Federal Court of Appeal | Cour d'appel fédérale

Date: 20151110

Docket: A-557-14

Citation: 2015 FCA 250

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

BETWEEN:

LAURA MARIE FLATT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 6, 2015.

Judgment delivered at Ottawa, Ontario, on November 10, 2015.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

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REASONS FOR JUDGMENT

TRUDEL J.A.

I. Overview

[1] This is an application for judicial review from a decision of the Public Service Labour Relations and Employment Board (Board), dismissing a grievance of Laura Marie Flatt (applicant) against her employer, the Treasury Board of Canada (employer).

[2] The Board's decision, penned by Board member Augustus Richardson, is dated November 13, 2014 and bears the citation 2014 PSLREB 02.

[3] Following her one-year maternity leave, the applicant requested permission to telework in order to continue breastfeeding her third child. Despite various exchanges, the parties failed to establish a suitable work schedule that would meet both their needs. As a result, the applicant filed a grievance claiming that the failure to accommodate was discriminatory on the basis of sex and family status, contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 and the collective agreement (see the applicant's individual grievance presentation, applicant's Record, Tab B-5 page 145). The grievance was refused at every level up to this Court.

[4] Having carefully reviewed the Board's decision and considered the parties' written and oral submissions, I propose to dismiss this application for judicial review. I have not been persuaded that the Board committed legal errors or any other errors warranting our intervention.

II. The relevant facts

[5] The Board aptly summarized the facts of this case. They are uncontested and well documented. For our purposes, it suffices to know that the applicant is a spectrum management officer. She works full-time within the Spectrum Management Operations Branch of Industry Canada, which supervises and manages the radio frequency spectrum in Canada. In April 2007, she became pregnant and went on maternity leave in September 2007. She returned from maternity leave in September 2008. In January 2009, she requested to telework out of her home

on Thursdays. Her request was accepted and she continued with this arrangement until September 2009.

[6] In September 2009, the applicant went on maternity leave again. She returned to work in September 2010. Although the arrangement differed, she once again received her employer's permission to telework out of her home, at least from April 2011 to March 2012.

[7] The applicant commenced her one-year maternity leave for her third child in March 2012. She breastfed her child. As the year wore on, the applicant decided that she would like to continue breastfeeding her child for another year, that is until March 2014. To that end, she approached her employer, in November 2012, and sought permission to telework full-time from her home between 6:00 and 14:00. The employer denied this request because, *inter alia*, it was not "operationally feasible" (email of January 25, 2013, applicant's Record, Tab C-4 at page 207).

[8] The applicant ended up asking for an extended leave without pay for the period running between March 4, 2013 and June 28, 2013 with a return to work on July 1st (email of January 27, 2013, *ibidem* at page 212). Her request was accepted.

[9] Nonetheless, the applicant continued to seek a teleworking arrangement. In early March 2013, several emails were exchanged between the parties. The applicant explored the possibility of finding a daycare close to her workplace. This would permit her to continue breastfeeding her child while working physically in the office. She proposed a schedule whereby she would

telework two days per week. On the remaining three days, when she would be in the office, she would take two 45 minutes breaks to attend the daycare center and breastfeed her child. It must be understood that with this proposal, the applicant wanted the breastfeeding time to be included in her paid hours and did not wish to forfeit her lunch breaks. She only agreed to count her two 15 minutes paid coffee breaks towards the breastfeeding time.

[10] The employer generally agreed with this proposal but flagged two issues: (1) the hours of work were to total 37.5 hours per week, excluding lunch breaks and the time associated to breastfeeding; and (2) the arrangement would be for one year (email of March 4, 2013, *ibidem* at page 220).

[11] The applicant did not seek to address her employer's concerns but rather abandoned this possible arrangement proposing a new one where she would telework from her home two full days per week and work in the office the other three days, from 10:00 to 14:30, teleworking again from her home on those days from 6:00 to 8:30.

[12] Having considered this new request in light of the relevant Duty to Accommodate Policy, the employer offered the applicant three options:

> a) That the [applicant] work from home one day a week, and in the Burlington office four days a week, working a minimum of 7.5 hrs a day when in the Burlington office;
>
> b) That the [applicant] work part-time; or
>
> c) That the [applicant] continue on leave-without-pay until she feels that her nursing is complete.
>
> (Board's reasons at paragraph 53, reference to Exhibits omitted).

