

City of Yellowknife v A.B. et al, 2018 NWTSC 50

Date: 2018 09 19
Docket: S-1-CV-2016-000101

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES
BETWEEN:

THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE

Appellant

-and-

A.B.

Respondent

-and-

THE NORTHWEST TERRITORIES HUMAN RIGHTS COMMISSION

Respondent

MEMORANDUM OF JUDGMENT

I) INTRODUCTION

[1] This appeal is brought by the Municipal Corporation of the City of Yellowknife (the City) pursuant to section 66 of the *Human Rights Act*, S.N.W.T. 2002 c.18 (the *Act*).

[2] In a complaint filed with the Northwest Territories Human Rights Commission (the Commission), A.B. alleged that the City discriminated against her in her employment on the basis of her family status. The Human Rights Adjudication Panel (the Panel) held a hearing into these allegations. The Adjudicator found in favor of A.B. and granted her various monetary remedies.

[3] The City now appeals the Adjudicator's decision. A.B. and the Human Rights Commission are the named Respondents on the appeal. The Panel, although not named as a Respondent, was granted leave to make submissions on matters related to jurisdiction, standard of review and any explanation that may be required about the record. *City of Yellowknife v A.B. et al.*, 2017 NWTSC 63.

II) OVERVIEW

[4] Section 5(1) of the *Act* sets out a general prohibition against discrimination founded on a list of prohibited grounds. These grounds include family status. Section 7 prohibits discrimination in regard to employment on the basis of a prohibited ground, subject to *bona fide* occupational requirement. Therefore, the prohibition is not absolute.

[5] The parties emphasized different aspects of the facts in their respective submissions, but in large measure the general circumstances that led to A.B.'s complaint are not disputed.

[6] A.B. worked for the City as a part-time cashier and receptionist from 2006 to 2010. During this period she worked a range of evening and weekend hours. She and her husband have a son, C.D. He has autism spectrum disorder, and very specific needs. Over the years, when A.B. worked on evening or weekends, her husband cared for C.D.

[7] In September 2010, A.B. was hired in the position of Booking Clerk, a full-time position with daytime working hours, Monday to Friday.

[8] At the hearing before the Adjudicator, there was a factual dispute as to whether specific terms of accommodation were agreed to when A.B. took this position. It was undisputed, however, that the City was aware of her family situation and that she would need accommodation from time to time to provide care for C.D.

[9] In the summer of 2011, A.B. requested the full summer school break off in order to care for C.D. The City granted her leave for this period through a combination of annual leave and leave without pay.

[10] A.B.'s duties, for that summer, were assigned to a summer student. That did not go well. The student made several errors and other employees had to spend considerable time correcting them.

[11] In the fall of 2011, A.B. asked for the Christmas school break off. That request was granted.

[12] In March 2012, A.B. initiated steps to obtain leave for the 2012 summer school break. This time, the City took the position that she had to demonstrate that no alternate childcare was available to her.

[13] In the following months, a number of discussions took place between A.B. and City officials, at meetings and through exchanges of emails and correspondence. A number of modified work schedules were proposed to A.B., including the possibility that she could work evenings and weekends. Some of these proposed schedules were the equivalent of full-time work, others the equivalent of part-time work. A.B. maintained that she could not work during the summer school break, even on a modified schedule, and care for C.D. full time during the week.

[14] At the end of the school year, A.B. used her paid leave to take time off to care for C.D. On July 15, 2012, having run out of leave, she resigned.

[15] A.B. filed her human rights complaint on September 30, 2013. The hearing into the matter proceeded over five days in November 2015. Several witnesses were called and numerous documents were filed as exhibits.

[16] Considerable evidence was called at the hearing about the communications that took place between A.B. and the City after she asked for the 2012 summer off and until she resigned. The Adjudicator concluded that different witnesses had different interpretations of some of these exchanges but found that certain things were not in issue. He summarized those facts as follows:

- On March 28, 2012, the complainant met with the respondent to discuss her request.
- When the complainant indicated that working evenings and weekends would leave her too stressed and tired, the Human Resources Officer said that she would have to get a doctor's note to explain why she could not work.

- On April 19, 2012, the complainant met with the respondent with letters from Dr. Ewan Affleck and the Northwest Territories Disabilities Council.
- Dr. Affleck supported the complainant's request on the basis that requiring the complainant to work as proposed would have a "deleterious impact" on the child.
- The Northwest Territories Disabilities Council could not support the child in its summer camps because of the child's complex needs and behavioral risks.
- On May 18, 2012, the complaint [sic] met again with the respondent with a further letter from Dr. Affleck.
- Dr. Affleck provided more detail about the child's disability and concluded that the complainant's request for accommodation was "medically merited".
- The complainant said she could work 20 hours but immediately retracted this proposal.
- On June 19, 2012, the complainant met again with the respondent with a letter from Dr. Nicole Radziminski, which explained the child's need for a routine and proximity to "people he is comfortable with and who are capable of managing his needs".
- The respondent deemed the letters provided by the complainant insufficient, since they did not come from the complainant's own doctor or establish her own medical need.
- The complainant resigned in mid-July after using the last of her annual leave.

Decision on the Merits, para 9.

[17] Given the legal framework set out in the *Act*, the Adjudicator needed to consider, first, whether A.B. established that the City discriminated against her. If so, he had to decide whether the City established that its practice was based on a *bona fide* occupational requirement.

[18] In deciding whether A.B. made out a *prima facie* case of discrimination, the Adjudicator applied the test set out in *Canada (Attorney General) v Johnstone*, 2014 FCA 110 (*Johnstone*). Under that test a claimant must establish, on a balance of probabilities, that:

- (i) there is a child under the claimant's care and supervision;
- (ii) the claimant's childcare obligations at issue engage a legal responsibility for the child, as opposed to a personal choice on the claimant's part;
- (iii) the claimant has made reasonable efforts to meet the childcare obligations through reasonable alternative solutions and that no such alternative solution is reasonably accessible, and

(iv) the impugned workplace rule interferes in a manner that is more than trivial and insubstantial with the fulfillment of the childcare obligation.

[19] The Adjudicator concluded that A.B. met these criteria.

[20] He then went on to consider whether the City had established the existence of a *bona fide* occupational requirement, applying the test set out in *British Columbia (Public Service Employee Relations Commission) v BCGSEU ("Meiorin")*, [1999] 3 S.C.R. 3 ("*Meiorin*"). Under this test, commonly referred to as "the *Meiorin* test", the City was required to establish on a balance of probabilities, that:

- (i) the employer adopted the standard or practice for a purpose that is rationally connected to the performance of the job;
- (ii) the standard or practice was adopted in an honest and good faith belief that it was necessary for the fulfillment of that legitimate work-related purpose; and
- (iii) the standard or practice is reasonably necessary to the accomplishment of that legitimate purpose. This includes a requirement to demonstrate that it is impossible to accommodate the claimant without imposing undue hardship upon the employer.

Meiorin, para 54.

[21] The Adjudicator concluded that the City met the first branch of this test but did not meet the other two.

[22] The City has broken down the issues raised on this appeal under several headings, but in my view, its challenges to the Adjudicator's decision come down to the following claims:

- a) he erred in his interpretation and application of the *Johnstone* test;
- b) he erred in his interpretation and application of the *Meiorin* test;
- c) he misapprehended the evidence in material ways, which led him into errors both in deciding the merits of the claim and what remedies A.B. should be granted.

III) STANDARD OF REVIEW

[23] The first step in any appeal or judicial review of the decision of an administrative tribunal is to determine the applicable standard of review.

[24] There are two standards of review: correctness and reasonableness. If the standard of correctness applies, the question for the court is whether it agrees with the decision maker's analysis. If not, the court substitutes its own view and provides the correct answer. By contrast, if the standard of reasonableness applies, the reviewing court must show considerable deference to the decision maker's findings. When an appeal raises several issues, different standards of review may apply to different issues.

[25] The standard of review determines the level of deference that will be afforded to the decision under review. As such, it is often a crucial step in any appeal or judicial review. No doubt for that reason, it is often a controversial question. That was very much the case at the hearing of this appeal: there was strong disagreement about which standard of review should apply to the Adjudicator's interpretation of the elements of the legal test to establish a *prima facie* case for discrimination and the test to establish the existence of a *bona fide* occupational requirement.

[26] When there is a dispute about the appropriate standard of review, a full analysis need not be done in every case. Courts are entitled to rely on existing jurisprudence that has determined what standard of review applies in a given area. *Dunsmuir*, para 57.

[27] In the Northwest Territories, there is appellate guidance as to the standard of review that applies to appeals in human rights cases. In *Northwest Territories and Nunavut (Worker's Compensation Board) v Mercer*, 2014 NWTCA 1 (*Mercer*) the Court of Appeal concluded that the standard of reasonableness applies to an adjudicator's interpretation of the scope of "social condition" as a prohibited ground of discrimination under the *Act*. There is no reason, in principle, why a different standard should apply where the issue is the interpretation and scope of another prohibited ground of discrimination set out in the same statute.

[28] Despite this, the City maintained at the hearing of the appeal that the Adjudicator's interpretation of the legal tests he was required to apply should be

reviewed on a standard of correctness. The City argued that *Mercer* should not be followed. It referred to subsequent decisions from various courts and argued that based on those decisions, a more stringent standard of review should be applied to human rights tribunals' decisions interpreting the scope of the protection afforded by human rights legislation.

[29] I found, at the time of the hearing, that the City's position was difficult to reconcile with the principle of *stare decisis*. *Mercer* is binding on this Court. Absent a decision from our Court of Appeal or from the Supreme Court of Canada contradicting it, it seems to me the rule of precedent requires this Court to follow it.

[30] In any event, since the hearing of the appeal, the Supreme Court of Canada has released its decision in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31. Although there were strong dissents in that decision, the majority decision is unambiguous: human rights tribunals' decisions interpreting their home statute must be reviewed on a standard of reasonableness. That decision renders any further discussion about the standard of review unnecessary for the purposes of this appeal. Both steps of the analysis the Adjudicator had to engage in (whether a *prima facie* case of discrimination was made out and whether the City had established the existence of a *bona fide* occupational requirement) required him to interpret his home statute. Therefore, his findings must be reviewed on a standard of reasonableness.

[31] As for his conclusions about what remedies should be granted, all parties agreed at the hearing of the appeal that those should be reviewed on a standard of reasonableness.

IV) REVIEW OF THE ADJUDICATOR'S DECISION

1. Preliminary comments

[32] The standard of reasonableness is a highly deferential standard of review. The majority in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)* reiterated this:

In reasonableness review, the reviewing court is concerned mostly with “the existence of justification, transparency and intelligibility within the decision-

making process” and with determining “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. (...) When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute. (...) Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker. At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even when they are not the court’s preferred solution. [References omitted]

Canada (Canadian Human Rights Commission) v Canada (Attorney General), para 55.

[33] As I already mentioned, the Adjudicator was required to engage in a two-step analytical process to deal with this complaint. First, he had to decide whether A.B. had established a *prima facie* case of discrimination. If so, he had to decide whether the City established that its conduct was based on a *bona fide* occupational requirement.

[34] The parties disagreed about where, in the analysis, certain aspects of the evidence should be considered. In particular, they disagreed about the relevance and significance of A.B.'s rejection of proposed modified work schedules, and the fact that she resigned.

[35] The relevance of A.B.'S rejection of the City’s proposals depends on how one identifies the “impugned workplace standard” for the purposes of the analysis.

[36] A.B.'s terms of employment were that she worked full time throughout the year, including the summer months. Her working hours were on weekdays, during the day. The City never insisted that she continue to work during the day, Monday to Friday over the summer, but it did insist that she continue to work. In my view, that is the workplace standard that was at issue in this case: the requirement that A.B. work during the summer.

[37] Given the factors to be considered under the *Johnstone* test, the proposed modified schedules have some bearing on whether a *prima facie* case of discrimination was made out. But they are first and foremost relevant to the whether the City established a *bona fide* occupational requirement, because the accommodation process is a very important aspect of that part of the analysis.

[38] As for A.B.'s resignation, whatever its legal effect was, it could only be relevant to the second branch of the analysis.

2. *Prima facie* case of discrimination

[39] As noted above at Paragraph 18, the *Johnstone* test requires a claimant to establish on a balance of probabilities that:

- (i) there is a child under the claimant's care and supervision;
- (ii) the claimant's childcare obligations at issue engage a legal responsibility for the child, as opposed to a personal choice on the claimant's part;
- (iii) the claimant has made reasonable efforts to meet the childcare obligations through reasonable alternative solutions and no such alternative solution is reasonably accessible, and
- (iv) the impugned workplace rule interferes in a manner that is more than trivial and insubstantial with the fulfillment of the childcare obligation.

[40] The first branch of this test is not at issue. The City argues that the Adjudicator's interpretation of the three others was unreasonable.

a) Whether A.B.'s childcare obligations engaged her legal responsibility

[41] The second branch of the *Johnstone* test draws a distinction between childcare obligations that engage a parent's legal responsibility to the child and those that are a matter of personal choice. In explaining this, the Federal Court of Appeal said:

The childcare obligations that are contemplated under family status should be those that have immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and a child. As a result, the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability. Thus a parent cannot leave a young child without supervision at home in order to pursue his or her work, since this would constitute a form of neglect, which in extreme examples could even engage section 215(1) of the Criminal Code. [references omitted].

Johnstone, para 70.

[42] The Adjudicator was alive to the distinction and referred to it specifically in

his decision:

The second branch of the test requires a distinction between childcare activities that engage legal responsibilities from those which constitute personal choice. Human rights should not be trivialized by protecting activities such as dance classes, sports events, family trips or extra-curricular activities. (...)

Voluntary activities are distinguishable from fundamental child care needs or immutable characteristics which the law is designed to protect. The types of childcare activities that will trigger a legal obligation are those which a parent cannot neglect without engaging legal liability. If the obligations were neglected, the parent could, for example, face criminal charges or interventions by child protection authorities (...)

Decision on the Merits, paras 21-22.

[43] Having noted this, the Adjudicator referred to two examples where childcare obligations were found not to meet the second branch of the *Johnstone* test. The first was a claim based on the denial of a mother's request to telework so that she could breastfeed her child (*Flatt v Treasury Board (Department of Industry)* 2014 PSLREB 02, (appeal dismissed, *Flatt v Attorney General of Canada*, 2015 FCA 250, leave to appeal to the Supreme Court of Canada dismissed [2016] S.C.C.A. No.8.) The second was a request for accommodation by a single mother who was asking for weekday shifts only, in order to spend as much time as possible with her child. She was asserting that the child needed special caregivers but the tribunal found that she had not established that need. The tribunal concluded that her claim was based on a personal choice, not a legal obligation. It also found that she failed to meet other branches of the *Johnstone* test. *Canadian National Railway Co. v Unifor Council 4000*, [2015] C.L.A.D. No.213.

[44] The Adjudicator went on to consider the City's assertion that A.B.'s claim was based on her personal preference and not her legal obligations to C.D. The City based its argument, in part, on A.B. having told the City's Human Resources Officer that she would like vacations and some time with her husband. The Adjudicator's interpretation of this evidence was that A.B. was not voicing a preference not to work during the summer, but rather, that she was attempting to express the impact of caring for her child on her personal and family life. He noted the child's disability, the fact that he was proving difficult to manage in 2011-2012, and that A.B. was his primary caregiver and the one who offered him the best

chance to function socially. He found that A.B. would be legally accountable if she failed to fulfill the obligations she had undertaken as C.D.'s primary caregiver. *Decision on the Merits*, para 26.

[45] The Adjudicator concluded:

The complainant had childcare obligations which were beyond preferences. If the complainant wished she could have a vacation or dates with her husband, this was understandable, not something to be held against her. The desire to spend some time with family is not exclusive of the legal obligation established in the evidence.

Decision on the Merits, para 28.

[46] Because the City's primary position on appeal was that the Adjudicator's application of the test should be reviewed on a standard of correctness, it made extensive submissions about how various aspects of the evidence should have been weighed and interpreted. On this and most aspects of this appeal the City, in effect, reargued the merits of the complaint in this Court.

[47] Since the standard of reasonableness applies, my role is not to retry the case and as such, I will not address all those submissions in detail. The issue for my consideration is whether the Adjudicator's conclusions fall within a range of possible, acceptable outcomes.

[48] The City argues that it was unreasonable for the Adjudicator to conclude that A.B.'s legal responsibilities would be engaged if she was required to work during evenings and weekends, noting that her husband was available to provide care during those times. The City argues, in effect, that because there was no evidence that working evenings or weekends would place A.B. at risk of being charged criminally for neglect, or that it could result in C.D.'s apprehension under child welfare legislation, it was unreasonable for the Adjudicator to conclude A.B. met the second branch of the *Johnstone* test.

[49] In my view, this is an overly restrictive and literal interpretation of *Johnstone*.

[50] To be sure, the second branch of the *Johnstone* test is strict. As noted by the Adjudicator, this is to ensure that human rights are not trivialized by protecting activities that are truly a matter of a parent's personal choice or preference. But that does not mean that it should be interpreted in a rigid manner, nor does it mean that a flexible interpretation of the test is necessarily unreasonable.

[51] The importance of a contextual analysis when deciding whether a *prima facie* case for discrimination has been made out, generally speaking, was underscored in *Johnstone*:

The test is necessarily flexible and contextual because it is applied in cases with many different factual situations involving various grounds of discrimination. As noted by Evans J.A. in *Morris v Canada (Canadian Armed Forces)*, a 'flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment (...) [references omitted]

As a result, a *prima facie* case must be determined in a flexible and contextual way, and the specific types of evidence and information that may be pertinent or useful to establish a *prima facie* case of discrimination will largely depend on the prohibited ground of discrimination at issue.

Johnstone, paras 83-84.

[52] As demonstrated by the cases referred to by the parties on this appeal, a claim for discrimination based on family status can arise in a wide range of circumstances. This is not an area that lends itself to the rigid or mechanical application of any given legal framework and therefore the *Johnstone* factors should not be applied blindly. *Flatt v Attorney General of Canada*, 2015 FCA 250, para 28. The specifics and nuances of every case must be taken into account. That is very much what a contextual and flexible approach requires.

[53] The City argues that A.B. could work on weekends or evenings without engaging her legal liability, because during those periods of time, C.D.'s father could look after him. As long as one of his parents could be with him at any given time, the City argues, their legal obligations were met.

[54] This may be true in many situations where childcare is an issue but it is an overly simplistic approach in the circumstances of this case. The City's position completely overlooks the central, and most significant feature of this case. The childcare obligations at issue were not ordinary childcare obligations. They were childcare obligations relating to a child suffering from a significant disability. These were unique circumstances, substantially different from any of the cases that the City relies on.

[55] The Adjudicator took into account the unique features of this case. He concluded that A.B.'s legal responsibility to care for C.D. could not be met if she was required both to care for him full-time during weekdays and to work for the City, even on a modified schedule. This conclusion was based in part on A.B.'s assertion that she could not do both. The Adjudicator was entitled to accept A.B.'s evidence in that respect. One might say that it is not surprising that he did, given that what A.B. said was supported to an extent by letters from medical practitioners who were familiar with C.D.'s condition.

[56] A.B.'s assertion that she could not both look after her special needs child full-time during weekdays and work for the City on evenings and weekends had nothing to do with her husband's ability to look after C.D. or his availability to do so on evenings and weekends. It was the expression of her own inability to be engaged in his full time care every day, five days a week if she also had to report to work during evenings and weekends. A.B. was intimately familiar with her son's situation and knew what it meant, realistically, to care for him full time. Indeed, she had done so the previous summer. Moreover, her views were supported by the doctors who provided letters to this effect. The City's officials simply refused to accept what she was trying to convey to them.

[57] I disagree with the City's claim that the Adjudicator's interpretation of the second branch of the *Johnstone* test was overly broad to the point of being unreasonable. I find, on the contrary, that he adopted a nuanced, contextual approach to the test, taking into account the unique circumstances before him. His assessment is entitled to deference and, in my view, does fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

b) The availability of reasonable alternative solutions

[58] The third branch of the *Johnstone* test is concerned with the claimant's efforts to find reasonable alternative solutions to the childcare problem at issue, and the availability of such solutions. A claimant has to show that workplace accommodation is the only solution that is reasonably available under the circumstances.

[59] In concluding that A.B. met this branch of the test, the Adjudicator took into account the fact that she made her need for accommodation known when she was hired in the full-time position of Booking Clerk in September 2010; her efforts to attempt to coordinate with her husband's schedule; the unavailability of the specialized supports that existed during the school year; and the unavailability of summer camps for C.D., as explained in the letter provided by the Northwest Territories Council for Disabilities. *Decision on the Merits*, para 29-35.

[60] The City argues that there was an alternative solution, which was to have A.B. work on days and at times when her husband was available to look after C.D. Again, this overlooks A.B.'s position, which was accepted by the Adjudicator, that she could not provide full-time specialized care for C.D. and work for the City during this period of time. As already noted, A.B.'s position was supported by the medical practitioners familiar with C.D.'s needs and what caring for him full-time actually involved.

[61] The City notes that there was no evidence that A.B. canvassed other options for part-time care for C.D. in the community. In my view, this is of no consequence given the evidence about C.D.'s needs, the information included in the letter from the Northwest Territories Disability Council, and A.B.'s testimony that she had, in the past, explored other childcare alternatives in the past, without success.

[62] On the whole, I conclude that it was not unreasonable for the Adjudicator to find that A.B. was in a situation where she had no other reasonable alternative than to request leave for the summer of 2012.

c) Whether the workplace rule interferes in a manner that is more than trivial and insubstantial with the fulfillment of the childcare obligation

[63] In concluding that the last branch of the test was met, the Adjudicator relied on the same evidence that led him to make his other findings: A.B.'s testimony

about why she could not work for the City while taking care of C.D. full-time and the information provided by the medical practitioners. The letters from the doctors referred to C.D.'s needs. They also addressed the possible impact on him and on A.B. if she was required to work during the summer while caring for him full time. *Decision on the Merits*, paras 36-41

[64] The City's criticism of that aspect of the Adjudicator's decision is primarily directed at the weight that he attributed to certain aspects of the evidence and to his overall interpretation of the evidence. Such arguments would warrant a closer analysis on a review based on correctness. But on a review based on reasonableness, the Adjudicator's weighing of the evidence is entitled to deference. There is no basis for this Court to interfere with his conclusions.

[65] Overall, I find no reason to interfere with the Adjudicator's conclusions in his application of the *Johnstone* test.

3. Whether the *Johnstone* test is the appropriate test

[66] The Commission urged this Court to uphold the Adjudicator's finding that A.B. made out a *prima facie* case for discrimination, but also invited the Court to go further and reframe the test that should be applied in cases involving a claim of discrimination based on family status. The Commission asks this Court to declare that the *Johnstone* framework should not be used in the Northwest Territories. It argues that claims of discrimination based on family status should be analyzed using the framework that the Supreme Court of Canada has set out, for the analysis of discrimination claims generally, in *Moore v British Columbia*, 2012 SCC 61.

[67] The *Johnstone* framework has been the subject of criticism. It has been said that it is overly restrictive, that it imposes an undue burden on claimants and that it creates a hierarchy between different human rights. *Misetich v Value Village Stores Inc.*, 2016 HRTO 1229. Some human rights adjudicators have declined to follow it, using instead the *Moore* framework, and were upheld on appeal. *SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162.

[68] I tend to agree with the Commission that the *Johnstone* test raises legitimate concerns. It creates a framework for the analysis of a claim of discrimination based on family status that is different from the one that applies to claims of

discrimination based on other grounds. It places a burden of self-accommodation on the claimant. Finally, the requirement that the childcare obligation at issue engage the parent's legal responsibility may be difficult to apply in complex situations, such as the one in this case. In some cases drawing the line between personal choice and legal obligation, and the idea that any given childcare obligation will neatly fall in one category or the other, is problematic.

[69] At the same time, it must also be recognized that the protection against discrimination based on family status in the employment context raises issues that are unique. As the Commission acknowledges, it gives rise to inevitable tension between work obligations and family responsibilities. Work obligations always interfere with family time. Not every such interference should engage human rights protections. These are reasons that may justify the use of a different legal framework when that ground of discrimination is raised.

[70] In any event, this matter proceeded on the basis that the *Johnstone* test was the one that should be applied. The Adjudicator was not asked to apply another framework by any of the parties. It would not be advisable for this Court to embark upon that analysis at this case, when the issue is raised for the first time on appeal.

[71] There is another reason why I am reluctant to accept the Commission's invitation. Had this issue been argued before the Adjudicator and decided by him, his conclusion, if challenged on appeal, would have been entitled to deference. This Court could not have substituted its own view as to what framework should apply to the analysis of this particular claim. Providing direction about the legal framework that adjudicators should follow in the future would be somewhat inconsistent with the deference that this Court is required, in law, to extend to a human rights tribunal's interpretation of its home statute.

4. *Bona fide* occupational requirement

[72] As noted above, to establish the existence of a *bona fide* occupational requirement, the City was required to establish that:

- (i) the standard or practice was adopted for a purpose that is rationally connected to job performance;
- (ii) the particular standard or practice was adopted in an honest and good

faith belief that it was necessary for the fulfillment of that legitimate work-related purpose; and

(iii) the standard or practice is reasonably necessary to the accomplishment of that legitimate purpose. This includes a requirement to demonstrate that it is impossible to accommodate the claimant without imposing undue hardship upon the employer.

[73] It is not disputed that the first branch of the test was met. The requirement for the Booking Clerk to work during the summer is rationally connected to performing the tasks attached to that position.

[74] With respect to the second branch of the test, the Adjudicator was not satisfied that the City's position that A.B. needed to work during the summer was based on an honest and good faith belief that this was necessary. He took a number of things into account in reaching this conclusion.

[75] He noted that the City had given A.B. the summer off in 2011 and that there had been no change in her circumstances or in the City's circumstances as far as number of employees on staff and operational needs.

[76] He noted as well that the City, aware of A.B.'s situation, took no steps in anticipation of addressing the need to accommodate her during the summer of 2012. Instead, it waited for her to raise the issue, and when she did, it withdrew the accommodation that it had granted to her the previous year.

[77] Evidently, the Adjudicator was unimpressed with how the City officials reacted to the letters that A.B. provided from doctors who were aware of her situation and of C.D.'s needs. He found that they were dismissive of the medical information and chose to ignore it.

[78] The Adjudicator was equally unimpressed with the fact that City officials latched on to concerns expressed by A.B. about stress and fatigue if she had to work while also taking care of C.D. full time, and used this to treat the situation as a request for accommodation for a medical issue of her own instead of a request for accommodation stemming directly from having to care for her disabled child. Similarly, they focused on her comments about wanting vacation and "date nights"

while ignoring the real issue, which was the C.D.'s special needs. *Decision on the Merits*, paras 45-51.

[79] The City challenges the Adjudicator's findings in large measure because it claims that he did not take into account the City's intention and placed undue emphasis on how it treated A.B. during the exchanges that took place between the time she sought the leave and her resignation.

[80] This criticism is misplaced. Considering a party's actions in determining that party's intention is not only permissible, it is logical. Actions speak louder than words and are often very telling about intention.

[81] The Adjudicator took into account how City officials dealt with A.B. because he considered it to be helpful to discern their motivation. This was especially important given the City's claim that its goal was to deal with A.B.'s request on a more principled manner than it had the previous year. The City having made that claim, it was perfectly legitimate for the Adjudicator to examine how its officials treated A.B. to decide whether in fact, the approach was a principled one. He concluded that it was not.

[82] Whether the City established that it adopted the workplace standard (requiring A.B. to work during the summer) in an honest belief that it was necessary was a question of fact. Findings on that issue were highly dependent on the Adjudicator's assessment of the evidence, which is entitled to deference. I see no basis for interfering with those findings.

[83] The Adjudicator having concluded that the City failed to meet the second branch of the *Meiorin* test, its defence to the claim on the basis of a *bona fide* occupational requirement could not succeed. The Adjudicator nonetheless went on to examine the third branch of the test.

[84] This branch is concerned with whether the workplace standard is in fact necessary, and whether it was impossible to accommodate A.B. without there being undue hardship to the City as a result.

[85] The Adjudicator found that the City failed to meet this branch of the test as well. In coming to this conclusion he took into account:

- the time that was spent correcting the mistakes made by the student who carried out A.B.'s role during the summer of 2011;
- the time required to train a casual employee to enter bookings properly, (approximately 29 hours), which he found was not excessive;
- the fact that the period that A.B. was requesting to take off was a slow period at the Field House, one of the facilities that falls under the responsibility of the Booking Clerk.
- that the functions of a Booking Clerk are not so specialized that they could not be, for the most part, transferred to casual cashiers;
- that the City hires a number of students for the summer and could have easily assigned extra staff to enter bookings;
- The size and capacity of the City as an organization;

Decision on the Merits, paras 52-56.

[86] The Adjudicator noted that a claimant has a duty to facilitate the search for suitable accommodation. *Central Okanagan School District No. 23 v Renaud* [1992] 2 S.C.R. 970. He considered whether A.B. had done her part in the search for accommodation.

[87] The Adjudicator found that A.B. had valid reasons for not providing feedback to the City in response to the various mock schedules it had proposed. She knew that the full-time care of C.D. was challenging and demanding. She provided the City with explanations and documentation to support her position that working weekends and evening was not a workable solution to the problem that she faced. The City persisted in presenting more mock schedules that would require her to work during the summer. This, the Adjudicator found, was not a remedial approach. He concluded that the City became entrenched in its refusal to accommodate A.B.

[88] The City characterizes A.B.'s decision to resign as the unilateral interruption of ongoing accommodation discussions that were being conducted in good faith. It argues that A.B.'s resignation put an end to the accommodation process and that, for this reason, it is not possible to determine whether A.B. could in fact have been accommodated without undue hardship to the City.

[89] The problem with this argument is that it is entirely at odds with the Adjudicator's interpretation of the evidence and his factual findings. He concluded that A.B. had no choice but to resign. He found that from the time A.B. raised the issue in March, the City continually persisted in presenting solutions that were variations on the same theme and did not meet her needs. He noted that by July school was out, C.D. needed to be cared for and she had used up all her leave.

[90] Under those circumstances, I find it difficult to see anything unreasonable about the Adjudicator's findings that A.B.'s resignation was irrelevant to the analysis under the *Meiorin* test. I also find that there is no need, in order to dispose of this appeal, to embark upon an analysis of the principles of constructive dismissal, referred to in the City's submissions.

[91] The City's challenge to the Adjudicator's conclusion that the City failed to establish the existence of a *bona fide* occupational requirement is based in large measure on disagreement about his interpretation of the evidence and the findings he made as a result. The City's submissions, in many respects, come down to a plea to this Court to retry the case, reassess and reweigh the evidence adduced at the hearing, and arrive at different conclusions. That is not this Court's function.

[92] A different decision-maker may have placed more emphasis on different aspects of the evidence, assessed the testimony of the witnesses differently, and reached different conclusions about the merits of the City's approach and the positions it took. That is beside the point. The Adjudicator weighed the evidence, drew certain conclusions, and explained his findings. His conclusions were well within a range of possible, acceptable outcomes defensible having regard to the facts and the applicable law.

V) THE DECISION ON REMEDY

[93] This leaves consideration of the Adjudicator's decision about the remedies that should be granted to A.B.

[94] At the remedies hearing, A.B. claimed: compensation for lost wages from the point of resignation until the hearing in November 2015; compensation for lost benefits; compensation for injury to dignity, feelings and self-respect; exemplary or punitive damages; hearing expenses with and without receipts; and interest. She also sought non-compensatory remedies.

[95] Before the Adjudicator, the City's position was that A.B. was not entitled to loss of wages because she had resigned. Alternatively, it argued that A.B. did not make sufficient attempts to mitigate her loss, and that because of that, any award for loss of wages should be reduced significantly. The City also argued that the compensation for injury to dignity, feelings and self-respect should be significantly less than A.B. claimed, because she was not subjected to prolonged discrimination or harassment, and because she resigned. As far as exemplary and punitive damages, the City argued that they require conduct that is willful or malicious, and noted that the amount claimed by A.B. was in excess of what the Act permits. The City also disputed A.B.'s claim for interest. The City disputed, as well, the non-compensatory remedies sought by A.B.

[96] The Adjudicator concluded that A.B.'s resignation was not determinative of her claim for lost wages. This is consistent with his conclusions about her having had no option but to resign so that she could look after her son. However, he found that she fell short in her duty to mitigate her damages. The award that he granted was substantially less than what A.B. was claiming.

[97] The Adjudicator awarded A.B. \$15,000.00 in compensation for injury to dignity, feelings and self-respect. He found that the discriminatory conduct was serious and accepted A.B.'s testimony about the impact these events had on her.

[98] The Adjudicator also ordered punitive damages in an amount of \$5,000.00, based on his conclusion that the City's conduct was willful and harsh, and continued over a period of months.

[99] Finally, the Adjudicator granted A.B. hearing expenses, but only for the expenses that she had receipts for.

[100] The City complains that in making his decision on remedies, the Adjudicator changed some of the findings of fact that he had made when he decided the merits of the claim. The City points to differences in the language used in the two decisions.

[101] In deciding the merits of A.B.'s claim, the Adjudicator said that the City's approach to accommodation was so flawed it amounted to bad faith. *Decision on the Merits*, para 50. He made reference to this finding when he gave his decision

on remedy. *Decision on Remedy*, para 28. Later in that decision, when considering whether exemplary or punitive damages should be awarded, he characterized the City's conduct as "willful and harsh" and noted that it was pursued over a period of time under legitimate protest from the complainant. *Decision on Remedy*, para 40.

[102] In my view, the language used by the Adjudicator does not reflect a change in his factual findings. The Adjudicator elaborated on his views about the nature of the City's conduct as he was required to do so in order to explain his conclusions on remedy. This was a different test than the one he was required to apply when deciding whether the City met the requirements of the *Meiorin* test was met. In any event, a finding of bad faith is not inconsistent with a finding that conduct was willful.

[103] Read as a whole, the *Decision on Merits* shows that the Adjudicator strongly disapproved of the City's conduct in its treatment of A.B. The comments he made are entirely consistent with his characterization of that conduct as having been "willful and harsh" when he dealt with the issue of remedy.

[104] The Adjudicator's decision on remedy was based on his assessment of the evidence. He carefully considered all of A.B.'s claims. He applied a critical lens to the various aspects of her claims. His Reasons demonstrate that he carefully reviewed the submissions of the parties and the evidence. I find no basis for this Court to interfere with his conclusions.

VI) CONCLUSION

[105] As I have said a number of times already, on a review based on the reasonableness standard this Court's role is not to reassess and reweigh the evidence that was before the Adjudicator. That is, in effect, what the City is asking this Court to do about virtually every aspect of this case.

[106] The Adjudicator did not mention every item of evidence contained in this voluminous record. He was not required to do so. There is no basis to suggest he misapprehended or ignored any aspect of the evidence. He simply rejected, in many respects, the City's position about the interpretation of this evidence and the findings that should be made.

[107] The Adjudicator's conclusions, while not the only ones available on the evidence, fall within the range of acceptable, possible outcomes, in light of the evidence and the law. There is no basis for this Court to intervene. The appeal is dismissed.

[108] If the parties wish to make submissions as to costs, they are to advise the Clerk of the Court within thirty days of the filing of this Memorandum of Judgment of the following:

- a) whether they wish to present oral submissions or would be content with proceeding by way of written submissions; and
- b) their availabilities to appear at a costs hearing if one is needed.

[109] If all parties are content to proceeding by way of written submissions, I will set timelines for the filing of those submissions. If any of the parties wish to have a hearing as to costs, I will schedule a hearing date based on the availabilities provided.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
19th day of September 2018

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IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

THE MUNICIPAL CORPORATION OF
THE CITY OF YELLOWKNIFE

Appellant

-and-

A.B.

Respondent

-and-

THE NORTHWEST TERRITORIES
HUMAN RIGHTS COMMISSION

Respondent

MEMORANDUM OF JUDGMENT
OF THE HONOURABLE JUSTICE L.A.
CHARBONNEAU
