Federal Court of Appeal | Cour d'appel fédérale

Date: 20181207

Docket: A-206-17

Citation: 2018 FCA 223

CORAM: **GAUTHIER J.A.**
GLEASON J.A.
WOODS J.A.

BETWEEN:

JOANNE FRASER, ALLISON PILGRIM, and COLLEEN FOX

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 6, 2018.

Judgment delivered at Ottawa, Ontario, on December 7, 2018.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: GAUTHIER J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellants are former regular members of the Royal Canadian Mounted Police force and are also women and mothers. When their children were young, they took advantage of the RCMP's job sharing policy to work reduced hours (by sharing a full-time job with another RCMP officer) in order to balance the demands associated with their jobs and the need to care for their children. By virtue of provisions in the *Royal Canadian Mounted Police*

Superannuation Act, R.S.C. 1985, c. R-11 (the RCMPSA) and the *Royal Canadian Mounted Police Superannuation Regulations*, C.R.C., c. 1393 (the Regulation), the appellants' pension benefits for the job-sharing periods were based on the hours the appellants regularly worked under their job-sharing arrangements, calculated in the same fashion as pension benefits are calculated for other RCMP members who work part-time hours.

[2] The appellants allege that this pro-rated calculation infringes their equality rights guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter) because they say they were treated less favourably than those who are absent from work on leave without pay of more than three months' duration. RCMP members who take such leaves are afforded the option of treating the period of leave without pay as fully pensionable, with pension for the leave period being calculated based on the hours regularly worked immediately prior to the leave, provided the member makes the necessary additional contributions for the leave period. The appellants could have opted to take unpaid care and nurturing leave instead of opting to job share. Had they done so, they could have opted to buy back their pensions for the period of the leave and not had their pension benefits reduced.

[3] The appellants allege that the failure to provide them with an equivalent pension buy-back option for the job-sharing period violates their equality rights guaranteed under section 15 of the Charter because they say they were afforded unequal benefit of the law by reason of the intersecting grounds of sex and family or parental status. More specifically, they assert that in light of the pension treatment afforded to RCMP members on leave without pay, they have a

right to require that the non-worked hours during their job sharing periods be treated as periods of leave without pay. They accordingly allege that they ought to have been given the option to buy back the equivalent of these non-worked hours so their pensions for the job-sharing period would be the same as they would have been had they taken leave without pay or worked full-time hours.

[4] The appellants commenced an application for judicial review in the Federal Court, seeking declarations of invalidity in respect of portions of the RCMPSA and the Regulation and also seeking to have entitlement to pension buy-back rights read into the RCMPSA and the Regulation. In a decision reported as 2017 FC 557, the Federal Court (*per* Kane J.) dismissed the appellants' application, finding that they had failed to establish that their equality rights had been infringed.

[5] For the reasons set out below, I agree with the conclusion reached by the Federal Court and would accordingly dismiss this appeal.

I. The RCMP Pension Plan

[6] It is useful to commence by reviewing the relevant provisions in the RCMPSA and the Regulation, which currently apply to the issues in this appeal. The RCMPSA and the Regulation were amended in 2006 to provide for differential pension treatment for part-time and full-time members and employees. However, the RCMPSA and the Regulation were applied in an identical fashion prior to 2006 to the appellants; therefore, nothing in this appeal turns on the dates the amendments came into force.

[7] The RCMP Pension Plan (or the Plan), established by the RCMPSA and the Regulation, is a contributory defined benefit plan that provides pension entitlements very similar to those afforded to federal public servants under the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36. Under the section 5 of the RCMPSA and section 5.2 of the Regulation, participation in the RCMP Pension Plan is compulsory for all RCMP members (both regular and civilian) working at least 12 hours per week.

[8] Part-time and full-time years of service are counted in an identical fashion for purposes of accrual of pensionable service under the Plan: RCMPSA, s. 6. A year of part-time service is therefore counted as a year of pensionable service the same way as a year of full-time service would be counted. However, contributions and benefits are based on the hours regularly worked by members and are thus pro-rated for part-time members, based on the part-time hours regularly worked: RCMPSA, s. 10(1); Regulation, ss. 5.4, 17.1-17.3.