[13] The parties did not reach an agreement and the applicant reverted to her original request – teleworking from her home on a full-time basis (email of April 16, 2013, applicant's Record at page 235). This request forms the basis of her grievance dated March 22, 2013, in which she alleges discrimination on the grounds of sex and family status contrary to the *Canadian Human Rights Act* and seeks the following corrective measures:

> That Management comply with my rights under the *Canadian Human Rights Act* regarding "Sex and Family Status" and that Management respects its obligation as prescribed in the Canadian Human Rights Commission, Duty to Accommodate Policy.
>
> That I be treated in accordance with the IBEW, Local 2228 collective agreement.
>
> That I be allowed to work from home full time, Monday to Friday between the hours of 7:00 am to 3:00pm to accommodate breastfeeding my son until March 2014.
>
> That based on the effective date of March 4, 2013 (*my original return to work date*), I be compensated for any lost wages and benefits that resulted due to the denial of my request and having to accept leave without pay during the time that an acceptable accommodation solution could have been arranged.
>
> That I be made whole again for any and all losses.
>
> (*ibidem* at page 146)

[14] In the end, the facts reveal that the applicant weaned her son sooner that she had planned to and returned to work on October 1, 2013.

III. The Board's decision

[15] Having considered the grievance and the current state of the jurisprudence, the Board opined that four issues needed to be addressed:

a) Is discrimination on the basis of breastfeeding discrimination on the basis of sex or family status or both?

b) What is necessary to establish a prima facie case of discrimination on the basis of breastfeeding, and did the grievor meet it in this case?

c) If the grievor did establish a prima facie case of discrimination, did the employer accommodate her to the point of undue hardship?

d) If it did not, then what is the remedy?

[16] In view of my proposed conclusion, the first two questions will be the focus of my analysis. This said, I return to the Board's decision.

[17] I start by saying a few words about the scope of the grievance. The applicant contends that the Board's first error is that it determined that the scope of the grievance prevented it from considering events that occurred after the filing of the grievance, *i.e.* March 22, 2013, mostly the on-going discussions between the parties to find a suitable arrangement allowing the applicant to continue breastfeeding her child for another year.

[18] Indeed, it is the applicant's view that the Board confounded the substance of the grievance with the corrective measures she sought. More specifically, the applicant writes at paragraphs 60-63 of her Memorandum of Fact and Law:

> 60. Moreover, contrary to the Panel's assertion that the Applicant's original request to telework five days per week in November of 2012 somehow limited the scope of the grievance as filed in March of 2013, the Applicant submits that the content of discussions between the parties before the filing of any grievance cannot serve to limit the scope of any subsequently filed grievance. A party filing a grievance is simply not constrained in this way.
>
> 61. Further, it is evident from the discussions before and, indeed, throughout the grievance procedure, that the Applicant communicated to the employer that

> while she required a change in the manner in which she worked to accommodate her son's breastfeeding schedule, she was more than willing to propose and consider different ways in which satisfactory accommodation could be made. The gravamen of the grievance was the employer's discrimination and failure to accommodate.
>
> 62. The statutory duty to accommodate is an ongoing duty. It does not disappear when a grievance is filed. Arbitrators have held that an employer's potential accommodation liabilities under human rights legislation cannot be said to have finally crystallized when a grievance is filed. Indeed, where one of the issues in a grievance is management's accommodation as required by human rights legislation, this gives rise to an exception to the privilege normally attached to grievance procedure discussions. As such, it is proper to consider evidence of discussions that may have arisen post-grievance or during the grievance procedure.
>
> 63. The Applicant submits that no meaningful consideration of the employer's accommodation efforts, or lack thereof, could have been made without regard to events that occurred following March 22, 2013. The Applicant continued to propose a number of alternative solutions, all of which were rejected by the employer. Given the employer's ongoing duty to accommodate, the events which occurred after March 28, 2013, ought to have been considered by the Panel.

