Tribunal found that CN did not produce evidence that it would have faced undue operational hardship by accommodating Ms. Seeley, that it was overwhelmed with requests for accommodation from individuals in a comparable situation to Ms. Seeley, or that accommodating her would cause undue hardship in terms of costs: Tribunal's decision at paras. 116 to 173.

[23] The Tribunal consequently concluded that CN had breached sections 7 and 10 of the *Canadian Human Rights Act*. It ordered CN (a) to work with the Canadian Human Rights Commission to ensure that such discriminatory practice and behaviour does not continue; (b) to reinstate Ms. Seeley as of March 2007 without loss of seniority, that being the date she would have returned to work at the Jasper terminal had she remained on the recall and seniority list, (c) to compensate Ms. Seeley for loss wages and benefits from March 1st, 2007, with a 30% reduction based on an assessment of Ms. Seeley's ability to mitigate her damages, and (d) to pay Ms. Seeley $15,000 for pain and suffering.

[24] The Tribunal also ordered CN to pay Ms. Seeley $20,000 for special compensation under subsection 53(3) of the *Canadian Human Rights Act* on the ground that CN's conduct had been reckless. This award principally resulted from the Tribunal's finding that CN managers had ignored CN's accommodation policy that identified family status as a ground of discrimination, and from its further finding that CN managers "didn't make any efforts to try to understand the Complainant's situations, ignored her letters, decided to treat her case as just a 'child care issue'

and to cherry-pick which ground of discrimination should give way to accommodation and which should not": Tribunal's decision at para. 191.

The judgment of the Federal Court Judge

[25] CN pursued the matter in the Federal Court through a judicial review application challenging the Tribunal's decision on various grounds. The Federal Court judge dismissed the application.

[26] The Judge applied the reasonableness standard of review to all of the issues raised before him, including the scope of the prohibited ground of discrimination on the basis of family status and the legal test for finding a *prima facie* case of discrimination on that ground.

[27] The Judge rejected CN's submission that the Tribunal had erred in adopting an overly broad interpretation of family status. He rather found that the Tribunal's conclusion that family status included childcare obligations was reasonable since "[i]t is within the scope of the ordinary meaning of the words; it is in accord with the objects of the [*Canadian Human Rights*] *Act* which express Parliament's intent; it is interpreted liberally giving the right enunciated full recognition and effect, and it is in keeping with previous decisions in related human rights and labour forums as well as relevant jurisprudence": Federal Court Judge's reasons at para. 70.

[28] The Federal Court Judge also found that the test used by the Tribunal for finding a *prima facie* case of discrimination was reasonable, as well as the application of that test to the

circumstances of Ms. Seeley. In so doing, he specifically discarded the "serious interference" test used in *Campbell River*.

[29] Turning to CN's submissions concerning its duty to accommodate, the Judge concluded that the Tribunal's finding that CN had failed to meet the third part of the *Meiorin* test was reasonable. The Federal Court Judge noted that CN never responded to Ms. Seeley's requests for accommodation, did not consider family status involving childcare obligations as requiring accommodation, and failed to meet the procedural component of the duty to accommodate: Federal Court Judge's reasons at para. 106.

[30] With respect to CN's submissions on the issue of "super seniority" and the terms of the collective agreement, the Federal Court Judge found these to be valid questions, but that they were not engaged in this case since CN had never raised the question with the Union before terminating the employment of Ms. Seeley: Federal Court Judge's reasons at paras. 108 and 109.

[31] Furthermore, the Federal Court Judge also found that the Tribunal had a sufficient basis to reasonably conclude that CN's conduct in this case was reckless, and consequently he upheld the Tribunal's award of special damages.

Issues raised in appeal

[32] The issues raised in this appeal may be set out as follows:

1. What is the applicable standard of review?

2. Did the Tribunal commit a reviewable error in finding that family status includes childcare obligations and in identifying the legal test for finding a *prima facie* case of discrimination on the ground of family status?

3. Applying the proper meaning and scope to family status, and using the proper legal test, did the Tribunal commit a reviewable error in finding that a *prima facie* case of discrimination on the ground of family status had been made out in this case?

4. Did the Tribunal commit a reviewable error in finding that CN had not met the *Meiorin* test in this case?

5. Did the Tribunal commit a reviewable error in ordering special compensation under subsection 53(3) of the *Canadian Human Rights Act*?

[33] The first two issues identified above have been extensively dealt with in the reasons for judgment released concurrently in *Johnstone*.

The standard of review

[34] As noted in *Johnstone*, in an appeal from a judgment concerning a judicial review application, the role of this Court is to determine whether the application judge identified and applied the correct standard of review, and in the event he or she has not, to assess the decision under review in light of the correct standard. In effect, this means that an appellate court's focus is on the administrative decision, in this case, the decision of the Tribunal. The application judge's selection of the appropriate standard of review is itself a question of law subject to review on the standard of correctness.

[35] There is no dispute that the findings of the Tribunal with respect to questions of fact and of mixed fact and law are to be reviewed on a standard of reasonableness. However, there is disagreement as to the standard of review that applies to findings of law made by the Tribunal with respect to (a) the meaning and scope of family status as a prohibited ground of discrimination and (b) the applicable legal test under which a finding of discrimination may be made under this prohibited ground.

[36] For the reasons extensively set out in *Johnstone*, the presumption of reasonableness that applies to the decisions of the Tribunal is rebutted and a standard of correctness is to be applied with respect to these two legal issues. This results notably from the following:

(a) the Supreme Court of Canada has consistently held that fundamental rights set out in human rights legislation are quasi-constitutional rights, and the principle that constitutional issues are subject to a correctness review extends as well to quasi-constitutional issues involving the fundamental human rights set out in the *Canadian Human Rights Act*;

(b) a multiplicity of courts and tribunals are called upon to interpret and apply the rights set out in human rights legislation, including the *Canadian Human Rights Act*, and it would be inconsistent to review the legal questions at issue here on judicial review of a decision of the Tribunal on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court of first instance on the same legal question;

(c) since most provinces have adopted human rights legislation that prohibit discrimination on the basis of family status, for the sake of consistency between these

statutes, the meaning and scope of family status and the legal test to find discrimination on that prohibited ground are issues of central importance to the legal system;

(d) the Supreme Court of Canada has determined in the past that a correctness standard applies to the meaning and scope of family status under the *Canadian Human Rights Act*, and it should be left to the Supreme Court of Canada itself to determine if this approach has been implicitly overruled by its more recent decisions dealing with the standard of review.

The meaning and scope of family status and the test for *prima* facie discrimination

[37] Contrary to the appellant in *Johnstone*, in this appeal CN does not dispute that the scope of the prohibited ground of family status is wide enough to encompass parental obligations such as childcare obligations.

[38] CN rather submits that the "issue raised by the instant appeal is when a parental obligation gives rise to a *prima facie* discrimination and requires accommodation", and the "resolution of this issue requires an appreciation of the nature of parental obligations": CN's memorandum at para. 40. In CN's view, "non-mandatory aspects of child-rearing do not fall within the scope of a parental obligation and are not protected by human rights law": *ibid.* at para. 41.

[39] CN further adds that there are a number of ways parents can meet both their professional obligations to their employer and their parental obligations, including care of the children by one of the spouses, by other family members, by daycare services, by nannies and by other

appropriate options. As a result, CN submits that family status discrimination on the basis of childcare obligations does not occur unless no reasonable childcare option is available without accommodation in the workplace: CN's memorandum at para. 48.

[40] CN thus submits that the test to establish a *prima facie* case of discrimination on the basis of family status involving childcare obligations requires the claimant to establish (1) that a parental obligation is at issue, as opposed to a preferred option for meeting that obligation; (2) that a causal connection exists between the parental obligation and any adverse employment consequences; (3) that the claimant has made all reasonable efforts to meet the parental obligation, but is unable to meet it without some form of accommodation in the workplace; and (4) that the facts of the case demonstrate arbitrariness or the perpetuation of prejudice or stereotyping: CN's memorandum at para. 57.

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

[42] As further found in *Johnstone*, in order to make out a *prima facie* case where an alleged workplace discrimination on the prohibited ground of family status resulting from a childcare obligation is alleged, the individual advancing the claim must show (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 that childcare obligation 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.

[43] These factors are all further explained in *Johnstone* and need not be reviewed again here.

Application to the circumstances of Ms. Seeley

[44] There is no fundamental dispute that Ms. Seeley meets the two first factors of the test for a *prima facie* case of discrimination. She was the mother of two young children at the time she was called to Vancouver, and these children were under her care and supervision and that of her husband. She and her husband had a legal responsibility to ensure that their children would be cared for and supervised while they were away at work.

[45] The dispute in this case concerns the two last factors, namely whether Ms. Seeley made reasonable efforts to meet her childcare obligations through reasonable alternative solutions, and that no such alternative was reasonably accessible, and whether her recall to cover the shortage

in Vancouver interfered in a manner that was more than trivial or insubstantial with the fulfillment of her childcare obligations.

[46] CN submits that by moving to the hamlet of Brule, Alberta, Ms. Seeley placed herself in a situation where no childcare services could be accessed so as to meet her obligations to her employer. This, in CN's view, was a personal family choice. CN further submits that Ms. Seeley decided that she would not bring her children to Vancouver during her work assignment there. As a result, according to CN, Ms. Seeley "did not discern between childcare options, but rather sought to enforce her preferred option: an outright exemption from her Collective Agreement obligation to protect shortages": CN's memorandum au para. 60.

[47] CN further submits that "[a]s [Ms.] Seeley made no effort to explore childcare options in Vancouver or in Brule (or nearby Jasper or Hinton, Alberta), she failed to establish a causal connection between her failure to report to Vancouver (and consequent termination) and her parental obligations": *ibid.* at para. 62. As a result, "[h]ad the Tribunal undertaken the proper analysis mandated by the case law, it would have recognized the complete lack of evidence of any effort by [Ms.] Seeley to meet her parental obligations in a way that would allow her professional obligations to be met": *ibid.* at para. 63.

[48] CN also submits that the evidence before the Tribunal was not capable of supporting a finding of arbitrariness, prejudice or stereotyping since the only disadvantage suffered by Ms. Seeley was the termination of an exceptional benefit in the form of continued access to recall

opportunities eight years after being laid off, when the condition of this benefit, accepting such opportunities when offered, was no longer satisfied: CN's memorandum at paras. 69 to 72.

[49] It adds that the Tribunal erred in placing considerable weight on the finding that CN did not believe that Ms. Seeley's situation required accommodation and did not attempt to accommodate her. In CN's view, this reasoning is problematic in that human rights law does not recognize a freestanding duty to accommodate before a *prima facie* case of discrimination has been established: CN's memorandum at paras. 74 to 76.

[50] The fundamental problem with CN's submissions is that none of its managers provided any useful information to Ms. Seeley about her work assignment in Vancouver that would have allowed her to assess her childcare needs. In fact, CN did not respond in a substantive way to any of her numerous inquiries. Indeed, on February 25, 2005, a CN representative left a message with Ms. Seeley's husband stating that she was being forced to cover a shortage in Vancouver and to report for duty in Vancouver within two weeks. This was the only information CN ever provided to Ms. Seeley: Tribunal's decision at paras. 44-45, 60 to 62 and 123.

[51] CN never provided Ms. Seeley information about the estimated duration of her recall to Vancouver, about the location in Vancouver to which she would be assigned, about her shifts once assigned to Vancouver, about the housing accommodation that would be made available to her in Vancouver, or any other pertinent information that would have assisted her in reasonably assessing whether her required childcare needs could be fulfilled while responding to the recall.

As a result, taking Ms. Seeley's children with her to Vancouver became an unrealistic option because she had no idea where, when or for how long she would be working in Vancouver.

[52] In these circumstances, the Tribunal found that a *prima facie* case of discrimination had been made out, and the Federal Court Judge concluded that this finding was reasonable. In this regard, I agree with the assessment of the Federal Court Judge set out at paragraph 90 of his reasons:

> [90] I would agree that by any standard, Ms. Seeley has provided evidence of a *prima facie* case of discrimination based on family status. She is the primary caregiver for two children of tender age. Her husband works full time and is the family breadwinner. The choice of residence in Brule was not an issue previously and Ms. Seeley's evidence indicates she considered whether childcare was available in nearby Hinton. CN never provided information necessary to explore whether childcare options were available or feasible in Vancouver. A realistic assessment of Ms. Seeley's familial circumstances does disclose she would have significant difficulty in fulfilling her childcare responsibilities in responding to an indefinite recall assignment to cover the Vancouver shortage.

[53] As for the fourth factor, it seems obvious that requesting Ms. Seeley to move from Alberta to British Columbia to meet a work shortage is a work related situation that interferes in a manner that is more than trivial or insubstantial with the fulfillment of Ms. Seeley's childcare obligations.

[54] In these circumstances, like the Federal Court Judge, I would not disturb the Tribunal's finding that Ms. Seeley met her burden of establishing a *prima facie* case of discrimination. This may well have been a different conclusion had CN actually provided Ms. Seeley with pertinent information about her new work arrangements in Vancouver, but it did not.

Duty to accommodate

[55] Once a *prima facie* case of discrimination has been made out, the burden shifts to the employer to demonstrate that the impugned standard or action is a *bona fide* occupational requirement (BFOR). The Supreme Court of Canada provided the following test for this purpose at paras. 54 and 55 of *Meiorin*:

> [53] Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> > (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.
>
> [55] This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool, supra*, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.

[56] In this case, the Tribunal found that CN had met the first two parts of the *Meiorin* test. However, it also found that CN had not met the third part since it concluded that CN had failed to demonstrate that accommodating Ms. Seeley would cause undue hardship.

[57] CN submitted to the Tribunal, and it reiterates in this appeal, three distinct arguments to support its argument with respect to having met its duty to accommodate.

[58] First, in CN's view, extending the date that Ms. Seeley was required to report to Vancouver by a few months to June 30, 2005 was a sufficient and reasonable accommodation in the circumstances. The Tribunal rejected this submission on the ground that this "was not in any way a meaningful response to the Complainant's request and to the factual underpinnings of her situation which she had communicated to the employer through her correspondence": Tribunal's reasons at para. 145. I agree.

[59] As the Tribunal found, at paras. 150 and following of its decision, CN was not sensitive to Ms. Seeley's situation, did not answer her requests, and did not consider family status matters that involve parental obligations as a ground of discrimination that necessitated any form of accommodation whatsoever.

[60] Second, CN adds that, in any event, the duty to accommodate does not extend to a complete exemption from Ms. Seeley's obligation to report to work under the terms of the collective agreement. Though I recognize that the duty to accommodate usually results in an accommodation allowing the employee to actually participate in work related activities, each case must be considered in light of its particular circumstances.

[61] CN had accommodated other running trade employees who had been recalled to Vancouver with Ms. Seeley. As an example, an employee identified as AB was "set up" at the

Sioux Lookout terminal. By being "set up" at his home terminal, he was no longer required to cover the shortage in Vancouver: Tribunal's decision at para. 49. Similarly, an employee identified as U was accommodated in various manners (extension of time to report, leave of absence, and "set up" at his home terminal) so as to attend to his father who was terminally ill: Tribunal's decision at paras. 50 to 57 and 130.

[62] It is abundantly clear from these examples that various forms of accommodation were provided by CN to other employees that were not offered to Ms. Seeley nor even contemplated in her case. In light of these circumstances, CN's submissions on this point are rather hollow.

[63] Third, CN submits that seniority rights under the collective agreement were ignored by the Tribunal, a submission that was identified as the "super seniority" argument by both the Tribunal and the Federal Court Judge. The Tribunal rejected this submission on the basis that CN had failed to submit evidence that an accommodation for Ms. Seeley would have caused any undue hardship for CN or its employees with more seniority: Tribunal's decision at paras. 166 to 173. The Federal Court Judge added that CN never raised this question with the Union before dismissing Ms. Seeley, and it was therefore precluded to raise this issue after the fact: Federal Court Judge's reasons at para. 109.

[64] In this matter, I agree with both the Tribunal and the Federal Court Judge. I add that seniority and other collective labour agreement provisions do not normally constitute an impediment to an accommodation required under human rights legislation: *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525 at p. 551; *McGill University Health*

Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4, [2007] 1 S.C.R. 161 at paras. 11 to 28.

Special Compensation

[65] In this appeal, CN is not challenging any of the remedies granted by the Tribunal except with respect to the amount of $20,000 for special compensation under subsection 53(3) of the *Canadian Human Rights Act*, which reads as follows:

> **53**. (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.
>
> **53**. (3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

[66] CN submits that the Tribunal's finding of reckless conduct in this case was not supported by the evidence. CN argues that at the time it made its decisions concerning Ms. Seeley, *Campbell River* was the only appellate decision concerning the scope of the prohibited ground of discrimination of family status, and that the cases on which the Tribunal relied to support a broader interpretation of family status had not been rendered by the time Ms. Seeley was terminated on July 4, 2005. In CN's view the "failure to abide by a jurisprudential current that did not yet exist is not representative of reckless behaviour": CN's memorandum at para. 117.

[67] CN adds that the Tribunal's conclusion of recklessness was based on its finding that CN had not applied its internal accommodation guidelines to Ms. Seeley. In CN's view, it "is

difficult to imagine why CN would have done so, when the state of the law at the relevant time provided no indication that [Ms.] Seeley's circumstances might have amounted to *prima facie* discrimination": CN's memorandum at para. 118.

[68] The Federal Court Judge rejected these submissions on the basis that CN "steadfastly ignored the basis for Ms. Seeley's request for accommodation despite [that] available jurisprudence recognized childcare as within the scope of human rights based on family status.": Federal Court Judge's reasons at para. 113. I agree with the Federal Court Judge on this matter, and add that the failure by CN to provide any significant information to Ms. Seeley concerning her assignment to Vancouver that could have assisted her in determining her childcare needs was, in any event, a form of reckless conduct.

Conclusion

[69] I would therefore dismiss this appeal, with costs to be paid by CN in favour of Ms. Seeley. There should be no award of costs for or against the respondent Canadian Human Rights Commission or any of the interveners.

"Robert M. Mainville"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-90-13
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MANDAMIN DATED FEBRUARY 1, 2013 DOCKET NO. T-1775-10	
STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v. DENISE SEELEY and CANADIAN HUMAN RIGHTS COMMISSION and FEDERALLY REGULATED EMPLOYERS - TRANSPORTATION AND COMMUNICATION and ONTARIO HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 12, 2014
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	PELLETIER J.A. SCOTT J.A.
DATED:	MAY 2, 2014

APPEARANCES:

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