Date: 20070116

Docket: T-1523-05

Citation: 2007 FC 36

Ottawa, Ontario, January 16, 2007

PRESENT: THE HONOURABLE MR. JUSTICE ROBERT L. BARNES

BETWEEN:

FIONA JOHNSTONE

Applicant(s)

and

ATTORNEY GENERAL OF CANADA

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Fiona Johnstone, is a Customs Inspector employed with the Canada Border Services Agency (CBSA) since 1998. She works at the Pearson International Airport (Pearson) in Toronto. Her husband also works at Pearson as a Customs Superintendent.

[2] The normal scheduling for Customs employees at Pearson involves rotating shifts providing 24-hour per day coverage. A full-time employee works 37.5 hours per week.

[3] In January, 2003, Ms. Johnstone, took maternity leave. She returned to work a year later. With both Ms. Johnstone and her husband working on differing shift schedules, it was essentially impossible for them to find a childcare provider with matching availability. In the result, Ms. Johnstone requested accommodation in the form of three fixed 12-hour shifts per week so that alternate childcare could be obtained while she was at work.

[4] For employees whose childcare responsibilities conflict with the rotating shift schedule, the CBSA accommodation policy provides for fixed shifts, but only up to 34 hours per week. In accordance with its policy, the CBSA responded to Ms. Johnstone's request for accommodation by offering fixed shifts of up to 4 days per week but not exceeding 10 hours per day to a maximum of 34 hours per week. When Ms. Johnstone considered the expenses required to attend at Pearson for a half day of paid employment, she concluded that the additional 4 hours of available work per week would not be cost-effective. For that reason she settled on three shifts per week of 10 hours each.

[5] Ms. Johnstone was not satisfied with the CBSA's policy which required that she accept part-time employment in return for obtaining fixed shifts. She made a complaint to the Canadian Human Rights Commission (Commission) arguing that the CBSA policy discriminated against her on the basis of family status. She also contended that the CBSA did not require all of its disabled employees to work on a part-time basis when accommodating their medical needs for fixed shifts.

[6] The Commission appointed an Investigator to review the circumstances of Ms. Johnstone's case. The Investigator conducted an investigation and recommended that the Commission appoint a

conciliator to pursue settlement of Ms. Johnstone's complaint and, failing settlement, she recommended the appointment of a Human Rights Tribunal to adjudicate the matter.

[7] The parties were allowed to respond to the Investigator's report and both of them did so. On October 11, 2005, the Commission dismissed Ms. Johnstone's complaint and it is from that decision that Ms. Johnstone seeks relief on this application for judicial review.

Investigator's Report

[8] The Investigator's Report contains a comprehensive review of the evidence considered. The Investigator's recommendation to the Commission to proceed with Ms. Johnstone's complaint was based on the following findings:

1. Ms. Johnstone required employment accommodation to address legitimate child care needs;
2. Ms. Johnstone was aware of the CBSA policy, which required employees seeking fixed shifts for family status reasons to accept part-time hours;
3. Ms. Johnstone requested that the CBSA accommodate her child care needs with three fixed 12-hour shifts per week;
4. The CBSA responded to Ms. Johnstone's proposal by imposing its policy of part-time employment not to exceed 34 hours per week;
5. Ms. Johnstone appears to have had no choice but to request and accept the CBSA offer of part-time employment in return for obtaining fixed shifts;

6. The CBSA policy on fixed shifts does not permit those requiring accommodation for non-medical needs to remain full-time employees and, in that regard, appears to differentiate between classes of employees who require accommodation;
7. The CBSA's argument that it had no duty to further accommodate Ms. Johnstone because she had failed to request full-time fixed shift employment was circular because its policy denied such accommodation;
8. The CBSA's evidence of operational concerns arising from a more liberal approach to fixed shift accommodation was an "impressionistic assumption".
9. The CBSA policy for family status accommodation may have an adverse impact on female employees because such requests are more often made by women than by men;
10. The CBSA policy on fixed shifts appears to have indirectly discriminated against Ms. Johnstone because she was "forced" to work part-time to accommodate her family situation; and
11. The relegation of Ms. Johnstone to part-time status may have a long-term negative impact on her pension entitlement.

[9] The Investigator also noted the potential importance of Ms. Johnstone's case for resolving similar future cases through the development of jurisprudence "surrounding the issue of accommodation based on family status".

The Commission's Decision

[10] The Commission rejected the recommendation of its Investigator and dismissed Ms. Johnstone's complaint. The Commission's letter to Ms. Johnstone provided the following rationale for its decision:

> - it is satisfied that the respondent accommodated the complainant's request for a static shift to meet her child care obligations;
>
> - the evidence shows that the complainant accepted the scheduling arrangement, and did not request full time hours; and
>
> - in view of the fact that that the respondent's policy permits employees in circumstances such as that of the complainant to be relieved from the obligation of working rotating shifts for 37.5 hours weekly, and to instead work static shifts for up to 34 hours weekly, the Commission is not convinced that the effect of the respondent's policy constitutes a serious interference with the complainant's duty as a parent or that it has a discriminatory impact on the basis of family status.

Issues

[11] The issue before me is whether the Commission erred by dismissing Ms. Johnstone's complaint at the screening stage. To decide that question, it is first necessary to conduct a functional and pragmatic assessment to identify the appropriate standard of review with respect to the issues raised by the Applicant.

Analysis

Standard of Review

[12] The Commission's decision to dismiss Ms. Johnstone's complaint at the screening stage was made in accordance with its statutory authority under section 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c H-6, as amended. This aspect of the Commission's jurisdiction has been the subject of considerable judicial attention and is fairly well defined. In *Bell v. Canada (Canadian Human Rights Commission)*; *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115, the Court described the Commission's screening role at para. 53 as follows:

> The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 899:
>
> > The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

It is clear from the above passage that the central task of the Commission at the screening stage is to weigh the sufficiency of the evidence to determine if a complaint should be referred to the next stage: also see *Coupal v. Canada (Attorney General)*, [2006] F.C.J. No. 325, 2006 FC 255 at para. 26.

[13] Although in *Bell Canada v. Communications, Energy and Paperworkers' Union of Canada*, [1999] 1 F.C. 113, [1998] F.C.J. No. 1609, the Federal Court of Appeal observed that a reviewing Court ought not to "intervene lightly" in a screening decision, it has also said that such a decision must have a discernable rational basis of support: see *Gee v. Canada (Minister of National Revenue)*, [2002] F.C.J. No. 12, 2002 FCA 4 at para. 13 and *Kidd v. Greater Toronto Airports Authority*, [2004] F.C.J. No. 859, 2004 FC 703 at para. 22 aff'd. [2005] F.C.J. No. 377, 2005 FCA 81. The Federal Court has also noted that a dismissal of a complaint at the screening stage "adds to the seriousness of the decision" and therefore justifies a careful review: see *Sketchley v. Canada (Attorney General)*, [2004] F.C.J. No. 1403, 2004 FC 1151 at para. 51. I would add that a decision by the Commission to dismiss a complaint without convincing reasons and contrary to the findings and recommendation of the Commission's investigator warrants a particularly careful review.

[14] In this case the Commission dismissed Ms. Johnstone's complaint on the basis that she had agreed to the CBSA's accommodation terms and because the impugned fixed shift policy was not discriminatory. The first of these issues is heavily fact-laden and the second raises an issue of law.

[15] Ordinarily the Commission's factual determinations are deserving of considerable judicial deference. This is reflected in the authorities and, most recently, in the *Sketchley* decision, [2005] F.C.J. No. 2056, 2005 FCA 404, which offers a comprehensive review of the pragmatic and functional analysis required to be applied to the Commission's screening decisions. The issue in *Sketchley* was one of law (ie. whether a particular employment policy was discriminatory), but the Court's detailed review of the pragmatic and functional factors is helpful to the standard of review analysis required in this case with respect to all of the Commission's grounds for dismissing Ms. Johnstone's complaint.