[19] In my view, this ground of complaint cannot succeed and I will dispose of it immediately. To start with, the Board heard all of the evidence, including the evidence dealing with the parties' negotiations before and after the filing of the grievance. It also noted the employer's objection to the introduction of this evidence because it constituted privileged information. The Board allowed the evidence in on a provisional basis because it "might be relevant" (Board's reasons at paragraph 63). In the end, however, "…having considered all the issues and the evidence [the Board was] satisfied that the post-grievance evidence was not relevant" (Board's reasons at paragraph 64), mostly because the applicant's original request in November 2012 was to telework from her home 5 days per week. It is the request that ultimately grounded the grievance that was filed in March 2013. The Board wrote at paragraph 100 of its reasons:

> It is true that between those dates, the grievor did suggest that she might be prepared to telework fewer days, provided certain other changes were made to her work schedule. However it remains the case that in the end, she backed away from those proposals and returned to her original request in its original form. Had she grieved simply that she had not been accommodated, she would have left open the possibility of some form of accommodation other than five days of teleworking. But that is not what she did. She grieved that the accommodation on her breastfeeding required a specific, particular and precise form of work.
>
> (Board's reasons at paragraph 100).

[20] Assessing the scope of the grievance and assessing the evidence and affording it the weight that it deserves is within the province of the Board. Absent an unreasonable determination, this Court will not intervene.

[21] Having carefully examined the material on record, I have not been persuaded that the Board erred when it concluded that the grievance with which it was concerned was "…the one that was filed, which stated that the employer failed to accommodate the [applicant's] desire to breastfeed her child by permitting her to telework five days per week" (*ibidem*). The record amply supports the Board's view that the crux of the grievance is that the employer would not accommodate the applicant so that she could work her 37.5 hours per week from her home.

[22] Coming back to the Board's analysis of the first issue, I note its conclusion "…that discrimination on the basis of breastfeeding, if it is discrimination, is discrimination on the basis of family status rather than sex or gender" (*ibidem* at paragraph 157).

[23] Although the Board acknowledges that to lactate is a physical condition – an immutable characteristic, it is of the view that breastfeeding is different. "It is a subset of and an expression

of a larger complex of factors stemming from the relationship between a parent and an infant" (*ibidem* at paragraph 150).

[24] As for the second issue, the Board asked itself what was necessary to establish a *prima facie* case of discrimination on the basis of family status. It chose to follow the test enunciated by this Court at paragraph 93 of *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, [2015] 2 F.C.R. 595 [*Jonhstone*]. Paragraph 93 reads as follows:

> [93] I conclude from this analysis that in order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations 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 those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

[25] Having so concluded, the Board found that the applicant's evidence fell short on the second and third factors of the *Johnstone* test (Board's reasons at paragraphs 182-183). As a result, the Board could have stopped its analysis. But in case it erred in deciding that the applicant had not established a *prima facie* case of discrimination, it went on asking itself whether the employer accommodated the applicant to the point of undue hardship. In short, its answer was yes. As stated earlier, in view of my conclusion it will not be necessary to address this particular issue.

IV. Analysis

[26] Whether sex or family status are alleged as grounds of discrimination, complainants are required to present first a *prima facie* case disclosing that they have a characteristic protected from discrimination, that they encountered an adverse impact with respect to employment and that the protected characteristic was a factor in the adverse impact. If this demonstration is successful, the employer must show that the practice or policy is a *bona fide* occupational requirement and that those affected cannot be accommodated without undue hardship in order to rebut the allegation (*Johnstone* at paragraph 76).

[27] At the hearing of this application, both parties agreed as to how to apply this test. The issue of *prima facie* discrimination should be decided in light of the factors enunciated in *Johnstone*, no matter the basis on which the alleged discrimination is examined, *i.e.*, sex or family status. I agree.

[28] This said, these factors should not be applied blindly without regard to the particular circumstances of the applicant whose situation differs greatly from that of Ms. Johnstone. The application of the facts to this test is dispositive of the grievance keeping in mind that the test that concerns *prima facie* discrimination "is necessarily flexible and contextual because it is applied in cases with many different factual situations involving various grounds of discrimination" (*Johnstone* at paragraph 83). The *Johnstone* factors should also be applied contextually.

[29] Indeed, Ms. Johnstone had complained that her employer had discriminated against her on the ground of family status by refusing to accommodate her childcare needs through scheduling arrangements. Ms. Johnstone's work schedule, as well as that of her husband, was built around a rotating shift plan with no predictable patterns such that neither could provide the necessary childcare on a reliable basis. In other words, Ms. Johnstone was unable to meet her parental legal obligation to care for and protect her child. Under these circumstances, she easily met the two first factors of the *Johnstone* test: (a) the child was under her care and supervision; and (b) she had the legal obligation to care for her child. This was not a personal choice.

[30] She also met the last two factors of the *Johnstone* test: (c) she had made reasonable efforts to meet her legal obligation through reasonable alternative solutions, and (d) her workplace schedule interfered substantially with that obligation.

[31] In the case at bar, there can be no doubt that the applicant's young son is under her care and supervision. But I have not been persuaded that the applicant has met her burden on the second and third factors. The applicant has been arguing that the equivalent for her of Ms. Johnstone legal obligation to care for her child is her "legal obligation to nourish her son by breastfeeding him" (applicant's Memorandum of Fact and Law at paragraph 96)

[32] Here, this comparison is inapt. I accept that there could be cases where breastfeeding is seen as part of a mother's legal obligation to care, and more precisely, to feed her child. As a result, I also accept the applicant's position that breastfeeding can fall under both prohibited grounds of discrimination. Here, and without adopting all of its reasoning, I can find no error in

the Board's ultimate conclusion that Ms. Flatt was breastfeeding her child out of a personal choice and that discrimination on that basis, if it was discrimination, was discrimination on the basis of family status. I do not share the applicant's view that the Board misapprehended *Johnstone* and misapplied the *Johnstone* factors. I need not further discuss the Board's analysis of case law dealing with the question of whether work requirements that impact an employee's breastfeeding schedule constitute discrimination on the basis of sex or family status.

[33] It seems to me that to make a case of discrimination on the basis of sex or family status related to breastfeeding, an applicant would have to provide proper evidence, foreseeably divulging confidential information. For example, such information may address the particular needs of a child or particular medical condition requiring breastfeeding; the needs of an applicant to continue breastfeeding without expressing her milk; and the reasons why the child may not continue to receive the benefits of human milk while being bottle-fed. This list of examples, of course, is not exhaustive. The purpose of such evidence would be to establish that returning to work at the workplace is incompatible with breastfeeding.

[34] Here, such information about the young infant is absent from the record but for a medical note from Doctor Josephine Smith, stating that she supports the applicant's choice to continue breastfeeding her child for a second year (applicant's Record, Tab 10 at page 167, note of December 18, 2012). A second note states that due to the applicant's inability to pump her milk, breastfeeding should occur twice over a 8-hour period to ensure that the milk supply is maintained (*ibidem*, Tab 18 at page 191, note of May 28, 2013). The applicant also wrote in one of her emails that she wanted to breastfeed the child past her one-year maternity leave because

her second child had had health issues and she felt that her young son's immune system would benefit from breastfeeding (*ibidem*, Tab 11 at page 168, email of January 25, 2013)

[35] Having carefully examined the record, I conclude that the applicant's evidence does not meet the second factor of *Johnstone*. In her particular circumstances, breastfeeding during working hours is not a legal obligation towards the child under her care. It is a personal choice.

[36] Moreover, the applicant has made no reasonable effort to find a viable solution. As mentioned earlier, she never addressed the employer's reasonable concerns with her proposal to leave the office twice a day for 45 minutes to breastfeed her child during paid hours and simply reverted to her original position. She does not meet the third factor of *Johnstone*.

[37] I therefore conclude, as did the Board, that the applicant has not made her case of *prima facie* discrimination and that the Board's application of the facts to the *Johnstone* factors was reasonable. I need not discuss the second stage of the test for discrimination dealing with the employer's answer.

[38] Before concluding, I must make one final comment. I do not wish these reasons to be understood as trivializing breastfeeding. The medical profession and numerous health organizations encourage mothers to breastfeed babies, praising, *inter alia*, the benefits of human milk on the immune system of young children. The applicant chose to breastfeed her children and respect must be had for her decision. This case is not about that choice but rather about the difficulties of balancing motherhood and career. It is about balancing the rights of mothers and

that of employers having regard to the basic principle that one must be at work to get paid. The test for establishing *prima facie* discrimination is well entrenched in Canadian jurisprudence. In the case of breastfeeding, the onus is on working-outside-the-home mothers to make a *prima facie* case of discrimination. Unfortunately in this case, the applicant failed.

V. Proposed disposition

[39] Consequently, I propose that this application for judicial review be dismissed with costs in the amount of $4600 inclusive of disbursements and taxes.

"Johanne Trudel"

J.A.

“I agree.

A.F. Scott J.A.”

“I agree.

Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Jennifer M. Duff James L. Shields	FOR THE APPLICANT LAURA MARIE FLATT
Richard E. Fader	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

SHIELDS & HUNT Ottawa, Ontario	FOR THE APPLICANT LAURA MARIE FLATT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA