Federal Court of Appeal  Cour d'appel fédérale

Date: 20170822

Docket: A-298-16

Citation: 2017 FCA 171

CORAM: **TRUDEL J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

RANDI BODNAR, BONITA EBELHER, KENDRA HALDORSON, RON HARRISON, GALLAGHER KEOUGH, MANDELLE MITCHELL-HIMLER, KEVIN WILLIAMS and CANDICE WESTBURY

Respondents

Heard at Ottawa, Ontario, on May 9, 2017.

Judgment delivered at Ottawa, Ontario, on August 22, 2017.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this application for judicial review, the applicant seeks to set aside the August 9, 2016 decision of the Public Service Labour Relations and Employment Board (the PSLREB or the Board) in *Bodnar et al. v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 71

[Reasons]. In that decision, the Board allowed the respondents' grievances and found that the employer had discriminated against them in the application of its National Attendance Management Policy (NAMP) by including in the calculations required under the NAMP absences due to a disability or for which family-related leave had been granted under the applicable collective agreement. The PSLREB determined that so doing amounted to discrimination based on family status and disability and thus violated the anti-discrimination article in the collective agreement between the employer and the respondents' bargaining agent. By way of remedy, the PSLREB awarded the respondents damages under paragraph 53(2)(*e*) and subsection 53(3) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA) and also issued a declaration that the employer's NAMP violated the anti-discrimination provision in the collective agreement.

[2] For the reasons that follow, I believe that the Board made reviewable errors in reaching these conclusions. I would accordingly grant this application with costs, set aside the decision of the PSLREB and remit the respondents' grievances to a differently-constituted panel of the Board for re-determination in accordance with these reasons.

I. Background

[3] The respondents were employees of Correctional Service Canada (CSC), employed at the Bowden Institution, where they held various positions in the Program and Administrative Services bargaining unit represented by the Public Service Alliance of Canada. At all relevant times, the applicable collective agreement provided for both sick leave and leave with pay for family-related responsibilities. The agreement also contained an anti-discrimination provision.

[4] In terms of sick leave, article 35.01 of the collective agreement provided that full-time employees earned sick leave credits at the rate of a day and a quarter a month. Entitlement to take sick leave was governed in part by articles 35.02 and 35.03:

> 35.02 An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:
>
> (a) he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer;
>
> and
>
> (b) he or she has the necessary sick leave credits.
>
> 35.03 Unless otherwise informed by the Employer, a statement signed by the employee stating that, because of illness or injury, he or she was unable to perform his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 35.02(a).

[5] Article 43 of the collective agreement established an entitlement to 37.5 hours of paid leave per year for leave for family-related reasons. Such leave could be taken for a variety of reasons, including situations that do not arise from family status responsibilities that are accorded protection under the CHRA. For example, under clause 43.03(e), employees were entitled to up to 7.5 hours of paid leave per year to attend school functions or appointments with their legal or financial advisors. Similarly, leave entitlements were granted under the article in respect of any relative residing with the employee and could be used for such things as attending a medical or dental appointment with such individuals, regardless of whether it was necessary for the employee to accompany the individual. As is more fully discussed below, these sorts of absences are not the type that an employer must accommodate under the CHRA.

[6] Finally, article 19.01 of the collective agreement incorporated several of the protections afforded by the CHRA into the collective agreement and provided in relevant part that "[t]here shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of […] family status, mental or physical disability […]".

[7] In October 2011, CSC launched the NAMP due to concerns about excessive employee absenteeism. The NAMP was a unilaterally-promulgated employer policy. It was intended to be non-disciplinary, to be used as a tool to assist employees in maintaining adequate attendance levels and to help identify, as early as possible, situations where employees might require accommodation by CSC. Under the NAMP, supervisors were required to note circumstances that might give rise to concern, such as suspicious patterns of absenteeism (like taking excessive Mondays or Fridays off or reporting sick after a leave request had been refused for the day in question). Supervisors were also required to flag situations when employees' total hours of absence exceeded the average for their peer group over a rolling 12-month period. When a situation giving rise to a concern arose or the average was exceeded, the NAMP required supervisors to make inquiries to be satisfied as to the legitimacy of the absences. If the absences were culpable, they would not be dealt with under the NAMP but rather would give rise to a disciplinary response. Similarly, if absences were caused by situations requiring accommodation, no further action under the NAMP was to be taken.

[8] In the event further follow-up was required, the NAMP provided for cases to be forwarded to the local NAMP coordinator – the Assistant Warden in the case of the Bowden

Institution – for further inquiry. Employees were entitled to have a union representative present with them when attending a meeting with the NAMP coordinator. Following the meeting, the NAMP coordinator could determine that no further action was required or could take a variety of other actions, including documenting the issues in an employee's file, imposing a requirement for medical certificates for further absences due to illness or taking progressively more severe actions that could ultimately lead to termination.

[9] All of the respondents in the instant case had absenteeism records that exceeded the applicable group average, and in 2013 their situations were reviewed under the NAMP by their supervisors and thereafter by the NAMP coordinator. In several cases, the coordinator insisted on meeting the employees – even though their supervisors had validated the reasons for the absences – as the program was a new one and the coordinator wished to ensure that it was being applied appropriately. In all cases except one, the coordinator determined that no further action was required under the NAMP. In Ms. Ebelher's case, the coordinator determined that further action was required as Ms. Ebelher steadfastly refused to discuss her situation with management, taking the position that all she was required to do was to furnish a medical certificate to substantiate some of her absences. In light of this refusal, the NAMP coordinator required that Ms. Ebelher provide medical certificates for all absences due to illness for a period of three months.

[10] In some cases, the respondents' absences were caused by medical situations that would constitute a disability under the CHRA, which extends protection for disabling illnesses and injury other than those that are trivial and transient, like the common cold: *Riche v. Treasury*

Board (Department of National Defence), 2013 PSLRB 35 at paras. 130-131 and, more generally, Honourable Justice Russel W. Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, Thomson Reuters Canada, Release No. 32, May 2017 at paras. 5:30 and 5:30.1. In other cases, it appears that the employees may not have provided enough information to determine if their absences due to illness were caused by a disability. In addition, some of the respondents took time off as family-related leave to care for children or to care for or take elderly and disabled family members to medical appointments.

[11] The respondent employees filed grievances, alleging that the NAMP and its application to them violated articles 19, 35 and 43 of the collective agreement. The PSLREB conducted a hearing over the course of three days into the grievances and issued its decision on August 9, 2016.

II. The Decision of the PSLREB

[12] The portions of the PSLREB's decision relevant to this application for judicial review involve the Board's treatment of the respondents' discrimination allegations. In dealing with this issue, the PSLREB principally considered the question of whether the respondents had established a *prima facie* case of discrimination. The Board noted that a *prima facie* case will be made out by a grievor where he or she makes an allegation that, if believed, would justify a finding in the employee's favour in the absence of an answer from the employer (Reasons, para. 141). The PSLREB also held that the elements of a *prima facie* case involve showing a connection between a prohibited ground of discrimination and the "distinction, exclusion or preference" a grievor complains of (Reasons, para. 142). In applying the foregoing test, the

PSLREB concluded that the group average thresholds established under the NAMP and the way in which individual employee absences were counted under the NAMP constituted a *prima facie* case of discrimination for two reasons.

[13] First, the PSLREB held that it was *prima facie* discriminatory to include absences for family-related leave in the calculation to set the NAMP group average threshold and in the compilation of an individual employee's absences to ascertain whether he or she exceeded the relevant group threshold. In reaching this conclusion, the Board drew no distinction between those absences that might arise from family status responsibilities that are accorded protection under the CHRA and those that are not accorded such protection, but for which an employee would nonetheless be entitled to paid leave under article 43 of the collective agreement (Reasons, paras. 145-149).

[14] Secondly, the PSLREB concluded that the inclusion of absences caused by a disability in the group average threshold under the NAMP and counting such absences in an employee's absenteeism level to determine if the NAMP threshold was exceeded likewise established a *prima facie* case of discrimination. The Board reached this conclusion even though the NAMP contemplated that if an employee were suffering from a disability requiring accommodation no further action under the NAMP should be taken after this need was identified. The PSLREB pointed to the fact that meetings were held with the NAMP coordinator (at which a union representative could be present) as well as the fact that the coordinator compiled notes of these meetings as *indicia* of the discriminatory nature of the employer's conduct, noting that the employer "left no room for an assessment on an individual basis, regardless of the reasons for the

lack of attendance" (Reasons, para. 161). However, these actions had nothing to do with the way in which the group average threshold or individual employee absence numbers were calculated under the NAMP.

[15] After determining that the respondents had made out a *prima facie* case of discrimination, the Board held that the employer had not discharged its burden of justifying the situation as it called no evidence to establish a *bona fide* occupational requirement defence (Reasons, para. 157). The Board also concluded that the employer was justified in imposing on Ms. Ebelher the three month requirement to provide medical certificates to justify absences due to illness in light of her failure to cooperate in the accommodation process (Reasons, paras. 155-156).

III. The Issues

[16] The parties raise three issues.

[17] First, they differ as to the standard of review to be applied. The applicant says that correctness applies to review the legal determinations made by the PSLREB concerning the requirements for a *prima facie* case of discrimination and that the reasonableness standard applies only to the review of the determinations of fact or of mixed fact and law made by the PSLREB. The respondents, on the other hand, argue that the reasonableness standard applies to the review of the entirety of the Board's decision.

[18] Second, they differ as to whether the Board committed a reviewable error in finding a *prima facie* case of discrimination to arise merely from the inclusion of certain types of absences

in the calculations under the NAMP. The applicant says that in so doing the Board erred as one of the necessary pre-conditions for a *prima facie* case is the presence of some sort of adverse treatment by the employer. The applicant asserts that there was no such adversity in the present case as nothing adverse flowed from the way in which the NAMP group average thresholds were calculated or from the inclusion of disability or family leave-related absences in totalling the respondents' absences to see if they exceeded the threshold. The applicant therefore says that it was unreasonable for the Board to have found *prima facie* discrimination in the absence of any adverse impact on the employees. The respondents, on the other hand, assert that there was a reasonable basis for the Board to have reached the conclusions it did, particularly in light of that fact that the NAMP coordinator chose to meet with all the respondents and to document their situations in notes to file even though, in many cases, their supervisors were satisfied that no further action was required.

[19] Finally, the applicant says that the PSLREB erred in conflating family-related leave under the collective agreement with the sorts of leave that an employee might be entitled to insist he or she be granted under the CHRA by reason of family status responsibilities. The applicant notes in this regard that in *Johnstone v. Canada (Border Services)*, 2014 FCA 110, 372 D.L.R. (4th) 730 [*Johnstone*], *Canadian National Railway Co. v. Seeley*, 2014 FCA 111, 458 N.R. 349 [*Seeley*] and *Flatt v. Canada (Attorney General)*, 2015 FCA 250, 479 N.R. 309, leave to appeal to SCC refused [2016] C.S.C.R. No. 8 [*Flatt*] this Court held that to establish a *prima facie* case of discrimination based on family status responsibilities, a claimant must establish four factors: (1) a family member is under his or her care and supervision; (2) the family obligation at issue engages the individual's legal responsibility for the family member as opposed to personal

choice; (3) the claimant has made reasonable efforts to meet the family obligation through another solution and no alternate solution to granting the requested leave is available; and (4) the workplace rule in issue interferes in a manner that is more than trivial or insubstantial with the fulfilment of the family obligation (applicant's memorandum of fact and law, para. 17). The applicant says that many of the situations contemplated under article 43 of the collective agreement do not meet the forgoing criteria and, thus, it was an error to conclude that counting all such leave in the NAMP gives rise to *prima facie* case of discrimination based on family status.

[20] While the respondents do not contest that there is a difference between family-related leave under the collective agreement and leave that an employee might be entitled to insist on receiving in conformity with the employer's obligations to accommodate family status needs under the CHRA, they contend that nothing turns on this distinction in the present case as the PSLREB was alive to this distinction and the respondents were, in any event, entitled to the family-related leave they took under both the CHRA and the collective agreement.

IV. Analysis

A. *What standards of review are applicable?*

[21] Turning, first, to the standard of review issue, the majority of the Supreme Court of Canada recently confirmed in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at paras. 19-22, 39 C.C.E.L. (4th) 1 [*Elk Valley Coal*] that the reasonableness standard of review applies to a human rights tribunal's assessment of whether a *prima facie* case of discrimination is made out

if, in conducting the assessment, the tribunal applies the well-established test for a *prima facie* case. In *Elk Valley Coal* at paragraph 24, the Supreme Court noted that this test requires three things: first, that complaints show they have a characteristic protected from discrimination under the applicable human rights statute; second, that they show that they experienced adverse impact and; finally, that they establish that "the protected characteristic was a factor in the adverse impact". In my view, these principles apply equally to cases where it is a labour adjudicator who addresses the human rights issues.

[22] In light of the foregoing as well as the decisions of this Court in *Johnstone* and *Seeley*, where this Court applied correctness to review of the definition of family status discrimination under the CHRA, I concur with the applicant that the correctness standard applies to those portions of the Board's decision setting out the test for what constitutes a *prima facie* case of discrimination whereas the reasonableness standard applies to the review of the balance of the decision. Thus, the reasonableness standard of review applies to the second issue whereas the correctness standard applies to the third.

[23] More specifically, the second issue, concerning the Board's finding of a *prima facie* case of discrimination, engages the reasonableness standard of review because the applicant is contesting the way in which the PSLREB applied the test for a *prima facie* case to the facts before it. A similar challenge to the tribunal's reasoning was made by the employer in *Elk Valley Coal*, and the majority of the Supreme Court of Canada held that the reasonableness standard applied.

[24] Conversely, in the third issue, the applicant asserts that the PSLREB applied the incorrect legal test for a *prima facie* case of family status discrimination, arguing that the PSLREB ignored the applicable test from *Johnstone*, *Seeley* and *Flatt* and instead concluded that any absence under article 43 of the collective agreement, regardless of the reason for it, could give rise to a *prima facie* case of discrimination. The applicant says that in so doing the PSLREB erroneously extended human rights family status protection beyond the bounds established by this Court. The third issue therefore calls for this Court to engage in correctness review to ascertain if the PSLREB applied the correct legal test for family status discrimination.

B. *Was the Board's finding concerning a prima facie case of discrimination reasonable?*

[25] Having identified the standards of review to be applied, I turn now to the second issue, namely, the reasonableness of the Board's finding that the respondents established a *prima facie* case of discrimination. In assessing this issue, I am mindful of the caution of the majority of the Supreme Court in *Elk Valley Coal* that reviewing courts must actually provide deference to expert tribunals' conclusions regarding a *prima facie* case of discrimination. Writing for the majority, the Chief Justice noted in this regard at paragraph 27 in *Elk Valley Coal* that:

> […] Deference requires respectful attention to the Tribunal's reasoning process. A reviewing court must ensure that it does not only pay "lip service" to deferential review while substituting its own views: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 48. If the decision is within a "range of possible, acceptable outcomes" which are defensible in respect of the evidence and the law, it is reasonable: *Dunsmuir*, at para. 47; see also *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16.

[26] Even with such deference, I believe that the PSLREB's decision must nonetheless be set aside because the Board ignored one of the essential pre-requisites for a *prima facie* case of

discrimination, namely, proof of adverse impact by a claimant, and unreasonably found that the respondents had made out a case of *prima facie* discrimination in the absence of any proof of adversity.

[27] More specifically, as noted, the Board found that the mere fact of including absences due to a disability or for family-related leave in the group average threshold for the NAMP and in the calculation of an employee's total number of absences was *prima facie* discriminatory. It was this finding that allowed the Board to issue the declaration that the NAMP violated article 19 of the collective agreement.

[28] However, nothing adverse flowed from the inclusion of such absences in the group average threshold under the NAMP as this is merely the number to which individual employees' statistics were compared. There is nothing discriminatory, *per se*, in including these sorts of absences in a group average under an attendance management plan, and this sort of calculation has been sanctioned in other cases where the plan made it clear that the employer would accommodate to the point of undue hardship absences occasioned by a disability: see, for example, *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111*, 2010 BCCA 447 at paras. 67-69, 298 B.C.A.C. 1 [*Coast Mountain Bus*]; *York University v. York University Staff Association*, 2012 CanLII 41233 (Ont. Labour Arbitration) at paras. 20-39 [*York University*]; *Spartech Color (Stratford) and IAM & AM, Local 103 (Attendance), Re*, [2008] O.L.A.A. No. 381 at paras. 51-52, 94 C.L.A.S. 168 [*Spartech*]; *Ottawa (City) v. Ottawa Carleton Public Employees Union, CUPE Local 503*, [2008] O.L.A.A. No. 207 at paras. 78, 79 and 87 (Q.L.); *Oshawa (City) v.*

C.U.P.E., Local 250, [1996] O.L.A.A. No. 31 at paras. 15, 28, 31-38, 44 C.L.A.S. 138 [*City of Oshawa*].

[29] Indeed, it is difficult to imagine how an attendance management plan such as the NAMP could ever function if an employer were required to subtract all absences due to disability from the group average as the reasons for an absence are not always immediately apparent, and employees' medical conditions may well evolve and worsen from a transitory illness to a disability. It is thus difficult to conceive how a bright line could be drawn in a timely way between absences due to disability and those due to other reasons for purposes of calculating a rolling twelve month group average absence rate.

[30] Thus, as there was nothing adverse in including absences due to disability or for family-related leave in the group average for purposes of establishing the relevant threshold under the NAMP, the PSLREB's decision was unreasonable as the presence of adversity is an essential component of a *prima facie* case of discrimination.

[31] Likewise, nothing adverse flowed under the NAMP from including absences due to disability or for family-related leave in the total number of days an employee was absent for purposes of simply determining if the employee exceeded the relevant peer group threshold. Under the NAMP (at least as it was written), all that was to transpire, once the threshold was exceeded, was that the supervisor was required to be satisfied as to the legitimacy of the absences and to identify, where possible, situations where an accommodation was required, as would be the case if the absences were occasioned by a disability or if the employee were

entitled to leave to address family-related responsibilities accorded protection under the CHRA. If accommodations were required, the employee was to be removed from the NAMP. Once again, at least at this initial stage of discussion with the supervisor, nothing adverse occurred. The mere identification of employees who exceed a group average threshold and initial discussions with them have been found to be permissible in other cases: see, for example, *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 67, [2008] 2 S.C.R. 362; *Coast Mountain Bus* at paras. 67-69; *Vancouver Public Library and CUPE, Local 391 (Bardos), Re*, [2015] B.C.C.A.A.A. No. 88 at para. 107, 124 C.L.A.S. 160; *York University* at paras. 37-38; *Spartech* at para. 51; *City of Oshawa* at paras. 31-38.

[32] I also note, as both parties agreed, that an employer has the right to monitor employee absences and to ensure that they are legitimate. In the case of sick leave, such right is indeed recognized in article 35 of the collective agreement, which makes receipt of sick leave conditional upon the employee having established that he or she is ill to the satisfaction of the employer, including by producing a medical certificate, if requested. Thus, there is nothing untoward in tasking supervisors with ensuring the legitimacy of employee absences.

[33] Therefore, there was nothing adverse in including absences due to disability or for family-related leave in the total number of absences simply for purposes of establishing whether an employee exceeded the relevant group threshold under the NAMP. In reaching the conclusion it did despite this, the PSLREB's decision was unreasonable as the presence of adversity is an essential component for a *prima facie* case of discrimination.

[34] That said, I would note that the foregoing should not be taken to mean that all decisions taken under the NAMP will necessarily be incapable of founding a *prima facie* case of discrimination. If and when an adverse action is taken by CSC, and if it is taken based on an employee's absence due to disability or because the employee took leave to address a family responsibility that is accorded protection under the CHRA, the employee would likely be able to make out a *prima facie* case of discrimination. Indeed, there might possibly be grounds to argue that such actions occurred in some instances in the present case due to the way in which the NAMP was applied as the NAMP coordinator insisted on meeting with all of the respondents and in making notes about their situations even though their supervisors were satisfied that there were legitimate grounds for the absences. However, rather than analyzing whether any of these actions gave rise to adversity and a *prima facie* case of discrimination, the Board instead concluded that the mere way in which absences were counted under the NAMP gave rise to a *prima facie* case of discrimination. As noted, this constitutes a reviewable error.

C. *Did the Board err in its treatment of family-status discrimination?*

[35] While the foregoing provides sufficient grounds for granting this application, it is useful to briefly address the third issue so the newly-constituted Board, to whom the case will be remitted, will have the benefit of this Court's views in the reconsideration.

[36] On the issue of family status discrimination, I agree with the applicant that there is a distinction between family-related leave under the collective agreement and leave based on family status that an employee is entitled to receive accommodations in respect of under the

CHRA. The former is considerably wider than the latter, and in the decision under review the PSLREB committed a reviewable error in conflating the two.

[37] As noted in *Johnstone*, *Seeley* and *Flatt*, family status protection under the CHRA – and the corresponding obligation of the employer to grant leave – is circumscribed by the four criteria listed above in the case of leave to care for minor or disabled children. It may well be that these criteria would need to be nuanced somewhat in the case of elder care responsibilities as there might be a practical and moral need to provide urgently needed care for a disabled parent or to take them to medical appointments as opposed to a legal requirement to do so as would exist in the case of a child. However, in either case, the scope of rights receiving protection under the CHRA is significantly narrower than the situations covered by article 43 of the collective agreement. Thus, in ascertaining whether discrimination has occurred, the Board should have regard to only those situations where the employee is entitled to claim a right to the leave under the CHRA based on his or her family status responsibilities.

V. Proposed Disposition

[38] It therefore follows that I would allow this application for judicial review with costs. Given that the errors identified are interwoven throughout the whole decision and that a re-

hearing is unlikely to be lengthy given the short duration of the first hearing, I believe that the wisest and fairest course is to set aside the decision in its entirety and to remit the respondents' grievances to a newly-constituted panel of the PSLREB for re-determination in accordance with these reasons.

"Mary J.L. Gleason"

J.A.

"I agree.
Johanne Trudel J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Sean F. Kelly	FOR THE APPLICANT
David Yazbeck	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPLICANT
Raven, Cameron Ballantyne & Yazbeck LLP Barristers & Solicitors Ottawa, Ontario	FOR THE RESPONDENTS