[16] The amount of deference that the Commission is owed for its factual conclusion that Ms. Johnstone had accepted the CBSA's accommodation terms is complicated in this case by its rejection of the contrary finding made by its Investigator. The Commission had to have drawn its own inference from the Investigator's factual findings to have reached such a conclusion and it is arguable that in so doing it was in no better position than the Court on judicial review. Nevertheless, I have concluded that a standard of reasonableness should be applied to this aspect of the decision in accordance with the decisions in *Gee*, above, at para. 13, *Gardner v. Canada (Attorney General)*, [2005] F.C.J. No. 1442, 2005 FCA 284 at para. 21, *MacLean v.* v. *Marine Atlantic Inc.*, [2003] F.C.J. No. 1854, 2003 FC 1459 at para. 42 and *Megerdoonian v. Canadian Imperial Bank of Commerce*, [2004] F.C.J. No. 1310, 2004 FC 1063 at para. 8.

[17] The Commission's decision that Ms. Johnstone had not established a *prima facie* case of discrimination was very much like the issue before the Court in *Sketchley*, above. In that case the Commission had dismissed a complaint at the screening stage by holding that the employer's policy

of differentiating between disabled employees was not *prima facie* discriminatory. That decision was described by the Court as one which turned on a particular and discrete question of law. This type of abstract legal analysis was said to attract less deference on judicial review than a question which was significantly fact-based. The Court also observed that where the Commission dismisses a complaint at the screening level it is making a final determination of rights and, when it does so on a point of law, the decision should be subject to a less deferential standard of review (see para. 80).

[18] In this case the Commission was not convinced that the loss of hours suffered by Ms. Johnstone brought about by the CBSA's fixed shift policy constituted "a serious interference" with her parental duties or that it had a discriminatory impact on the basis of family status. As in *Sketchley*, above, this characterization of the CBSA's employment policy as non-discriminatory was based on a discrete and abstract question of law and, as such, it is reviewable on the standard of correctness.

Did the Commission Err by Concluding that Ms. Johnstone Had Accepted the Accommodation Terms Proposed by the CBSA?

[19] The Commission's decision is obviously at odds with the Investigator's finding that Ms. Johnstone had no option but to request part-time employment in the face of the CBSA accommodation policy providing for fixed shifts in family status cases.

[20] The Investigator found that Ms. Johnstone had made inquiries and was aware of the CBSA policy which required that she assume part-time employment in return for fixed shifts. That was the established context in which she requested part-time work of three 12-hour shifts per week, was

offered 34 hours per week over 4 days and ultimately accepted 30 hours per week over 3 days. The Investigator declined to accept that this exchange represented a matter of choice by Ms. Johnstone but found, rather, that it was the simple imposition by the CBSA, and the reluctant acceptance by Ms. Johnstone, of the existing CBSA policy.

[21] In contrast, the Commission's decision states that the CBSA accommodated Ms. Johnstone's request for static shifts, that she accepted the scheduling arrangement and that she did not request full-time hours.

[22] The positions of the Investigator and the Commission are obviously not congruent and cannot be reconciled.

[23] The Commission's decision on this issue presents a number of problems. The Commission offers no reasons for coming to a different conclusion than the Investigator in the face of a substantial body of evidence supporting the Investigator's finding that Ms. Johnstone's decision to accept part-time work was essentially involuntary. It is also noteworthy that the CBSA never contended that the result might have been different had Ms. Johnstone simply requested full-time hours and, indeed, the CBSA's submissions to the Commission indicate that its fixed shift policy in family status cases had no built-in flexibility. Quite to the contrary, the Investigator noted that the CBSA had defended its policy by arguing "that only employees requiring medical accommodation can remain full-time employees while working on a static shift" and because its "operational needs require that its full-time staff work on shifts". The CBSA also argued that it would face a likely increase in sick-leave usage if it allowed employees to work a static shift and still retain their full-

time status. It seems to me that if the CBSA had been willing to deviate from its policy requiring part-time employment in return for fixed shifts it would have so advised the Investigator.

[24] The Commission's decision on this point seems to me to suffer from the same weaknesses that were of concern to the Court in *Moore v. Canada (Attorney General)*, [2005] F.C.J. No. 18, 2005 FC 13 and in *Kidd*, above, where Justice Richard Mosley observed at para. 22:

> 22 It should be noted that the Commission's decision in Maclean, supra, contradicted an investigator's report that favoured sending the applicant's complaints to further inquiry. The Court commented that it is well established that the Commission is not bound by an investigator's recommendation(s) and therefore, the Commission must be presumed to have considered such recommendation in reaching its decision. I do not dispute the Commission's authority to disagree with the recommendation of an investigator or that the Commission is presumed to have examined such report and recommendation. However, when the reasons disclose no rationale for the Commission's decision not to exercise its discretion to deal with the complaint beyond the one year limitation period, the existence of a contradictory recommendation from an investigator makes the inadequacy of the reasons more readily apparent.

As in *Gardner*, above, the absence of any reasons by the Commission for rejecting the Investigator's finding on this point places the reviewing Court in a position of marked disadvantage. However, unlike *Gardner*, I am unable to draw an inference as to how the Commission came to this conclusion and I accept that Ms. Johnstone would be left to speculate as to the Commission's reasons. I have, therefore, concluded that the Commission's decision is unreasonable and deficient for failing to provide a rational basis for the conclusion that Ms. Johnstone voluntarily accepted the CBSA's accommodation terms.

Did the Commission Err by Concluding that the CBSA's Fixed Shift Policy Did Not Constitute a Serious Interference with Ms. Johnstone's Parental Duties And that It Did Not Have a Discriminatory Impact on the Basis of Family Status?

[25] There also appear to be fundamental flaws in the Commission's analysis of the legal issues raised by Ms. Johnstone's complaint. I have used the word "appear" in the previous sentence advisedly. It is impossible to know exactly what the Commission had in mind in saying that it was not convinced that the CBSA's fixed shift policy constituted a serious interference with Ms. Johnstone's parental duties or that it had a discriminatory impact.

[26] It appears that the Commission lost sight of the fact that it was the CBSA rotating shift policy that was *prima facie* discriminatory and not necessarily its fixed shift policy which was an accommodation measure. This point was recognized by the Investigator who made specific reference to the decision in *Brown v. Canada (Department of National Revenue, Customs and Excise)*, [1993] C.H.R.D. No. 7, which had already concluded that the CBSA rotating shift policy at Pearson was *prima facie* discriminatory in terms of its adverse effects in the family status context. The Commission's conclusion suggests that it examined the fixed shift policy to see if it was discriminatory when, instead, it should have considered whether that policy was sufficient to fulfill the CBSA's duty to accommodate.

[27] If the Commission was of the view that the CBSA fixed shift policy needed to have a discriminatory effect for Ms. Johnstone's complaint to move forward, it erred in law. Such an approach would incorrectly conflate the issues of *prima facie* discrimination and accommodation. In the absence of a determination that the fixed shift policy was itself *prima facie* discriminatory, what was required was a determination of whether that policy accommodated Ms. Johnstone's

family status needs to the point of undue hardship. The burden of proof on that issue rested with the CBSA and not with Ms. Johnstone so that the Commission's statement that it was "not convinced" gives rise to a further concern about whether that burden was incorrectly imposed upon Ms. Johnstone: see *British Columbia Public Service Employee Relations Commission v. BCGSEU*, [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 at page 39.

[28] The fixed shift policy might also have been *prima facie* discriminatory in the sense that it may have been more restrictive than the policy available to other classes of employees who required fixed-shift accommodation: see *Sketchley*, above, at para. 91. Here, there was evidence noted by the Commission's Investigator that the CBSA did differentiate between medical and family status cases by not requiring all of its medically accommodated employees to work part-time. This point is not resolved conclusively in the Record before the Court and the point seems to have been overlooked by the Commission when it dismissed the complaint. If it was not overlooked, it was at least deserving of some explanation or analysis by the Commission because it was potentially important evidence that the CBSA's fixed shift policy was itself *prima facie* discriminatory or, alternatively, that the CBSA had failed to accommodate Ms. Johnstone's family status needs to the point of undue hardship. After all, if exceptions to the part-time rule could be made in medical cases, it might be difficult to deny the same relief in cases involving other forms of discrimination.

[29] It also appears that the Commission adopted the CBSA submission that the fixed shift policy was required to constitute a "serious interference" with Ms. Johnstone's parental duties. The Commission's use of the "serious interference" test seems to have been taken from the British Columbia Court of Appeal decision in *H.S.A.B.C. v. Campbell River & North*

Island Transition Society, [2004] B.C.J. No. 922, 2004 BCCA 260, 240 D.L.R. (4th) 479, where the Court described an employer's legal obligations in dealing with a family status accommodation request as follows:

> [39] If the term "family status" is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to *prima facie* discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that 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. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.
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> [Emphasis added]

The *Campbell River* decision, above, has been criticized for conflating the threshold issue of *prima facie* discrimination with the second-stage bona fide occupational requirement (BFOR) analysis. In *Hoyt v. CNR*, [2006] C.H.R.D. No. 33, Tribunal Member, Julie Loyd, rejected the *Campbell River* approach on the following basis at paras. 119 to 121:

> 119 A different articulation of the evidence necessary to demonstrate a *prima facie* case is articulated by the British Columbia Court of Appeal in *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society*, [2004] B.C.J. No. 922. The Court of Appeal found that the parameters of family status as a prohibited ground of discrimination in the Human Rights Code of British Columbia must not be drawn too broadly or it would have the potential to cause 'disruption and great mischief' in the workplace. The Court directed that a *prima facie* case is made out "when a change in a term or condition of employment imposed by an

> employer results in serious interference with a substantial parental or other family duty or obligation of the employee." Low, J.A. observed that the *prima facie* case would be difficult to make out in cases of conflict between work requirements and family obligations.
>
> 120 With respect, I do not agree with the Court's analysis. Human rights codes, because of their status as 'fundamental law,' must be interpreted liberally so that they may better fulfill their objectives (*Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 547, *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at pp. 1134-1136; *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84 at pp. 89-90). It would, in my view, be inappropriate to select out one prohibited ground of discrimination for a more restrictive definition.
>
> 121 In my respectful opinion, the concerns identified by the Court of Appeal, being serious workplace disruption and great mischief, might be proper matters for consideration in the Meiorin analysis and in particular the third branch of the analysis, being reasonable necessity. When evaluating the magnitude of hardship, an accommodation might give rise to matters such as serious disruption in the workplace, and serious impact on employee morale are appropriate considerations (see *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489 at pp. 520 - 521). Undue hardship is to be proven by the employer on a case by case basis. A mere apprehension that undue hardship would result is not a proper reason, in my respectful opinion, to obviate the analysis.

In my view the above concerns are valid. While family status cases can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status: see *ONA v. Orillia Soldiers Memorial Hospital* (1999), 169 D.L.R. (4th) 489, 42 O.R. (3d) 692, [1999] O.J. No. 44 (C.A.) at para. 44 and *British Columbia v. BCGSEU*, above, at paras. 45 and 46. I would also add that to limit family status protection to situations where the employer has changed a term or condition of employment is unduly restrictive because the operative change typically arises within the family and not in the

workplace (eg. the birth of a child, a family illness, etc.). The suggestion by the Court in *Campbell River*, above, that *prima facie* discrimination will only arise where the employer changes the conditions of employment seems to me to be unworkable and, with respect, wrong in law.

[30] The Commission's apparent adoption of the serious interference test for identifying family status discrimination also fails to conform with other binding authorities which have clearly established the test for a finding of *prima facie* discrimination. No where to be found in those authorities is a requirement that a complainant establish a "serious interference" with his or her protected interests. A recent confirmation of the accepted approach can be found in *Sketchley*, above, at para. 86 where the Court held:

> [86] At the outset, I must reiterate the overarching principles of the *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 [Meiorin] test, whereby human rights cases are determined. Initially, the onus lies on the complainant to prove *prima facie* discrimination. A *prima facie* case 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" (*Ontario (Human Rights Commission) v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321, at para. 28). That being established, it is then incumbent on the employer to justify that discrimination as a bona fide occupational requirement (BFOR).

To the same effect are the decisions in *Canada v. Minister of National Revenue*, [2004] 1 F.C.R. 679, [2003] F.C.J. No. 1627, 2003 FC 1280 at para. 15 and *Morris v. Canada (Canadian Armed Forces)*, [2005] F.C.J. No. 731; 2005 FCA 154 where Justice John Evans held at para. 27:

> In other words, the legal definition of a *prima facie* case does not require the Commission to adduce any particular type of evidence to

> prove the facts necessary to establish that the complainant was the victim of a discriminatory practice as defined in the Act. Paragraph 7(b) requires only that a person was differentiated adversely on a prohibited ground in the course of employment.

[31] On this issue I agree with the legal analysis at para. 38 of the Applicant's Memorandum of Fact and Law where it is stated:

> The Applicant submits that the underlying circumstances in the present case are no different, and the same threshold for discrimination must apply. To that end, pursuant to the *CHRA*, any and all discrimination is contrary to the *Act*. There is no discretion, and no degree or level of discrimination which must be suffered by a complainant to obtain the protection of the *CHRA*. Thus, the fact that the Applicant was adversely affected by the Respondent's policy is sufficient to establish a *prima facie* case of discrimination, and, by applying a higher standard to the ground of family status in its decision, the Commission erred in law.

[32] I have one remaining concern with the Commission's approach to Ms. Johnstone's complaint. The Commission's Investigator recommended that the complaint go forward, in part, because she felt it raised an important human rights issue, the resolution of which might assist in the further development of the law. That view was obviously rejected by the Commission but it was, nevertheless, a valid observation.

[33] The law is not well settled with respect to the balancing of competing workplace interests insofar as family status accommodation is concerned. For instance, it is probably a safe assumption that many employees would consider rotating shift work to be an undesirable feature of their employment. In the result, some employers pay a shift premium to compensate their employees for the less desirable working conditions. If that was the situation facing Ms. Johnstone, she would

have considerable difficulty claiming a wage premium that she had not earned. That is so because the law is clear that providing different levels of compensation to employees providing different levels of service is not considered discriminatory: see *ONA*, above, at paras. 26 and 27.

[34] In this case, though, the CBSA's policy relegated Ms. Johnstone to part-time status in consideration for obtaining fixed shift employment. That policy appears not to have been designed to motivate the non-accommodated workforce. Instead, its purpose seems to have been to discourage employees like Ms. Johnstone from seeking accommodation in the form of fixed shifts. The purpose of an employment policy or standard can be an important consideration in determining whether it is discriminatory: see *ONA*, above, paras. 28 to 31.

[35] One important issue raised by Ms. Johnstone's complaint is, therefore, whether it is legally appropriate to reduce an accommodated employee's hours of work as a means of either addressing a perceived non-compensatory workplace advantage (eg. the avoidance of rotating shifts) or as a disincentive to employees who might seek accommodation for family status reasons. This is, of course, not a question for the Court to decide but the Commission's obvious failure to consider it raises a further concern about the correctness of its decision to summarily dismiss Ms. Johnstone's complaint.

[36] In conclusion, I find that the Commission's decision to dismiss Ms. Johnstone's complaint cannot be sustained for the reasons I have given. I will, therefore, set aside that decision and remit the matter back to the Commission for a redetermination on the merits by a new decision-maker. That redetermination shall be carried out in conformity with these reasons.

[37] The Applicant shall have her costs in the amount of $1,750.00 inclusive of disbursements.

JUDGMENT

THIS COURT ADJUDGES that this application is allowed with the matter to be remitted to the Commission for a redetermination on the merits by a new decision-maker. That redetermination shall be carried out in conformity with the reasons given herein.

THIS COURT FURTHER ADJUDGES that the Applicant shall have her costs in the amount of $1,750.00 inclusive of disbursements.

"R. L. Barnes"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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