Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 11
Date: February 26, 2021
File No.: T2268/2318

Between:

Andreas Smolik

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Seaspan Marine Corporation

Respondent

Decision

Member: Alex G. Pannu

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Complaint

[1] Andreas Smolik is the Complainant in this case. He is a marine engineer holding a First Class certification. Mr. Smolik's employer, Seaspan Marine Corporation (Seaspan) is the Respondent. Seaspan is a marine transportation company operating along the West Coast of North America. Its main activities are ship assist/escort and towing services. It has a fleet of approximately 32 tugboats with over 600 employees, including approximately 44 marine engineers at the time of the complaint. Depending on the operations, some vessels are at sea for a 12-hour period, while others will sail continuously for a period of one to three weeks at a time.

[2] Mr. Smolik alleges that the Respondent treated him in an adverse differential manner on the basis of his family status, under section 7 of the Canadian Human Rights Act, RSC 1985, c H-6 (CHRA), by failing to accommodate him with a work schedule that would allow him to fulfil his childcare obligations.

[3] The Respondent submits that the Complainant has failed to establish a prima facie case of discrimination and that the case should be dismissed. In the alternative, Seaspan says that it offered reasonable accommodation to Mr. Smolik, to the point of undue hardship.

[4] All parties were represented by counsel at the three-day hearing, which was held in Vancouver, British Columbia. The Canadian Human Rights Commission ("Commission") which investigated and referred the matter to the Tribunal for adjudication participated at the hearing in support of the public interest. The Complainant and the Respondent both provided evidence and called several witnesses to testify.

A. Preliminary Objection – Scope of Commission's Participation

[5] During the hearing and in its closing written submissions the Respondent alleged that the Commission acted outside the scope of its jurisdiction and mandate under the CHRA and that I should entirely disregard its closing written submissions.

[6] During the hearing I ruled that the Commission was entitled to "fully participate" in the hearing and I reiterate that decision now.

[7] The term "public interest" is not defined under the CHRA. There is nothing in the legislation nor am I aware of any jurisprudence that narrowly restricts the participation of the Commission in human rights matters.

[8] Section 51 says clearly that "…the Commission shall adopt such position as, **in its opinion** (emphasis added), is in the public interest having regard to the nature of the complaint."

[9] The Commission's discretionary power to act in the public interest is not absolute. The power exercised by the Commission would still be subject to normal administrative law principles such as fairness, acting in an unbiased manner and not engaging in acts tantamount to abuse of process. None of these occurred during the hearing.

[10] The legislative scheme of human rights in Canada mandates the Commission to investigate complaints and refer them to the Tribunal if warranted. At a hearing one would expect the Commission to raise evidence of possible discrimination as their mandate includes trying to eliminate discrimination. Their mandate does not restrict them to only participate where issues of systemic discrimination exists.

[11] It was obvious to me during the hearing that the Commission had a particular interest in how employers accommodated their employees who had childcare obligations.

Issues

[12] The issues for the Tribunal to decide are:

A. Has the Complainant established a prima facie case of discrimination under section 7 of the Act, because the Respondent failed to provide a work schedule that would allow him to meet his childcare obligations?

B. If yes, has the Respondent established a valid justification for its otherwise discriminatory actions?

C. If the Respondent cannot establish a justification, what remedies should be awarded that flow from the discrimination?

Law

[13] Section 7 of the CHRA says it is a discriminatory practice to refuse to employ or continue to employ, or differentiate adversely against an employee, on a prohibited ground of discrimination. The prohibited grounds of discrimination include family status and are set out in section 3(1) of the Act.

[14] Childcare obligations are within the scope of protection offered by the ground of family status. In *Canada (Attorney General) v. Johnstone*[1], the Federal Court of Appeal set out the applicable test of discrimination based on family status. A Complainant making a claim for discrimination on the basis of family status must show on a balance of probabilities that:

1. a child is under their care and supervision;
2. the childcare obligation engages the individual's obligation for that child rather than personal choice;
3. they have made reasonable efforts to meet that childcare obligation through reasonable alternative solutions; and that no such alternative solutions are reasonably accessible; and
4. the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.[2]

[15] In *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*,[3] the Supreme Court explained that in practical terms, once a prima facie case of discrimination has been established, the Respondent can either present evidence to refute the allegations of discrimination, put forward a defence justifying the discrimination, or both. If no justification is established by the Respondent, proof of these three elements on a balance of probabilities will be sufficient for the Tribunal to find that the CHRA has been violated. If, on the other hand, the Respondent succeeds in justifying the decision, there will have been no violation, even if the complainant meets their case.

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[1] *Canada (Attorney General) v. Johnstone* 2014 FCA 110
[2] *Johnstone* FCA at para 93
[3] *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier),* 2015 SCC 39 at para. 56

[16] In the wake of *Bombardier*, it is clear that a complainant must establish a case which covers the allegations made and which, if believed, is complete and sufficient to justify a decision for the complainant.

[17] Mr. Smolik is required to establish, on a balance of probabilities, each of the four elements set out in *Johnstone*. Seaspan may then provide evidence that refutes the Complainant's allegations, put forward a defence justifying its own actions, or both.

[18] If Mr. Smolik is able to establish a case of discrimination against him, Seaspan may argue in its defence that they attempted to accommodate the Complainant to the point of undue hardship. Under this defence, the Respondent has a burden to prove that they had a *bona fide* justification for the alleged discrimination. The Supreme Court of Canada held in cases such as *British Columbia (Public Service Employee Relations Commission v BCGSEU (Meiorin)*[4] and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) (Grismer)*[5]*,* that a respondent relying on a defence of bona fide occupational requirement must demonstrate on a balance of probabilities that:

1. The Respondent adopted the impugned standard (in this case, its work scheduling policies and practices) for a purpose or goal rationally connected to the function being performed;

2. The Respondent adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate purpose or goal; and

3. The standard is reasonably necessary to the accomplishment of that legitimate purpose or goal, in the sense that it is impossible to accommodate an individual sharing the characteristics of the Complainant without incurring undue hardship based on health, safety or cost.

[19] I would add that undue hardship means more than inconvenience to a respondent should they rely on such a defence. In *Central Okanagan School District No. 23 v. Renaud* the Supreme Court said that the word "undue" implied that some hardship is acceptable.[6]

[20] In its submissions, the Commission noted that Seaspan did not question Mr. Smolik's need for accommodation because of his childcare obligations. The Commission pointed out

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[4] *British Columbia (Public Service Employee Relations Commission v BCGSEU* [1999] 3 SCR 3
[5] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868
[6] *Central Okanagan School district No. 23 v. Renaud* [1992] 2 SCR

that Seaspan's witness Mr. Thompson admitted on cross-examination that he did not question Mr. Smolik's need for accommodation nor what childcare arrangements he tried to make. Seaspan's other witness, Ms. Vigeant also admitted during her cross-examination that she did not raise questions about Mr. Smolik's request for accommodation during the 2016 mediation because she said she was more concerned about finding a resolution than legal questions.

[21] The Commission contended that Mr. Smolik did establish a case for discrimination and that Seaspan, not having questioned Mr. Smolik's need for accommodation previously, should not have raised it for the first time at the hearing.

[22] The Commission cited *Lafreniere v Via Rail Canada Inc.*[7] , submitting that an employer who does not challenge an employee's medical documentation at the time that an accommodation request is made cannot later rely on that negligence as a defence.

[23] However, I do not agree that *Lafreniere* suggests that Seaspan's failure to challenge Mr. Smolik's request for accommodation somehow lowers the initial burden on him to provide some evidence of discrimination. The principles set out in *Bombardier* still apply and the initial burden still falls upon the Complainant.

Evidence

A. Complainant Witness

(i) Andreas Smolik

[24] Andreas Smolik testified as the Complainant. He is a Marine Engineer with a first-class marine engineer certification. Mr. Smolik started working for Seaspan in that capacity in 1997. Since 2017, he has been working as a marine engineer for another company while on a leave of absence from Seaspan.

[25] Mr. Smolik worked on vessels chartered by Seaspan to Seaspan Ferries immediately prior to the events which led to the filing of his human rights complaint. He worked 12-hour

[7] *Lafreniere v Via Rail Canada Inc*. 2019 CHRT 16 (*Lafreniere*) at paras 99-105

shifts, five to seven days a week. After his shifts, Mr. Smolik went home to his family in North Vancouver. Occasionally, Mr. Smolik worked overtime shifts to cover for colleagues.

[26] Mr. Smolik married his wife Cathy in 2001. They had a daughter Anna in 2003 and son Magnus in 2006. Cathy's employer permitted flexible work hours; from 2003 to 2013 the Smoliks were able to meet their childcare obligations themselves.

[27] Sadly, Cathy was diagnosed with cancer in 2011. Her conditioned worsened in 2013 and Mr. Smolik took a leave of absence in March 2013 to take care of their children and support his wife. Tragically, she passed away in May 2013. Mr. Smolik went on bereavement leave from Seaspan following Cathy's death.

[28] Mr. Smolik became the sole caregiver for his children, aged 9 and 6 at the time. He testified that his daughter became reclusive and, despite counselling, had difficulty processing her mother's death. Mr. Smolik described his son as being emotionally dependent on him and anxious when apart from his father.

[29] By September 2013, Mr. Smolik thought his children's emotional state had stabilized enough that he could return to work. He met with Captain Steve Thompson (Seaspan's manager of Marine Personnel) and Jeff Sanders (his Canadian Merchant Service Guild union representative) to discuss a return to work.

[30] Mr. Smolik testified that he told Seaspan that he could not work on their coastal vessels because of his lack of childcare options and his children's emotional needs. These emotional needs prevented Mr. Smolik from being away from his children for the two to three weeks required to work on a coastal vessel.

[31] Mr. Smolik told Seaspan that he needed either (a) a job like his previous one – in which he worked 12 hour shifts and could go home to his family; or (b) another schedule that was flexible enough to allow him to do most school pickups. Unfortunately for Mr. Smolik, during his leave from Seaspan, the two coastal ferries on which he had worked were no longer part of their fleet, complicating these requests.

[32] Due to the emotional impact on his children, Mr. Smolik testified that he wanted to preserve his family unit. He considered his relatives as caregivers. Mr. Smolik had one brother

with four children who lived in Maple Ridge. His other brother was a bachelor in New Westminster who Mr. Smolik felt could not look after his children for extended periods. Mr. Smolik's mother-in-law lived closer in West Vancouver, but he did not consider her a suitable caregiver.

[33] He testified that he had considered hiring a nanny for his children, but felt that he could not trust one to care of his children for either multiple weeks at a time or an erratic schedule. Mr. Smolik said he consulted a friend who had hired a caregiver after his wife passed away, and it turned into a "revolving door of nannies".

[34] Given his family situation at the time, the option of having a family member or nanny be available on stand-by to provide 24-hour care for his children (who were dealing with the loss of their mother) on an unpredictable schedule or for an extended period of time (1 to 3 weeks), was not reasonably accessible.

[35] Mr. Smolik testified he was able to meet his childcare obligations through alternative childcare for a number of hours, including overnight, in the event he received and took a call-out shift and chilldcare in the event he received a scheduled, 12-hour "lunch bucket" shift/position and in the event he received a 7-8 day pager/on-call shift/position.

[36] Mr. Smolik said he maintained contact with Mr. Thompson and other Seaspan representatives throughout the fall of 2013. In November 2013, he met with Thompson, Capt. Walker (Assistant Manager, Marine Personnel), Gilbert Astorga (Seaspan Manager, Labour Relations), and Robert Sampson (Guild business agent). They discussed the option of placing Smolik on the call-out list to provide him the flexibility to turn down callouts that did not work with his schedule. Mr. Smolik said around this time he printed a copy of the CHRA for Mr. Thompson to flag Seaspan's duty to accommodate based on Mr. Smolik's family status. Mr. Smolik said that Mr. Thompson did not seem to want to acknowledge the copy.

[37] In January 2014, Seaspan presented a proposal for call-out work which Mr. Smolik accepted. It was for a one-year term and would be reviewed after six months. Mr. Smolik would be eligible for call-out work at the Roberts Bank and Vancouver Harbour locations only. The list would be called on the basis of seniority.

[38] Mr. Smolik testified that he accepted the proposal because he was led to believe that it would result in full-time income while accommodating his schedule. Unfortunately, the amount of work from this proposal ended up being far less than what Mr. Smolik expected.

[39] He said that from January until August 2014, he received only 7 call-outs. Mr. Smolik was very concerned about the lack of work and began calling and visiting the dispatch office numerous times to inquire about available work.

[40] He met with Mr. Thompson and Mr. Sanders in June 2014 to review the call-out agreement. Mr. Smolik testified that Seaspan acknowledged at this meeting that it had not provided him with sufficient work. He did not recall turning down any call-outs. Although there was no resolution to the lack of work for Mr. Smolik at this meeting, he testified that Seaspan assured him more work would be available in the busier summer season. However, the situation did not improve for Mr. Smolik during the rest of 2014.

[41] From September to December 2014, the situation only improved marginally, with Mr. Smolik receiving 8 call-outs and some limited dockside maintenance work. From January 2015 to April 2015, Mr. Smolik received an additional 9 call-outs. Mr. Smolik said he believed he completed the majority of the call-out work that was offered to him

[42] On January 5th, 2015, Mr. Smolik and Mr. Thompson met to discuss a position in the office for a marine dispatcher. He testified that Seaspan did not provide him with any information about the pay scale, compensation, or hours of work. The dispatch position also would not allow him to maintain his Marine Engineer certificate. Seaspan asked Mr. Smolik to respond to the offer that day or the next day, at the latest. Mr. Smolik turned down the job on the basis that it would mean the eventual loss of his engineer certification. A few days later, Seaspan asked whether he was interested in undertaking aptitude testing for the dispatch job. Mr. Smolik said he did not respond to that request because he had already turned down the offer.

[43] In March 2015, Mr. Smolik requested and received a one-year leave of absence from Seaspan to seek full-time employment elsewhere. During this leave, Mr. Smolik maintained his employment and Guild status with Seaspan. He found a job as a replacement marine engineer with Coast Mountain Bus Company on their Seabus ferries. This position did not pay as much

as his job with Seaspan, but it was close to home and the hours were consistent. The Seabus job lasted until June when the Seabus employee he was replacing returned from leave.

[44] Although Mr. Smolik believed there was enough work at Seaspan to employ him on almost a full-time basis through call-outs and relief work, he testified that Seaspan was not willing to provide a sufficient amount of work to meet his financial needs.

[45] Mr. Smolik advised Seaspan that he was not interested in part-time work. Rather, he proposed working a Wednesday to Wednesday pager job (i.e. on-call) for the vessels Resolution, Kestrel, Eagle and Osprey, in addition to the random call-out list. In response, Seaspan advised Mr. Smolik that those relief pager jobs "typically go to the high seniority engineers whom are in a red day situation" and the amount of shifts he could pick up would be relatively small.

[46] Mr. Smolik also suggested he be given holiday relief work as there were 7.5 senior Marine Engineers (who had 6 weeks' vacation each) at Roberts Bank and Vancouver Harbour. This meant there were 45 weeks of holiday relief time available to be filled. This proposal was not accepted by Seaspan either.

[47] Mr. Smolik made inquiries with Gilbert Astorga, the Manager of Labour Relations of Seaspan Marine and Seaspan Ferries as to the possibility of obtaining work at Seaspan Ferries. Mr. Astorga contacted the Engineering Superintendent for Seaspan Ferries, Phil Loewen, and advised that Seaspan Marine had no restrictions in allowing Mr. Smolik to work for Seaspan Ferries. However, Mr. Smolik never heard back from Mr. Loewen. Mr. Smolik went to see him and was advised that Seaspan did not want any past Seaspan Marine employees who had worked on certain vessels previously on loan to Seaspan Ferries (i.e. the Challenger and Greg) to work for Seaspan Ferries. Mr. Smolik was denied the opportunity to work for Seaspan Ferries.

[48] In March 2016, Mr. Smolik attended a mediation with Seaspan and the Commission on his human rights complaint. The Guild was not named as a party in the complaint and did not attend the mediation.

[49] The parties reached an agreement in principle involving the designation of “super seniority” for Mr. Smolik during a one week on, one week off work schedule. During his week

"on", he would be available to do call-out and relief work at Roberts Bank and Vancouver Harbour, with the first right of refusal until he met his monthly hours for full-time income. During his "off" week, Mr. Smolik would receive call-out work based on his regular seniority level and could choose to work additional hours, above full-time, if he wanted. Mr. Smolik testified he was told he would have super seniority for one week at a time, with the possibility that someone else would be displaced.

[50] Unfortunately, the Guild did not support the settlement because it said it contravened provisions of the collective agreement. Seaspan and the Guild blamed each other for the collapse of the settlement. Seaspan did not undertake any further efforts to accommodate Mr. Smolik with work at Seaspan.

[51] Seaspan granted another unpaid leave of absence and Mr. Smolik was initially able to find work again at Seabus. With Seaspan's consent, Mr. Smolik next worked with Saam Smit, a competitor of Seaspan. The employment with Saam Smit became full-time. Mr. Smolik is currently employed at the same maritime engineer pay scale rate as he was at Seaspan.

B. Respondent Witnesses

(i) Steve Thompson

[52] Captain Steve Thompson worked for Seaspan until his retirement in 2015. He was formerly the Manager of Marine Personnel responsible for ensuring adequate crew levels as well as hiring, discipline and training. At Seaspan, Mr. Thompson dealt with Mr. Smolik's human rights complaint against it.

[53] In his testimony, Mr. Thompson described Seaspan's various operations and the types of ships and schedules that marine engineers like Mr. Smolik would work. Mr. Smolik used to work a shift that was 12 hours on and 12 off, seven days a week and then 14 days off.. However, those vessels were transferred during Mr. Smolik's bereavement leave in 2013.

[54] Seaspan's remaining operations were long-haul barge towing on their continuous vessels. These vessels would be at sea for two to three weeks at a time. There were two ships continuous docking at the Roberts Bank location. Those crews worked a shift schedule of seven days on shift, followed by seven off, seven on and then 14 days off. Seaspan used a

pager system in which crew "on shift" were required to be on-call to work with a four-hour notice. They could work up to 16 hours on a shift. In addition to the regular work at Roberts Bank there was also some sporadic tug work at Vancouver Harbour.

[55] In September 2013 Mr. Smolik spoke to Mr. Thompson and Jeff Sanders about his return to work. Mr. Smolik told Mr. Thompson that due to his childcare requirements, he could not work on the continuous coastal vessels. Mr. Smolik told Mr. Thompson that he needed either (a) a flexible schedule in that would allow him to pick up his children after school; or (b) structured work in the Lower Mainland providing a full-time salary.

[56] Mr. Thompson testified that there were few options for employment based on Mr. Smolik's requirements. First, the structured schedule was no longer possible given the transfer of the vessels on which Mr. Smolik previously worked. Second, Mr. Smolik ruled out the continuous coastal vessels. Third, the Roberts Bank vessels had very unstructured schedules. Finally, the river and harbour tugs did not require marine engineers.

[57] Mr. Thompson testified that the 2014 call-out agreement limiting Mr. Smolik's employment to call-outs was contrary to Seaspan's normal policy. The agreement also expected Mr. Smolik to make reasonable efforts to return to his regular full-time duties by January of 2015. In addition, as a non-full-time employee, Mr. Smolik was told that his benefits were to be pro-rated, although inadvertently that was not done.

[58] Mr. Thompson said he met with Mr. Smolik in January 2015 to offer him a job as a marine dispatcher at Seaspan's office. He described the dispatcher's schedule as seven days on (12 hours) seven days off, seven nights (12 hours) and two weeks off. Mr. Thompson said he considered it a "perfect fit" for Mr. Smolik because it was both structured and provided a full-time salary. No evidence was produced at the hearing about the compensation. The position was a non-union one and the evidence was not conclusive about the effect this may have on Mr. Smolik's Guild membership and his Guild pension.

[59] In August 2015, Mr. Thompson reviewed the call-out sheets for relief work prepared by the payroll department. Mr. Thompson's analysis was that based on seniority, Mr. Smolik could not expect to receive the full-time hours that he needed.

[60] In August 2015, Mr. Smolik emailed Mr. Thompson to say that he believed he could also work the Roberts Bank pager job, based on his experience working in a structured job at Seabus. However, Mr. Thompson said he rejected the idea because (a) the pager job normally went to high priority senior engineers; and (b) the job was actually unstructured.

(ii) Virginie Vigeant

[61] Virginie Vigeant was formerly the Human Resources manager at Seaspan from 2013 to 2018. She became involved in Mr. Smolik's matter when he filed a human rights complaint against Seaspan.

[62] In May 2016, she and Mr. Thompson attended a mediation with Mr. Smolik on behalf of Seaspan. Ms. Vigeant testified that she invited Trevor Lang from the Guild to attend the mediation, but he declined as the Guild was not named as a party in the human rights complaint.

[63] Ms. Vigeant testified that after Seaspan and Mr. Smolik reached an agreement at the mediation, she brought it to Mr. Lang at the Guild to obtain the union's consent. Despite her efforts, she said the union refused to support the agreement because giving Mr. Smolik "super seniority" status would, in the union's words, "open up a can of worms". She said the union threatened to file both union and individual grievances if the agreement was implemented.

[64] Ms. Vigeant said that Seaspan would not proceed with the agreement without the union's consent. After the Guild confirmed in writing that they would not support the agreement, Seaspan took no further action to engage with the union on the issue.

Analysis

A. Did the Complainant establish that the Respondent discriminated against him under section 7?

[65] In order to establish a case of discrimination on the basis of his family status, Mr. Smolik needed to establish on a balance of probabilities that his circumstances met the four-stage test set out by the Federal Court of Appeal in *Johnstone.* The four requirements are: 1) a child is under their care and supervision; 2) the childcare obligation engages the individual's obligation

for that child rather than personal choice; 3) they have made reasonable efforts to meet that childcare obligation through reasonable alternative solutions and that no such alternative solutions are reasonably accessible; and 4) the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.

(i) Was a child under the Complainant's care and supervision?

[66] The tragic death of Cathy Smolik in May 2015 left their two children in the sole custody, care and supervision of their father Andreas Smolik. The Respondent did not dispute this first element of the *Johnson* test.

(ii) Did the childcare obligation engage the Complainant's obligation for that child rather than personal choice?

[67] Becoming the sole parent and provider for his children was an obligation thrust upon him by his wife's death and a responsibility that Mr. Smolik dutifully accepted.

[68] The Respondent disputed this second element of the *Johnson* test. The Respondent submitted that Mr. Smolik's legal obligation to provide childcare for his children did not mean that he was the only one who could provide it.

[69] The Respondent relied on a number of cases to support its position. *In Flatt v Treasury Board (Department of Industry)*[8], the grievor was unsuccessful in arguing that her employer had a duty to accommodate her in allowing to work from home so that she could continue to breastfeed her child. The Board in applying *Johnstone*, made a legal distinction saying while it was her legal obligation to provide nourishment to her child, it was her personal choice on how to provide that nourishment.

[70] I would distinguish *Flatt* on the basis that in *Flatt*, the parent's desire to breastfeed during office hours is factually far different from Mr. Smolik's legal obligation as the only parent to provide childcare to his children when his employment options were to be away from home for weeks at a time or be called to work on short notice at irregular hours.

[8] *Flatt v Treasury Board (Department of Industry)*, 2014 PSLREB 2 (*Flatt*).

[71] The Respondent also cited *Canadian National Railway Co. v. Unifor Council 4000*[9], where the grievor had her previous position abolished. The arbitrator did not find that the grievor established a prima facie discrimination on the basis of family status saying the grievor's childcare requirements (medical knowledge and English fluency) were not based on legal requirements but rather based on personal preference.

[72] This case is distinguishable in that Mr. Smolik's children were young, and they were mentally and emotionally affected by their mother's death. Mr. Smolik was not seeking any specific type of childcare based on his personal preference. As their father and sole parent, he made an assessment was that he was their only suitable caregiver at the time he was ready to return to work. Seaspan did not challenge Mr. Smolik's initial assessment nor ask for medical evidence to support it or his childcare arrangements when they tried to accommodate his return to work.

[73] The Federal Court in *Canadian National Railway v. Seeley*[10] said that in a claim for discrimination under family status, the Complainant needed to provide some evidence but did not create a high standard of proof.

[74] Mr. Smolik was in a similar situation to the Complainant in *Seeley* – the primary caregiver with two young children. Unlike Mrs. Seeley, Mr. Smolik did not have a spouse to share any of the childcare obligations.

[75] Two other cases involving family status claims before the Tribunal add further support to Seeley in terms of standard of proof. Both involve CN as respondent and together with *Seeley*, are often referred to as the CN Trilogy.[11]

[76] In both *Whyte* and *Richards*, the Tribunal reviewed the evidence and concluded that it showed the complainants were parents and that this status generally included the duties of childcare. The Tribunal said that their childcare obligations as sole parents were sufficient to establish a prima facie case.

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[9] *Canadian National Railway Co. v. Unifor Council 4000*, [2015] C.L.A.D. No. 213
[10] *Canadian National Railway Company v. Seeley*, 2014 FCA 111 (*Seeley*).
[11] *Whyte v. Canadian National Railway*, 2010 CHRT 22 (*Whyte*), and *Richards v. Canadian National Railway*,2010 CHRT 24 (*Richards*).

[77] In these family status cases, I must consider these claims in context. Mr. Smolik is a sole parent and has no spouse or partner with whom to share his childcare obligations. His claim clearly relates to his childcare obligations and not a personal choice.

[78] I find in this case that Mr. Smolik's childcare obligations were a legal obligation and not a personal choice.

(iii) Did the Complainant make reasonable efforts to meet that childcare obligation through reasonable alternative solutions and no such alternative solutions were reasonably accessible?

[79] The Respondent made submissions during the hearing that Mr. Smolik did not make reasonable efforts to satisfy his childcare obligation through reasonable alternative solutions.

[80] At the time of their mother's passing, the Smolik children were nine and six years old respectively. Mr. Smolik testified that his children were greatly affected by their mother's death. Both received counselling and he described his daughter as becoming reclusive and his son as being very dependent on him , wanting to know his father's whereabouts even up until the date of the hearing.

[81] Mr. Smolik said that he considered family members as options for childcare. His own mother had passed away six months earlier. He had one brother who was married and had children, but he lived in Maple Ridge, quite a distance from the North Shore. His other brother was a bachelor with no parenting experience living in New Westminster and Mr. Smolik doubted he could provide more than five to six hours of childcare at a time. Cathy's only living relative was her mother in West Vancouver, but Mr. Smolik did not believe she could provide much childcare beyond pick-ups from school.

[82] Mr. Smolik's initial assessment of his family members as insufficient to meet his childcare obligations was subsequently borne out by the types of work available and the required work schedule. It would be too onerous to expect family members to provide childcare if Mr. Smolik were at sea for 1-3 weeks at a time. Neither could he reasonably expect them to be able to provide childcare on short notice on unstructured schedules.

[83] Mr. Smolik testified that he discussed childcare options with a friend and his impression of their experience in hiring a nanny was that it would become a “revolving door” because of the difficulty of finding a nanny to be on call for stretches of 24/7 work for 1-3 weeks at a time. He rejected the idea and felt that he himself was the best option for childcare upon his return to work.

[84] The Tribunal should give some deference to a Complainant who is presumed to have the best knowledge of his children. I accept Mr. Smolik’s belief that his childcare obligations were best met by him at the time he first indicated he was ready to return to work.

[85] Mr. Smolik demonstrated that he was able to secure alternative childcare for a number of hours to, including overnight, in the event he received and took a call-out shift and chilldcare in the event he received a scheduled, 12-hour “lunch bucket” shift/position and in the event he received a 7-8 day pager/on-call shift/position.

[86] The evidence does not show whether Seaspan asked Mr. Smolik, at the conclusion of the one-year agreement if he could alter his childcare arrangements to allow him to work additional hours or different shifts.

[87] In my view, Mr. Smolik made reasonable efforts to meet his childcare obligation through alternative solutions and no such alternative solutions were reasonably accessible.

(iv) Did the impugned workplace rule interfere in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation?

[88] The workplace rules in question are the available employment opportunities, work schedules and the distribution of work at Seaspan for their marine engineers at the time of Mr. Smolik’s return to work.

[89] With the transfer of the two coastal ferries during Mr. Smolik’s leave, Seaspan’s available work for marine engineers largely consisted of long-haul barge towing on their continuous vessels. These vessels would be at sea for two to three weeks at a time. It was not feasible nor reasonable to expect Mr. Smolik to accept assignment to these vessels. He could not be away from home for weeks at a time because his children were still emotionally fragile

after their mother’s death. He was also not able find alternative childcare from either family members or a nanny for such long periods at a time.

[90] There were two ships continuous docking at the Roberts Bank location. Those crews worked a shift schedule of seven days on shift, followed by seven off, seven on and then 14 days off. Seaspan used a pager system in which crew “on shift” were required to be on-call to work with a four-hour notice. They could work up to 16 hours on a shift. It would have been challenging for Mr. Smolik to work on these ships because the irregular schedule and short notice would have made arranging suitable childcare difficult.

[91] Seaspan’s proposal for call-out work, on the basis of seniority, at the Roberts Bank and Vancouver Harbour locations only did not produce the equivalent of a full-time income.

[92] Seaspan’s work opportunities and schedules made it almost impossible for Mr. Smolik to return to work without an accommodation for Mr. Smolik’s childcare obligation. They interfered with Mr. Smolik’s childcare obligation in ways that were more than trivial or insubstantial.

[93] Thus, I find that the Complainant has met the four prongs of the *Johnstone* test.

[94] I conclude that Mr. Smolik established a prima facie case of discrimination against him on the grounds of his family status contrary to section 7 of the *Act.*

B. Has the respondent established a valid justification for its otherwise discriminatory actions?

[95] I have determined that the Complainant established a case that the Respondent discriminated against him on the basis of his family status. The Respondent submitted evidence to try to refute the Complainant’s case, but I have preferred the evidence of the Complainant. The Respondent has also submitted evidence to justify its actions and support its argument that it offered accommodation to the Complainant to the point of undue hardship.

[96] The test for establishing a *bona fide* occupational requirement (BFOR) was set out in *Meiorin*. It says an employer relying on an undue hardship defence must prove the following on a balance of probabilities:

a. The Respondent adopted the impugned standard (in this case the requirement to adhere to the employer's standard hours of work and scheduling practices) for a purpose or goal rationally connected to the function being performed;

b. The Respondent adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate purpose or goal; and

c. The standard is reasonably necessary to the accomplishment of that legitimate purpose or goal, in the sense that it is impossible to accommodate an individual sharing the characteristics of the Complainant without incurring undue hardship based on health, safety or cost.

[97] There is no dispute on the first two prongs of the *Meiorin* test. Tests. Seaspan's work schedule and practices (the standard) were adopted for a purpose rationally connected to the performance of the job. They were necessary because of the requirements of the coastal vessels with their weeks long continuous operations, and the irregular, short-notice requirements of the Roberts Bank tugs.

[98] There is no suggestion that the standard was not adopted in an honest and good faith belief that it was necessary for the fulfilment of that legitimate work purpose.

[99] The salient issue is whether the standard was reasonably necessary to accomplish it purpose because it was impossible to accommodate Mr. Smolik with imposing undue hardship on Seaspan.

[100] Although there is no free-standing procedural duty to accommodate under the CHRA, Seaspan has to prove, on the balance of probabilities, that accommodating Mr. Smolik's work schedule to enable him to meet his childcare obligations would have imposed an undue hardship.

[101] To answer the question, I must examine what Seaspan did to try to accommodate Mr. Smolik.

(i) Callout work

[102] Mr. Smolik worked full-time for Seaspan from 1997 to 2013. When Mr. Smolik felt ready to return to work in September 2013, he requested a position that provided either a structured shift like his previous position or enough flexibility to satisfy his childcare requirements.

[103] Mr. Smolik relied on Seaspan to come up with a solution to accommodate his conditions. He patiently waited until November 2013 before meeting again with Seaspan and the Guild to discuss the concept of going on a call-out list. Mr. Smolik even provided Mr. Thompson with a copy of the CHRA to flag to his attention that Seaspan had a duty to accommodate him. However, it was not until January 2014 that Seaspan presented him with a written plan for a return to work that restricted him to callout work, contrary to the collective agreement. Seaspan insisted that seniority rights still applied to this arrangement.

[104] As it turned out, the callouts that Mr. Smolik received were far fewer that he had expected. His income from Seaspan dropped dramatically. Mr. Thompson assured him that work was bound to increase as Seaspan became busier in the summer but that did not happen. It was not until August 2015 that Mr. Thompson analysed how much callout work an engineer with Mr. Smolik's seniority could expect to receive. The number was far too low to meet Mr. Smolik's needs.

[105] In addition to the lengthy delay in presenting Mr. Smolik with a return to work plan based solely on callouts, it was patently obvious that Seaspan did not know whether the amount of work would be sufficient when it presented the plan in January 2014. According to Mr. Thompson's testimony, Seaspan did not even attempt to calculate how much work was possible for Mr. Smolik until August 2015. This analysis should have been done prior to the call-out agreement being presented to Mr. Smolik.

[106] The evidence presented at the hearing by the Complainant showed numerous examples of engineers with less seniority than Mr. Smolik getting callout or relief work. Mr. Smolik was able to identify on the harbour work logs many times where more junior engineers received call out assignments instead of him. Although documents were specifically requested by the Complainant during the disclosure period prior to the hearing, Seaspan did not provide evidence that would explain these occurrences.

[107] The evidence that both sides presented at the hearing was unclear and contradictory. For example, despite Seaspan's assertion that seniority rights applied, it is not mentioned in the collective agreement when referring to call-outs.

[108] This failure by Seaspan to produce relevant documents is relevant because part of its defense of its accommodation efforts is that Mr. Smolik did not receive as much work as envisaged because there was not enough work available and other engineers with more seniority had priority on the opportunities that arose.

[109] The Respondent also argued that allowing Mr. Smolik to usurp seniority rights by giving him work over more senior employees would cause undue hardship to Seaspan. However, the evidence provided by Seaspan is not sufficient to support its claim. There is simply not enough evidence for me to make a determination that Seaspan provided all the call-out work that was available, based on seniority, to Mr. Smolik.

[110] Seaspan did not appear to react with any urgency in dealing with the matter, despite the fact that Mr. Smolik directly raised the issue of accommodation in the context of human rights obligations in November 2013 and then filed a human rights complaint in September 2015.

(ii) Dispatcher position

[111] On January 5, 2015 Mr. Thompson advised Mr. Smolik that there was a vacancy in the Seaspan office for a marine dispatcher. It was a full-time regular shift job that Mr. Thompson, in his testimony, stated that he thought was perfect for Mr. Smolik.

[112] In cases like *Central Okanagan School District No. 23 v. Renaud* the courts have made it clear that accommodation need not be perfect.[12] However, in this case although Mr. Thompson thought the dispatcher position was a good fit for Mr. Smolik, Seaspan gave him only one day to consider the position. There was no explanation provided by Seaspan for the abrupt deadline nor was there an explanation of why it failed to provide arguably the most important piece of information for a prospective applicant – the compensation. Mr. Smolik had an advanced marine certification and years of experience. He previously earned a substantial salary working for Seaspan. He was given a tight deadline to respond, for a position in which he and Seaspan knew could result in him losing his marine certification if he could not continue to maintain his sea duty hours, and for which he did not even know the compensation.

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[12] *Central Okanagan School District No. 23 v. Renaud* [1992] 2 SCR 970 (*Renaud*)

[113] Seaspan asked Mr. Smolik some time later if he would take an assessment for the dispatcher position which undercuts the impression that an immediate answer from him was urgent. Apart from that, Seaspan made no effort to persuade Mr. Smolik to accept this dispatcher position which they deemed a "perfect accommodation". It is not clear from the evidence that Seaspan even told Mr. Smolik that it viewed the dispatcher job as a reasonable accommodation or that by refusing to even being assessed for the position could be considered by Seaspan as not cooperating with the accommodation process.

[114] The evidence is insufficient for me to determine whether the dispatcher job was a reasonable accommodation offered by the Respondent.

[115] Furthermore, as a matter of law, before I consider the dispatch position as a reasonable accommodation, I would expect the Respondent to demonstrate that they had exhausted all attempts to accommodate Mr. Smolik in his own job as a marine engineer.[13]

[116] Seaspan refused to consider Mr. Smolik's suggestion of working the Roberts Bank shifts because he believed that operationally, more than four hours notice was given. Seaspan also did not accept his suggestion of working holiday relief shifts.

[117] Seaspan refused Mr. Smolik's request to transfer to the division which operated the coastal ferries and had the requisite structured schedule that could accommodate his childcare obligations.

[118] Although Seaspan allowed Mr. Smolik to work for Coast Mountain's Seabus vessels, they initially maintained the prohibition on him working for a competitor. That strikes me as overly restrictive since Mr. Smolik did not possess intellectual property or trade secrets.

[119] Based on the results of the call-out work agreement which failed to satisfy Mr. Smolik's requirements and failure to consider all other reasonable options proposed by him, I do not find that Seaspan satisfied that requirement before offering him alternative work as an accommodation.

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[13] *Seaspan ULC v. International Longshore and Warehouse Union Local 400 (GH grievance)*, [2014] BCCAAA No 108

(iii) Mediation Agreement

[120] As part of his human rights complaint, Mr. Smolik and Seaspan agreed to mediation in May 2016 to try and resolve his complaint. The Guild, which was not a party to the complaint did not attend. Ms. Vigeant testified that she invited the Guild to participate.

[121] The parties reached an agreement in principle that provided Mr. Smolik with right of first refusal on callout and relief work, in effect giving him “super seniority rights”. Since the agreement affected seniority rights in the collective agreement and established work practices at Seaspan, the consent of the Guild was required.

[122] Seaspan and the Guild were unable to agree on the proposal for Mr. Smolik. The Guild apparently had serious concerns about the impact of the mediation proposal on seniority rights and considered it an unenforceable side agreement. Neither party called representatives from the Guild to testify to provide more information After that, Seaspan did not engage in further attempts to try to accommodate Mr. Smolik’s return to work.

[123] The Respondent submits that an employer is not required to give an employee seeking accommodation more rights than what other employees would be entitled. Yet Seaspan was prepared to do just that with the settlement agreement with Mr. Smolik. Only the opposition of the union and the failure of all three parties to try to further resolve the issue of seniority rights prevented this as an accommodation. Seaspan did not produce any clear evidence that such an accommodation would have caused it undue hardship.

[124] Certain elements of Seaspan’s scheduling policies and practices do not appear to have been part of the collective agreement. The collective agreement seems to only mention seniority in the context of officers in a red day situation. The union seemed to consider the settlement agreement as an unenforceable side agreement.

[125] In any event, provisions of a collective agreement do not absolve an employer’s duty to accommodate. There is insufficient evidence to support the Respondent’s contention that the settlement agreement would have resulted in substantial impact on the collective agreement or the rights of other employees.

[126] Although Ms. Vigeant testified that the union threatened to file grievances if Seaspan proceeded with the settlement, the threats were speculative not evidence. The fact that Seaspan may have believed grievances were forthcoming does not mean their failure to act satisfies their duty to accommodate.[14]

[127] Seaspan made no further attempts to engage the union to seek a solution that it could satisfy its concern over seniority rights. There was nothing before the Tribunal that indicated whether Seaspan asked Mr. Smolik if he could be flexible with his schedule restrictions. Nor did the Tribunal ever hear that Mr. Smolik was willing to modify his schedule restrictions.

[128] The Respondent left it up to the human rights process to render a decision despite clear guidance from the Supreme Court of Canada in *Renaud* that the search for an accommodation is a multi-party process.[15]

Decision

[129] I find based on the evidence that the Respondent discriminated against the Complainant under section 7 of the CHRA. I further find that the Seaspan did not establish that it accommodated the Complainant to the point of undue hardship.

[130] The Complainant established that he had a characteristic protected by section 3 of the CHRA, namely his family status. He met all the tests set out in *Johnstone* that would have triggered a duty to accommodate on the Respondent.

[131] The Respondent did not provide sufficient evidence that they met their duty to accommodate to the point of undue hardship, or that accommodation would impose an undue hardship upon them.

[132] The Respondent met the Complainant in September 2013 when he indicated he was ready to return to work from his bereavement leave. Mr. Smolik told Seaspan that due to his childcare obligations as a single parent, he needed full-time employment that was either a

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[14] *Johnstone* CHRT at para 352

[15] *Renaud*, supra note 6.

structured job such as he previously held at Seaspan, or one that was flexible enough to allow him meet his childcare obligations.

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

[134] I find that Seaspan's efforts in providing call-out work for Mr. Smolik fell far short of their duty to accommodate.

[135] Despite their failure to accommodate Mr. Smolik with marine engineer work, they offered him an office position on shore as a marine dispatcher. However, they provided Mr. Smolik with few details on the position, particularly the compensation. Seaspan also told Mr. Smolik that he had one day to respond. I do not see how a reasonable person could characterize this offer as a serious attempt at accommodation much less Seaspan's belief that it was the "perfect solution".

[136] A failed mediation attempt between the Respondent and Complainant further underlined the inadequacy of Seaspan's accommodation. Despite claiming that providing Mr. Smolik with priority on call-out work was tantamount to super-seniority rights contrary to the collective agreement, Seaspan was prepared to do just that in a draft settlement reached at the mediation. When the union, who did not participate at the mediation, objected to the settlement, Seaspan did not attempt to engage the union to find a resolution but simply did nothing further to meet its duty to accommodate.

[137] Based on the evidence before me, Seaspan failed to establish that it accommodated Mr. Smolik to the point of undue hardship.

Remedy

[138] I find the Respondent discriminated against the Complainant with adverse differential treatment because of his family status by failing to find a way for him to continue working while

also parenting, contrary to section 7 of the CHRA. For that action, under s. 53(2)(e) I award the Complainant $15,000 for pain and suffering. This amount is in line with the damages previously awarded by the Tribunal in the *Seeley, Johnstone* and *Richards* cases.

[139] The drastic reduction in income, depletion of savings and insult to dignity and self-confidence experienced by Mr. Smolik as a result of Seaspan's failure to accommodate his return to work no doubt exacerbated the grief he suffered from his wife's death. Mr. Smolik testified that he felt mislead by Seaspan and began doubting his own abilities. He said Seaspan's lack of effort to accommodate him had a psychological impact on him. I accept that he endured pain and suffering because of Seaspan's discrimination.

[140] I do not find the Respondent's actions to be wilful in the sense that it deliberately intended to prevent Mr. Smolik from returning to work. Yet its slow and inadequate attempts to accommodate Mr. Smolik's return, even when made aware of its duty to accommodate by him, were at the very least, reckless. Seaspan had gone through a previous human rights case in *Eyerley*[16]. Unlike the complainant in *Eyerley*, Mr. Smolik held a professional position, had no medical conditions nor a history of absenteeism through injuries. Yet Seaspan made wholly inadequate efforts to accommodate him. Under s. 53 (3) I award a further $10,000 to the Complainant under the category of wilful and reckless behaviour by the Respondent.

[141] In terms of the wage loss suffered by Mr. Smolik, the Complainant has asked for full recovery of the income he would have received but for the discrimination for the years 2014 to 2017 inclusive. Under s. 53 (2)(c) I award Mr. Smolik wage loss for the years 2014 to 2017 inclusive minus the income he earned during those periods from Seaspan and other employers.

[142] The Complainant provided information on Mr. Smolik's earnings during those periods. In those years Mr. Smolik would have expected to earn approximately $144,462.67 annually not including overtime for a total of $578,570.68. He earned only $109,778 mitigating his damages by working irregular callout shifts at Seaspan and for other employers. Therefore, the Respondent shall pay the Complainant for wage loss from 2014-2017 caused by their discrimination, the sum of $469,392.68.

[16] *Eyerley v. Seaspan International Ltd.* [2001] C.H.R.D No. 45

[143] Based on the average amount of pension and other contributions Seaspan made prior to 2014, I further order Seaspan to pay Mr. Smolik $27,239.84 for pension and other contributions for 2014-2017. Lastly, I order Seaspan to pay Mr. Smolik $10,392.23 for out-of-pocket health and dental expenses.

[144] Simple interest shall be payable on the monetary awards at the average annual bank rate established by the Bank of Canada (subsection 53(4) of the CHRA). The interest will run from the date of complaint until the date of payment of the awards of compensation and out of pocket costs.

[145] There is also the matter of the public interest. I substantially agree with the submission of the Commission on the subject of public interest remedies. I therefore make an order under paragraph 53(2)(a) that the Respondent cease any discriminatory practices and, in consultation with the Commission, take measures to ensure future discrimination does not take place. These measures shall include reviewing its policies and procedures that apply to family status accommodation and amending or creating new policies and procedures that acknowledge the duty to accommodate under the CHRA, especially with respect to family related needs such as caregiving. These measures should take into account workplace scheduling rules that are flexibly applied and acknowledge that accommodations which depart from the strict application of seniority rights under the collective agreement and workplace practices may be reasonable and must be considered as part of an accommodation process.

[146] Any new or amended scheduling policies adapted as a result of this decision should be made available to Seaspan employees, and those Seaspan employees who are responsible for workplace scheduling and accommodation should be provided with appropriate training.

Signed by

Alex G. Pannu
Tribunal Member

Ottawa, Ontario
February 26, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2268/2318

Style of Cause: Andreas Smolik v. Seaspan Marine Corporation

Decision of the Tribunal Dated: March 1, 2021

Date and Place of Hearing: June 12-14, 2019

Vancouver, British Columbia

Appearances:

Jay Spiro, for the Complainant

Daphne Fedoruk and Julie Hudson, for the Canadian Human Rights Commission

Chris Leenheer and Alyssia Paez, for the Respondent