[9] Part-time and full-time members and employees are defined in section 2.1 of the Regulation. Of pertinence to this appeal are the definitions of part-time and full-time member, which read as follows:

full-time member means a member of the Force who is engaged to work the normal number of hours of work per week for members of the Force;	*membre à plein temps* Le membre de la Gendarmerie qui est engagé pour effectuer le nombre normal d'heures de travail par semaine des membres de la Gendarmerie.
[…]	
part-time member means a member of the Force who is engaged to work on average not fewer than the number of hours of work per week set by	*membre à temps partiel* Le membre de la Gendarmerie qui est engagé pour effectuer en moyenne un nombre d'heures de travail par semaine non

subsection 5.2(1), but who is not a full-time member.	inférieur à celui fixé au paragraphe 5.2(1), mais qui n'est pas membre à plein temps.

Subsection 5.2(1) of the Regulation sets the minimum number of hours per week for part-time Plan membership at 12.

[10] By virtue of section 6.1 of the RCMPSA and section 10 of the Regulation, RCMP Pension Plan members who are on leave without pay for a period of three months or more are provided the option of treating the leave period as either pensionable or non-pensionable service. If they opt for the former, their contributions and benefits for the period of the leave are premised on the pay for the hours they regularly worked prior to the leave: RCMPSA, s. 27(1); Regulation, s. 5.8. If members elect to treat a period of leave as pensionable service, they are required to make extra contributions – i.e. buy-back their service: RCMPSA, ss. 6(*b*)(ii)(K), 7(1)(*i*); Regulation, s. 10(1)(*b*). The buy-back rate generally applicable is double the contribution the contributor would otherwise have made plus interest: Regulation, ss. 10(1)(*b*), 10.8. Thus, for those working part-time hours before going on leave, the required contribution and amount of pension payable for the buy-back period is pro-rated based on the part-time hours regularly worked by the member immediately prior to the leave: Regulation, s. 10.1.

[11] The Government of Canada is the sponsor of the RCMP Pension Plan and the Minister of Public Safety and Emergency Preparedness is the Minister responsible for the Plan. The administration of the Plan is shared between the RCMP and the Department of Public Works and Government Services Canada, with the former being responsible for developing legislation and related policies and the latter being responsible for day-to-day administration, including

determining eligibility for pension benefits, calculating and paying benefits: see *Department of Public Works and Government Services Act*, S.C. 1996, c. 16, s. 13. The Treasury Board is responsible for setting contribution rates: RCMPSA, s. 5(1).

[12] Under the *Financial Administration Act*, R.S.C. 1985, c. F-11 and the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, the Treasury Board is the employer of members of the RCMP: *Gingras v. Canada*, [1994] 2 F.C. 734 at p. 753, 113 D.L.R. (4th) 295 (C.A.); *Wilson v. Canada (Attorney General)*, 2010 FC 250 at paras. 30, 32, 365 F.T.R. 310. The Treasury Board is empowered to determine and regulate the pay to which RCMP members are entitled for services rendered, their hours of work, leave and related matters: *Financial Administration Act*, s. 11.1(1)(*c*); *Royal Canadian Mounted Police Act*, ss. 20.1, 22.1. In practice, the Treasury Board has delegated decision-making responsibility for many of these matters to the RCMP.

[13] Neither the RCMPSA nor the Regulation contains any provision aimed specifically at those who work under a job-sharing arrangement. The appellants and all others RCMP members who job-shared were treated as part-time members for the periods they job-shared as they were considered to have then been engaged to work less than full-time hours and to have not been on a period of leave in excess of three months' duration. The appellants' pensions are therefore less than they would have been had they worked full-time hours throughout their careers or than they would have been had they taken unpaid care and nurturing leave instead of job-sharing and had opted to exercise buy-back rights.

II. The Evidence before the Federal Court

[14] As the appellants proceeded by way of application under sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the evidence consists of affidavits as well as the transcripts of the cross-examinations of several of the affiants.

[15] Each of the appellants provided an affidavit, detailing why she chose to job-share and also detailing the pension treatment she was afforded for the period of job-sharing. The appellants also deposed to the affront they felt by reason of the reduction in their pensions for the period of job-sharing, asserting they believe that the reduction evinces a lack of appreciation for female RCMP officers who chose to have children. However, none of them provided evidence comparing the pecuniary value of the job-sharing arrangement, inclusive of the reduced pension treatment, with the pecuniary value of an equivalent period of leave without pay.

[16] One of the appellants, Ms. Fraser, provided evidence that the cost of repurchasing her pension for a three year leave without pay totalled approximately $24,000 and another, Ms. Pilgrim, deposed that her pension was reduced by approximately 5 per cent as a result of treating the three years she worked under a job-sharing arrangement as part-time service under the RCMP Pension Plan, but provided only a hypothetical calculation to support this claim. There is no other evidence as to the financial impact of the pension treatment afforded to RCMP members who job-share or as to the comparative value of an equivalent period of leave without pay.

[17] Similarly, there was very little evidence about the number of RCMP members who have opted to job share or to work part-time and no evidence about those who have opted to take an unpaid leave of absence. One of the appellants' affiants conducted an informal e-mail survey of co-workers, which suggested that 34 regular RCMP members had chosen to job-share over the period from the inception of the job-sharing policy in 1998 until 2002. However, no evidence was provided as to the reasons they elected to job-share.

[18] A witness tendered on behalf of the respondent provided a snap shot of the situation as of May 11, 2010 and as of May 11, 2014. On the former date, there were 11 regular and 16 civilian RCMP members who were job-sharing and 74 civilian and regular RCMP members who were working part-time. On the latter date, there were no regular and 14 civilian RCMP members who were job-sharing and 78 civilian and regular RCMP members who were working part-time hours. All the job-sharers were women, but for many of them the reasons for job-sharing were reported to be unrelated to the need to care for young children. No evidence was provided as to the total percentage of female RCMP members or as to the proportion of them that might have children. Likewise, there was no evidence as to the sex or parental status of those who worked part-time or who took leaves of absence of three months or more. Nor do we have any idea of how many members may have opted to take leaves without pay.

[19] In addition to the foregoing, the appellants filed expert evidence, which showed that, in Canada, women, including working women, disproportionately shoulder the burden associated with child-rearing and that working women in particular face role overload due to the competing demands on their time. The appellants' expert also opined that these stressors may be particularly

acute for women in policing, and most especially for those who work in rural and isolated areas with limited access to child care.

III. The Decision of the Federal Court

[20] I move to next detail the salient findings made by the Federal Court.

[21] After reviewing the evidence, the Federal Court commenced its analysis by rejecting the appellants' assertion that they were full-time members who merely worked reduced hours on a temporary basis when they job-shared. Relying on the terms of the applicable RCMP policies, the terms of the job-sharing agreements signed by the appellants and the fact that the appellants had regularly scheduled part-time hours when job-sharing, the Federal Court held that the appellants worked on a part-time basis when they job-shared. The Federal Court also held that the appellants were not periodically on leave without pay when job-sharing, finding that leave without pay "is a different status that reflects that the member has no assigned hours and no attachment to the workplace during the time on [leave]" (Reasons, para. 55).

[22] The Federal Court then moved to consider the appellants' Charter arguments, applying the two-step test for discrimination elucidated by the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 91 N.R. 255 (*Andrews*); *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 236 N.R. 1 (*Law*); *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 (*Kapp*); and *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 (*Withler*). The Federal Court noted the test involves asking two questions: first, whether the impugned law creates a distinction based on grounds enumerated in

section 15 of the Charter or on analogous grounds and, second, whether any such distinction creates or perpetuates a disadvantage by perpetuating prejudice or stereotyping.

[23] Relying on the above-mentioned cases as well as the decision of the Supreme Court of Canada in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 (*Taypotat*) and the decisions of this Court in *Grenon v. Canada*, 2016 FCA 4 (*Grenon*) and *Thomson v. Canada (Attorney General)*, 2016 FCA 253 (*Thomson*), the Federal Court stated at para 107 of its Reasons that the relevant principles for step one of the section 15 Charter analysis may be summarized as follows:

> - Section 15 protects substantive equality. Substantive equality seeks to prevent conduct that perpetuates arbitrary disadvantage <u>because of</u> membership in an enumerated or analogous group.
>
> - Discriminatory distinctions are those which have the effect of perpetuating an arbitrary disadvantage <u>because of</u> membership in an enumerated or analogous group.
>
> - Not all differential treatment or distinctions that impose burdens or deny benefits are discriminatory and […] contrary to the *Charter*.
>
> - A mirror comparator group is not required to identify a distinction. However, comparison is inherent in the notion of identifying a distinction.
>
> - Indirect or adverse effects discrimination focuses on the effect of the law or measure on the group. Historical disadvantage may demonstrate that the law imposes a burden or denies a benefit not imposed on or denied to others.
>
> - The qualitative differential impact must be assessed. Numerical imbalances will not be sufficient to demonstrate that a law or measure is discriminatory.
>
> - Applied to the present case, the law must affect the [appellants] because of their sex or parental status and not as a consequence of this status; there must be a "qualitative nexus between the law and the group".
>
> [emphasis in original]

[24] Applying these principles to the appellants' situation, the Federal Court concluded that the appellants had failed to show that the impugned provisions in the RCMPSA and Regulation create a distinction on a ground enumerated in section 15 of the Charter or on an analogous ground. More specifically, the Federal Court concluded that the appellants had failed to establish that they had been adversely impacted by the impugned provisions and that, even if such a demonstration had been made, any impact they incurred was not because of their sex and/or family or parental status, but rather because they had worked part-time hours. The Court concluded that there was no nexus between the impugned provisions in the RCMPSA and the Regulation and an enumerated or analogous ground and that, as in *Grenon*, "[t]he *Charter* argument [failed] because it confounds the underlying social circumstances with the consequences of the law" (Reasons, para. 139, citing from *Grenon* at para. 43).

[25] The Federal Court then moved on to consider the second portion of the section 15 test and, relying on the decisions of the Supreme Court of Canada in *Law*, *Kapp*, *Withler* and *Taypotat*, as well as the decisions of this Court in *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158, [2014] 4 F.C.R. 709 (*Miceli-Riggins*) and *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3, [2003] 2 F.C. 697 (*Lesiuk*), held at para. 166 of its Reasons that the relevant principles for the second step of the section 15 analysis can be summarized as follows:

- Substantive inequality, or discrimination, may be established by:
    - Showing that the impugned law, in its purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of their personal characteristics. Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group.
    - Showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group.

- In determining whether a social benefits scheme creates a distinction and perpetuates a disadvantage, the contextual analysis includes consideration of the ameliorative effect of the law or scheme, the multiplicity of interests it seeks to balance, the intended beneficiaries, whether the lines have been drawn appropriately *vis a vis* the intent of the scheme and the persons impacted, the allocation of resources and the policy goals of the architects of the scheme.

- Perfect correspondence between a social benefits scheme and the needs and circumstances of its claimants is not required.

- Not all distinctions amount to discrimination; a section 15 violation cannot be found simply because "social benefits legislation leaves a group, even a vulnerable group, outside the benefits scheme" [citing from *Miceli-Riggins* at para. 59].

[26] Applying these principles to the appellants' situation, the Federal Court held that the appellants had failed to show that the impugned provisions in the RCMPSA and Regulation create a disadvantage by perpetuating prejudice or stereotyping. More specifically, the Federal Court held that the impugned provisions were not shown to perpetuate disadvantage as there was no evidence that the RCMPSA was a disincentive to recruitment of women to the RCMP or of any historic disadvantage to women or women with parental status arising from the RCMP Pension Plan. The Federal Court also noted that the impugned provisions in the RCMPSA and Regulation needed to be considered in the context of the Plan as a whole and, as in *Miceli-Riggins*, the appellants "were not able to make contributions at the full-time rate and to receive full pension benefits on retirement because they did not meet a requirement of the plan" (Reasons, para. 179). The Federal Court also noted that there was no evidence of the sort of stereotype alleged by the appellants that women who seek to combine the roles of wife and mother are less worthy of respect. The Federal Court finally held that, "[t]o the extent that human dignity plays a role in assessing discrimination, there is no 'personal sting' or 'singling out' of

the [appellants]" (Reasons, para. 185). It therefore concluded that the appellants had failed to meet the second step of the test under section 15 of the Charter.

[27] While sympathetic to the difficulties faced by working women with children in general and that the appellants in particular faced, the Federal Court concluded that "the fact that the RCMPSA does not perfectly correspond to the [appellants'] needs does not mean that the RCMPSA is discriminatory" (Reasons, para. 186). It therefore dismissed the appellants' application, without costs.

IV. Analysis

[28] With this background in mind, it is now possible to consider the issues raised by the parties to this appeal. Given their arguments and the conclusions that I have reached, only the following issues require consideration. First, what is the appropriate standard of review? Second, did the Federal Court err in determining that the appellants and other RCMP members who chose to job-share are not full-time employees and are not on leave without pay during the hours they are not working during the job-sharing arrangement? And, finally, did the Federal Court err in determining that the impugned provisions do not infringe section 15 of the Charter?

A. *Standards of Review*

[29] I turn now to these issues. In terms of the first, the parties concur that the normal appellate standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 are applicable.

[30] I agree as what is at issue in this appeal is the validity of the impugned provisions in the RCMPSA and the Regulation as opposed to a discretionary decision of the various federal agencies who administer the RCMPSA and the Regulation: see, by contrast, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 57, 423 D.L.R. (4th) 197 "[d]iscretionary administrative decisions that engage the *Charter* are reviewed based on the administrative law framework set out by [the Supreme] Court in *Doré* [*v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395] and *Loyola* [*High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613]".

[31] Therefore, the appropriate standards of review are the normal appellate standards. Under those standards, legal determinations made by the Federal Court are reviewable for correctness and findings of fact or of mixed fact and law from which a legal issue cannot be extricated are reviewable for palpable and overriding error.

B. *Did the Federal Court err in finding that RCMP members who job-share work part-time and are not on leave without pay?*

[32] I turn next to the Federal Court's conclusions on the status of the appellants and other RCMP members who job-share. The appellants advance this argument to suggest that they are similarly-situated to full-time employees on a period of leave without pay of three months duration or more.

[33] The Federal Court's conclusions that the appellants and others who job-share are not full-time members within the meaning of the RCMPSA and the Regulation and are not on leave

without pay are largely factual. Contrary to what the appellants assert, I see no palpable and overriding error in either conclusion.

[34] Insofar as concerns the issue of full-time status, section 2.1 of the Regulation defines a full-time member for purposes of the RCMP Pension Plan as one who is engaged to work the normal number of hours for an RCMP member, which the parties concur is 40 hours per week. A part-time member, on the other hand, is defined as one who is engaged to work on average more than 12 hours per week, but less than full-time hours. There was ample basis for the Federal Court to have concluded that the appellants and those who job-share are engaged to work less than 40 hours per week as the job-sharing contracts they signed provided for a regular work week of less than 40 hours, the RCMP's job-sharing policy is to similar effect and the appellants in fact regularly worked less than 40 hours per week when they were job-sharing.

[35] Likewise, insofar as concerns the issue of whether the appellants and RCMP members who job-share are on leave without pay during the balance of the 40 hours they do not work under their job-sharing schedules, the Federal Court did not err in concluding that the appellants were not on leave without pay. RCMP members who job-share have regularly-scheduled hours and thus cannot be said to be on leave as they are required to attend work regularly under a pre-set schedule. They are accordingly not on leave without pay.

[36] Thus, there is no basis for disturbing the Federal Court's finding that the appellants and RCMP members who job-share are not full-time employees or on leave without pay when they are working under a job-sharing arrangement.

C. *Did the Federal Court err in its Charter analysis?*

[37] I turn next to the assertion that the Federal Court erred in its section 15 analysis, and, while I agree with the conclusion that the Federal Court reached, I do not entirely endorse the Federal Court's reasoning as it tends to conflate the two steps in the section 15 analysis and does not squarely grapple with the requirements for a claim of adverse impact discrimination.

[38] Subsection 15(1) of the Charter provides that "[e]very individual is equal before and under the law" and guarantees "the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[39] As this Court recently noted in *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181 (*Begum*), a case that is somewhat similar to the present, section 15 of the Charter guarantees substantive as opposed to merely formal equality and requires the following two-step analysis: first, determination of whether the impugned law on its face or in its impact creates a distinction based on a ground enumerated in section 15 of the Charter or on analogous ground, and second, determination of whether such distinction imposes a burden or denies a benefit in a manner that has the effect of reinforcing or perpetuating prejudice or disadvantage: *Begum* at para. 48; see also *Withler* at para. 30; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61 at paras. 186, 324, 418; *Taypotat* at paras. 19-20*; Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18 (*Centrale des syndicats du Québec*) at para. 22.

[40] The present appeal, unlike many section 15 cases, turns on the first step of the above analysis. In many section 15 cases, including the recent pay equity-related decisions of the Supreme Court of Canada in *Centrale des syndicats du Québec* and *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, the impugned legislation draws distinctions based on enumerated or analogous grounds. In such circumstances, the first step of the section 15 test is readily met as the distinction is apparent on the face of the legislation.

[41] That is not true in the present case as the RCMPSA and the Regulation are facially neutral and draw distinctions based on hours regularly worked and whether an employee is on leave without pay, which the parties agree are not enumerated or analogous grounds within the meaning of section 15 of the Charter. Indeed, the case law recognizes that employment status is not an enumerated or analogous ground: *Thomson* at para. 39; *Reference Re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 1 S.C.R. 922, 96 N.R. 227; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at paras. 43-44, 244 N.R. 33; and *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, at para. 165, [2007] 2 S.C.R. 391.

[42] This case rather involves an allegation of adverse impact discrimination in which the appellants claim that the effect of the RCMPSA and the Regulation is to deny them pension buy-back benefits based on the intersecting grounds of sex and family or parental status.

[43] In *Ontario Human Rights Commission v. Simpson-Sears*, [1985] 2 S.C.R. 536 at p. 551, 64 N.R. 161 (*Simpson-Sears*), the Supreme Court of Canada explained that adverse impact discrimination (sometimes termed adverse effect discrimination) arises when a neutral rule or standard imposes obligations, penalties or restrictive conditions on a protected group because of some special characteristic the group possesses that are not imposed on others. Thus, two things are required to establish adverse effect discrimination: demonstration of adverse treatment as compared to others and demonstration that such treatment results from the particular characteristics that the protected group possesses.

[44] Although *Simpson-Sears* was a discrimination case under human rights legislation, the definition of adverse impact discrimination there posited applies equally under section 15 of the Charter. As noted by the Supreme Court of Canada in *Taypotat*, to meet the first step of the section 15 analysis in a case of adverse effect discrimination, the claimant must establish that the law has a disproportionate effect on the claimant or the group to which the claimant belongs based on his or her membership in an enumerated or analogous group (at para. 21).

[45] The quintessential case of adverse effect discrimination is perhaps *Griggs v. Duke Power Co.* (1971), 401 U.S. 424 (*Griggs*). There, the United States Supreme Court held that a facially neutral rule of requiring job applicants to have a high school diploma for manual labour positions violated Title VII of the *Civil Rights Act of 1964* because it adversely impacted African Americans, who were capable of performing the required work but who were shown, as of the date the case arose, to be statistically less likely than others in the pool of applicants to have graduated from high school.

[46] Thus, as in *Griggs*, in order to establish a case of adverse effect discrimination, it is necessary to identify the impugned neutral rule and to present evidence to establish how it adversely or disproportionately negatively impacts a claimant or his or her group based on an enumerated or analogous ground. As Abella J., writing for a unanimous Supreme Court, noted in *Taypotat*, there "must be enough evidence to show a *prima facie* breach […] [which] must amount to more than a web of instinct" (at para. 34).

[47] Here, the neutral rules in the RCMPSA and the Regulation that the appellants claim adversely impact them and other RCMP members who job-share are the provisions that establish that pension buy-back is only available for those who take leaves of absence without pay of three months or more. To meet the first step of the section 15 analysis, the appellants were required to show that these rules negatively impact them in a disproportionate way and that such impact is due to a protected or analogous ground.

[48] The Federal Court found that the appellants had failed to establish that the impugned provisions in the RCMPSA and the Regulation negatively impacted them and other female RCMP members who job-share to care for young children in a disproportionate way on an enumerated or analogous ground for two reasons: first, because the appellants failed to show the provisions had any negative impact at all and, second, because even if any such impact were demonstrated, it could not be said to have been based on sex and family or parental status.

[49] On the first point, the Federal Court reasoned that the impugned pension provisions could not be viewed in isolation, but rather had to be considered along with the other parts of the

remuneration package provided to RCMP job-sharers compared to that provided to RCMP members on leave without pay.

[50] In my view, this is the correct approach as, in the present case, pension entitlements cannot be viewed in isolation from the rest of the remuneration package afforded to the two groups of employees. Job-sharing and care and nurturing leave without pay are both leave options that are open to RCMP members to address demands associated with caring for young children. RCMP members on leave without pay receive no salary, but those working part-time and under a job-sharing arrangement do. Conversely, those on leave without pay incur no pension diminution, but those working under a job-sharing arrangement do. They may also incur a reduction in other employment-related benefits, but there is no evidence on this point. Without any evidence as to relative value of the two packages, it is impossible to conclude that job-sharing is adverse to being on a leave without pay. I therefore agree with the Federal Court that the appellants failed to establish the requisite adversity of treatment to give rise to an infringement of section 15 of the Charter.

[51] Perhaps more importantly, even if the overall remuneration package granted to job-sharers had been shown to be inferior to that offered to RCMP members on leave without pay, or even if it were permissible to consider only the differential pension treatment between the two groups, the Federal Court did not err in concluding that the appellants had failed to establish that the differential treatment was based on an enumerated or analogous ground. There was no evidence before the Federal Court to establish the requisite nexus between the grounds recognized under section 15 of the Charter and any adverse result. In short, any inequality in

treatment that the appellants might have incurred (had the same been established) was not shown to have been based on or to have arisen by reason of the appellants' sex and family or parental status.

[52] More particularly, there was no evidence before the Federal Court to suggest that the option of a leave without pay was unavailable (either actually or practically) to female RCMP members who had young children. Nor was there any evidence to suggest that more men than women or more childless individuals than those with children had opted to take leaves without pay. In the absence of such evidence, one cannot conclude that any difference in pension treatment between members who job-share compared to those who take a leave without pay is based on an enumerated or analogous ground.

[53] As in *Grenon*, the mere fact that women disproportionately take advantage of the job-sharing option does not mean that the pension treatment afforded to those who job-share under the RCMPSA and the Regulation creates a distinction on an enumerated or analogous ground. Likewise, as in *Begum*, the general expert opinion evidence filed by the appellants fails to establish the requisite nexus between the impugned provisions and a protected ground so as to give rise to a section 15 breach. In sum, the appellants were not denied buy-back rights based on their personal characteristics of being female RCMP members with young children, but rather because they elected to job-share as opposed to taking care and nurturing leave. The requisite nexus to establish a breach of section 15 of the Charter is therefore absent in this case as the appellants cannot show that the impugned provisions in the RCMPSA and Regulation impact them more negatively than others because of their sex and family or parental status.

[54] In some respects, this case is similar to *Lesiuk* and *Miceli-Riggins*. It the latter case, Justice Stratas, writing for the Court, noted at paragraph 76:

> The applicant alleges that the impugned provisions have a disproportionately negative impact upon women. In making out this claim, an indirect discrimination claim, the applicant must adduce evidence showing that the impugned provision is responsible for the effect, not other circumstances: *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3. We cannot just assume that the impugned provision is responsible:
>
> > If the adverse effects analysis is to be coherent, it must not assume a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.
>
> (*Symes v. Canada*, [1993] 4 S.C.R. 695 at paragraph 134.)

[55] Those comments apply with equal effect in the present case.

[56] The appellants contend that the opposite conclusion should be drawn because they say their situation is analogous to that of the grievors in *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital* (1999), 42 O.R. (3d) 692, 169 D.L.R. (4th) 489 (C.A.) (*Orillia Soldiers*) and in two arbitral cases they cite, *Riverdale Hospital (Board of Governors) v. C.U.P.E. Local 79, Re* (1994), 41 L.A.C. (4th) 24 and *Ontario Secondary School Teachers' Federation, Local 10 v. Peel Board of Education (Lambert Grievances)* (1998), 73 L.A.C. (4th) 183. I disagree for several reasons.

[57] In the first place, each of the cases the appellants rely on involved a situation of direct as opposed to adverse impact discrimination. The cases therefore provide no assistance on the

central issue in this appeal, namely, whether there was evidence before the Federal Court to establish a nexus sufficient to give rise to a claim of adverse effect discrimination.

[58] In addition, to the extent it is relevant, the decision of the Ontario Court of Appeal in *Orillia Soldiers* actually supports the respondent's position in this appeal. In *Orillia Soldiers*, the Ontario Court of Appeal held that providing a different level of employment benefits to employees absent from work by reason of disability is not discriminatory as it is not discriminatory to provide differential compensation (including benefits) based on whether an employee is actively at work. Here, as in *Orillia Soldiers*, the different pension treatment that the appellants impugn is premised on the hours worked by the RCMP members. *Orillia Soldiers* would thus indicate that making a distinction based on hours worked is not discriminatory.

[59] Insofar as concerns the arbitral cases, they turn at least in part on provisions in the collective agreements that the arbitrators were called upon to interpret. Moreover, there are several authorities that reach the opposite conclusion and allow employers to alter the status of disabled employees from full to part-time if they are only able to work part-time hours: see, for example, *Nadeau c. Canada (Agence du revenu)*, 2018 FCA 214, aff'g 2017 FPSLREB 27; *Crossroads Regional Health Authority v. Alberta Union of Provincial Employees* (2002), 105 L.A.C. (4th) 78; *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, 2004 SKQB 102 at para. 26, 246 Sask. R. 260, aff'd 2005 SKCA 30, 257 Sask. R. 199; *Ontario Liquor Control Board v. Ontario Public Service Employees Union* (2009), 182 L.A.C. (4th) 116; *SaskPower v. Unifor, Local 649*, [2015] S.L.A.A. No. 21. Thus, contrary to what the appellants assert, there is no principle arising from the arbitral case law that would prevent an

employer from altering an employee's status from full to part-time if the employee ceased to work full-time hours. The arbitral authorities are therefore of no assistance to the appellants.

[60] In light of the foregoing, the Federal Court did not err in concluding that the appellants have not established an infringement of section 15 of the Charter.

V. Proposed Disposition

[61] In closing, I wish to underscore that the present decision should in no way be read as minimizing the very real and significant challenges working mothers face, especially in male-dominated workplaces. However, this social reality does not give rise to a constitutional right to increased pension benefits in the absence of discrimination. The appellants have failed to establish a claim of discrimination in the instant case. Absent a constitutional defect, this Court cannot intervene; rather, it is for Parliament to decide whether to grant the appellants the benefits they seek.

[62] I would therefore dismiss the appeal. In the circumstances, I would adopt the same approach to costs as that taken by the Federal Court and decline to make a costs award.

"Mary J.L. Gleason"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	GAUTHIER J.A. WOODS J.A.
DATED:	DECEMBER 7, 2018

APPEARANCES:

Paul Champ Bijon Roy	FOR THE APPELLANTS
Gregory Tzemenakis Youri Tessier-Stall	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Champ & Associates Barristers & Solicitors Ottawa, Ontario	FOR THE APPELLANTS
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT