Date: 20200310

Files: 566-02-14389 and 14390

Citation: 2020 FPSLREB 27

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ANGELA BZDEL

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Bzdel v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Pamela Sihota, Public Service Alliance of Canada

For the Employer: Philippe Giguère, counsel

Heard at Lethbridge, Alberta,
January 21 to 23, 2020.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] The grievor, Angela Bzdel, alleged that her employer, the Canada Border Services Agency, failed to accommodate her and that it discriminated against her on the basis of her family status, in violation of article 19 of the agreement between the Treasury Board and the Public Service Alliance of Canada for the Border Services Group (all employees), which expired on June 20, 2014 ("the collective agreement"). According to her, the employer discriminated against her when it delayed approving her deployment from her workplace, the port of entry at Coutts, Alberta, to her desired work location, the Edmonton International Airport (EIA) in Edmonton, Alberta, so that she could raise her daughter in a location nearer to her extended family.

II. Summary of the evidence

[2] The grievor joined the employer in 2008 and was assigned to the Coutts port of entry. In 2012, while pregnant, she submitted a deployment request under the employer's *Deployment Policy*. She sought a transfer to EIA because of the upcoming change to her personal circumstances. She was about to become a single mother and anticipated no assistance from the child's father. She had no support system in the Coutts area, where she lived. She intended to relocate to Edmonton and raise her child in that area, where her parents and the rest of her family were located.

[3] The grievor took leave in late 2012 and relocated to Edmonton. She spent her maternity leave there, settled her child there, and was able to find suitable daycare there. While on maternity leave, she again submitted a deployment request to EIA under the *Deployment Policy*, which she testified was again denied.

[4] Following her maternity leave, the grievor took parental and care-and-nurturing leave until January 2015, all of which was without pay. To deploy to EIA, she had to complete the duty firearms training course (DFC). As of January 2015, she had not completed it. Part of that course was completed in an office or classroom setting, which the employer allowed her to complete in Edmonton, in anticipation of an upcoming training course to be held later that spring.

[5] By a letter dated December 18, 2012, the grievor had been advised that upon her return from maternity leave, she was expected to return to her substantive position in

Coutts. She was also advised that her deployment request was valid for one year and that if she was seeking an accommodation, she was to pursue it under the provisions of the employer's *Policy on the Duty to Accommodate*.

[6] She did not file an accommodation request under that policy, but she did renew her deployment request in the meantime. On March 23, 2015, the grievor emailed Marlene St. Onge, who was the acting chief of operations at Coutts, to request an accommodation on the basis of family status. The accommodation requested was a transfer to EIA because according to the grievor, she would have access there to the medical and family support that she needed. She was a single parent and was unable to find suitable certified and accredited daycare in the Coutts area. She had no resources to assist with her child-rearing.

[7] Ms. St. Onge responded to the grievor's request by referring her to the *Policy on the Duty to Accommodate* and by providing her with the necessary forms, which she asked the grievor to fill out and return. The grievor returned her accommodation request form, family status information form, and 16 pages of supporting documents to Ms. St. Onge by return email on April 14, 2015. Ms. St. Onge forwarded them to the departmental accommodation coordinator but still required further information. She wanted the grievor to clarify what if any role the child's father would play, and she wanted to know whether the grievor had considered day homes and babysitters or only licensed daycares.

[8] According to the grievor, the employer was fully aware of her circumstances and the requirements that had to be in place so that she could both work and rear her child. She and Ms. St. Onge had had several conversations about what could be done to ensure that the necessary support was available to her. They frequently discussed what the employer was able and willing to do and how it could align with her requirements and needs for daycare and child-rearing. The employer was willing to change her hours of work to a regular Monday-to-Friday day shift and to ensure that her post rotation would be such that she would not be on secondary inspection, where it was most likely that she would be required to stay past the end of her shift if she discovered something while searching a traveller.

[9] The grievor was not willing to consider those options. She looked for daycare in the surrounding areas, including as far away as Lethbridge. Daycare did not offer

emergency coverage in the event that she became stuck at work and could not get to the daycare before it closed. She testified that the daycares she contacted charged penalties of $10 per minute, which she could not afford. She also was aware that daycares have a duty to report it if a child is left after hours too often. If she remained in Coutts, she foresaw that her child would be in daycare more than the recommended 9.5 hours per day. She found that number on the Internet; however, according to her evidence, she did not know the source or the rationale behind it.

[10] The employer's suggestions on how to amend her working conditions did not address the fact that she would have to work a 10-hour shift in an unpredictable place, that there was no childcare in Coutts, and that she had no alternate support system other than a daycare because she could not afford a babysitter or nanny, and evening care was not available for her night shifts.

[11] In February 2015, the grievor took the DFC. On the second-last day of training, she was injured; as a result, she was unable to complete the course. She was on workers' compensation or injury-on-duty leave until June 2015, when she was cleared for a return to sedentary and light duties at Coutts. She appealed the decision and successfully delayed her return until July 2015, when she was cleared to attend the next DFC. With that course, and on the basis of her deployment request, she successfully secured a position at EIA.

[12] According to the grievor's evidence, she diligently pursued deployment opportunities. She complied with all the employer's requests for information related to her accommodation request. She provided it with information about her daycare search in the Coutts area. Her search was, using her word, "massive". The parameters included that the daycare had to have an opening for a two-year-old, be accredited and licenced, and provide her with eligibility for the provincial daycare subsidy.

[13] Despite all the information that the grievor provided, she concluded that the employer was not willing to accommodate her. She received a summary of the interactions and information she had provided to Ms. St. Onge via email, along with the employer's determination that she was to return to her assigned workplace in Coutts once the workers' compensation authority cleared her to return to work (Exhibit 2, tab 8). It was clear to her that the employer was comparing her to her colleagues who also had children, but she insisted that she was not like them as she was a single

parent. She admitted that she was offered a temporary accommodation, but her parental duties were not temporary.

[14] The grievor declined the offer of working 7.5 hours per day, Monday to Friday. She had relocated to Edmonton by then and had established her home there. Her daughter was in daycare there. It was unreasonable for the employer to expect her to commute from Edmonton to Coutts each week. It was also unreasonable for the employer to expect her to relocate from Edmonton to Coutts. She had no support system in Coutts, and no daycare was available. By then, the grievor had been living in Edmonton for 3 years, and she was not willing to return to Coutts, even if her position was there. She knew when she moved to Edmonton that her position remained in Coutts, but she had hoped to be deployed to EIA before she was due to return to work.

[15] On cross-examination, the employer's representative spent a great deal of time questioning the grievor about her knowledge of the National Joint Council's *Commuting Assistance Directive*, which recognizes that for employees assigned to work at Coutts for the employer, bargaining agents and the employer had agreed that it would be reasonable for them to commute to Lethbridge from Coutts for daycare purposes. As the grievor lived in Coutts and not in Lethbridge, she would have had to drive to Lethbridge and return to Coutts before and after each shift.

[16] According to the grievor, she was very diligent in her daycare search. She searched in Coutts and the surrounding communities on both sides of the Canada - United States border. While options might have been available, they were not licensed, accredited, or qualified. Had she accepted the employer's proposal of a daycare in Lethbridge, it would have added up to six hours of driving to her day in all types of weather, which was not at all reasonable. Had she been deployed to EIA, she testified that she would have been able to work full scheduled shifts due to her family support.

[17] The grievor admitted that when she conducted her daycare research, she had not yet given birth. She did not put her name on any daycare waiting lists in her area because they required deposits. Daycare vacancies arise randomly, and she had no way of knowing the vacancy status from month to month unless she checked every month, which she did not do. She was not able to consider babysitters as her childcare subsidy applied only to day homes and daycares. She had what she needed in Edmonton; she needed a job there.

[18] Ms. St. Onge testified that while she was the acting chief of operations at the Coutts port of entry, she worked with the grievor on her accommodation request, her workers' compensation leave, and her return to work to Coutts. As the grievor testified, Ms. St. Onge was able to secure her a seat on the DFC in February 2015. The grievor was able to take the required online training in Edmonton rather than having to return to Coutts.

[19] In the course of the DFC, the grievor was injured and had to withdraw for medical reasons. She received workers' compensation benefits for the time lost until she was able to return to work, which was initially scheduled for June 2015 but was then delayed until July 2015.

[20] On March 23, 2015, the grievor emailed Ms. St. Onge, requesting accommodation based on her family status in the form of a transfer to EIA. She stated in her request that there were no licensed or accredited daycares in Coutts or in the surrounding areas. She also stated that she had diligently been pursuing a deployment to EIA for three years (since 2012). In response, Ms. St. Onge outlined the process for requesting and obtaining a workplace accommodation and sent the grievor the appropriate forms to be completed. Ms. St. Onge also pointed out to her that accommodations are based on need and not on personal preference.

[21] This was the first time the grievor ever mentioned the need for accommodation on the basis of family status. On April 14, 2015, she returned the completed family status information sheet, with 16 pages of supporting documentation, which Ms. St. Onge then forwarded to the departmental accommodation coordinator. A few questions were asked of the grievor, about what daycares, day homes, and babysitters she had considered, as Ms. St. Onge was aware that there were numerous options in the southern Alberta area around Coutts and neighbouring Milk River, Warner, McGrath, Raymond, and Lethbridge.

[22] Milk River was 10 to 15 minutes' drive from Coutts. Warner was 20 minutes' drive. New Drayton was 30 minutes away. McGrath and Raymond were 45 minutes away. All these areas, including Lethbridge and the areas surrounding it, had suitable daycares with vacancies for a two-year-old child. Despite this, the grievor continued to tell the employer that there were no licensed and accredited daycares available in the Coutts area that met her needs.

[23] After the accommodation coordinator reviewed the grievor's accommodation request, she also required further clarification as to the extent of the grievor's daycare search. The grievor responded on April 27, 2015, to the effect that she had looked into day homes and babysitters but that their qualifications, licensing, and accreditation were issues for her. She did not tell the employer which ones she had considered, their locations, or the resources she used to conduct her search, but according to Ms. St. Onge, the search was limited to only the Village of Coutts.

[24] The employer asked the grievor to expand on her response; it stated that many employees had successfully found appropriate daycare in the Coutts area. She responded, "I am not many employees …". She did not answer the employer's questions, and after a careful review of the information available and the forms she had provided, Ms. St. Onge concluded that the grievor did not make all diligent efforts to find daycare in the Coutts area.

[25] Ms. St. Onge did propose an alternate schedule at Coutts, which would have accommodated the grievor's childcare needs until her family status changed or until she no longer needed daycare. The number of work hours would be based on what she needed to meet her childcare needs and would be worked Monday to Friday, during the day. Ms. St. Onge also left the door open to accepting further information in support of the grievor's request if she were interested in providing it. The grievor was presented with a proposed temporary accommodation of an eight-hour Monday-to-Friday day shift (Exhibit 2, tab 6). Overtime was not mandatory; it was optional for officers. This solution was not acceptable to the grievor; she was interested only in a transfer to EIA.

[26] Once the grievor was cleared to return to work from her workplace injury, the accommodation request was still outstanding in her mind. The employer had offered her different work schedule options in Coutts, but she insisted that she be allowed to proceed on leave without pay for family reasons while she appealed her workers' compensation claim. Her appeal was successful, and her return to work at Coutts was delayed until July 2015.

[27] Ultimately, the grievor was approved to return to work in time to complete the next DFC, which was held in July 2015. After that, she met the conditions of employment for a position at EIA. Her deployment was then approved, and the outcome was that she never did return to work in Coutts.

[28] Steven Singer also testified for the employer. He is the current chief of operations and resides in the Village of Coutts. He has lived there since 2009, when he became the superintendent at the port of entry. He explained the difference between the deployment and accommodation processes. The deployment process is initiated by an employee voluntarily seeking a workplace change. The home location does not deploy the employee to the new location. The new location seeks the employee and brings her or him to that location. The new location is under no obligation to staff its vacant positions via the deployment process but if it chooses to, the selection of a successful candidate is normally based on the best fit for the location, based on skill set. The management group for the location determines its staffing needs and goes to the deployment list to find anyone who has expressed an interest in the location and who meets its needs.

[29] On the other hand, the accommodation process is initiated when an employee notifies the employer that he or she is facing barriers with his or her working arrangement on the basis of one of the grounds identified in the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*), which, despite reasonable efforts, cannot be overcome to meet the employee's needs. There is a difference between needs and wants. The accommodation process addresses needs, not wants. The employer's obligations under the duty to accommodate are separate and distinct from the deployment process.

[30] As a resident of the Village of Coutts, Mr. Singer has had to find daycare. He testified that in the village, with a population of approximately 300, there is limited availability, but it is available. Within the village, daycare is primarily available in private day homes. Outside Coutts, but within the immediate area, there are day homes in Milk River, and Warner has a daycare centre as well as day homes. Private babysitters are readily available. People make it known that they are available. Daycare opportunities can be found by word of mouth, friends, colleagues, other parents, other caregivers, posting ads locally, posting electronic ads, etc. Searching for daycare requires a sustained effort and requires making adjustments. At times, parents work together to cover the gaps and develop contingency plans.

[31] The childcare providers in the Coutts area are very supportive of shift workers. People in the community understand that things can happen at the border that could require workers to stay beyond the end of their shifts. The expectation is that parents

will notify their daycare providers if they will be late. Mr. Singer testified that at times, he had to arrange for someone to pick up his child when he could not leave work on time.

[32] According to Mr. Singer's evidence, he was advised at the first-level grievance hearing by the grievor's union representative (the grievor did not attend the meeting) that the grievor considered only family members and licensed and accredited daycares suitable for her childcare needs. She did not consider day homes or any other childcare options suitable. Nor did she consider living in Lethbridge and commuting to Coutts a viable option even if her shifts were altered to only day shifts. The only acceptable option to her was a transfer to EIA. When she was asked when she last looked for daycare in Coutts, her response, through her union representative, was May 2015.

III. Summary of the arguments

A. For the grievor

[33] The issues before the Board are whether the employer contravened article 19 of the collective agreement by delaying moving the grievor's workplace to EIA and whether the delay was reasonable.

[34] In August 2012, the grievor asked to be deployed to EIA. She was pregnant at the time and was about to become a single parent. She intended to relocate to the Edmonton area to raise her child in the midst of her extended family. In November 2012, she went on sick leave and moved to Edmonton, where she eventually gave birth. She remained there through her maternity, parental, and care-and-nurturing leaves. Throughout that time, she renewed her deployment requests, as each was valid for only one year.

[35] In January 2015, after all the grievor's leave had expired and her deployment had not come through, her only option was to return to Coutts. Before that occurred, she was given an assignment in Edmonton that allowed her to complete the online portion of the DFC, which she had to do before she could complete the hands-on training. Completing the course was a condition of employment at EIA. She began the DFC in February 2015 but was unable to complete it due to the workplace injury, which kept her on leave until June 2015.

[36] In the meantime, on April 14, 2015, the grievor made an accommodation request, on the basis of family status, with Ms. St. Onge. When she was cleared to return to duty on June 1, 2015, she was still not in a position to return to Coutts because of her childcare situation. She had been unable to find suitable daycare in Coutts or in any of the surrounding communities. The closest was in Lethbridge, which was over an hour's drive from Coutts. With her regular work schedule, it would have meant that her child would have been in care 12 hours per day, barring any unforeseen circumstances.

[37] The employer proposed the temporary accommodation of altering the grievor's schedule to a regular 7.5-hour day shift, which would still have required keeping her child in daycare 10 hours per day. That would still have been in excess of the recommended 9.5 hours per day. Regardless, she could not find daycare in the Coutts area.

[38] The grievor did not return to work in June 2015 as her workers' compensation claim was extended until July, which coincided with the start of the next DFC. She attended and successfully completed it and was deployed to EIA. The delay from her first deployment request in August 2012 to the date of her deployment in 2015 was unreasonable and is *prima facie* proof of discrimination. While she used the deployment process to achieve her goal, the employer knew that she was looking for an accommodation based on family status.

[39] The test for whether a *prima facie* case of discrimination has been made is set out in *Johnstone v. Canada Border Services Agency*, 2010 CHRT 20, which the Board adopted in *Havard v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 36. The grievor demonstrated the three criteria outlined in these decisions, in that she had a child under her care and supervision, her childcare obligation engaged legal obligations and was not a personal choice, and she made reasonable efforts to meet the obligations through reasonable alternate solutions.

[40] The evidence shows that she attempted to find daycare. She looked in the community and found nothing suitable either in Coutts or in Lethbridge. Any available daycare would have meant that her child would have been in care for 10 hours each day, when the maximum time a child should be in care is 9.5 hours. The daycare options available would not have addressed emergencies or leaving work late. The

employer argued that other options were available in the Coutts area, but it did not contact the daycare providers to determine whether there were openings. Nor did it find her a daycare that met her needs.

[41] Mr. Singer described his experience securing daycare. He testified that childcare is limited in the Coutts area and that it amounts to day homes that are mostly supplemented by other services, such as babysitters or nannies. The grievor testified that she could not have afforded a nanny. Even if she could have found daycare, it would not have solved her issue of the lack of family support in the Coutts area.

[42] The employer must assess each case individually. It did not in this case. The grievor was faced with a different reality as a single parent, which was compounded by having no external support network. Having to account for rotating shifts aggravated her daycare search. The temporary accommodation proposed led to the same problem because of the lack of family support and the commuting time. Had her workers' compensation appeal not been approved, she would have been required to commute from Edmonton to Coutts every week, which would have negatively impacted her parental obligations. The fact that the employer expected her to return to Coutts in July 2015 after she made her request in April 2015 clearly demonstrated that it did not consider her accommodation request.

[43] The grievances should be allowed, and damages under the grounds identified by the Canadian Human Rights Commission should be awarded retroactive to the grievor's first request in August 2012.

B. For the employer

[44] The grievor insisted that the root of her grievances was in her deployment request in August 2012. This is not accurate. She did not seek accommodation until April 2015. The Board does not have jurisdiction to deal with a deployment by consent, which the deployment would have been in this case, since she had initiated the process. Mr. Singer explained that a deployment request and an accommodation request involve two separate processes; this is clear. That was explained to the grievor in 2012 when she made her deployment request. She was told what she needed to do and how to do it, yet she did nothing until April 2015.

[45] The employer cannot be held responsible for a failure to accommodate before an accommodation request is made. The grievor filed her grievance on June 1, 2015. She alleged that she had been discriminated against beginning in 2012. In the case of a continuing grievance, failing to act at the first opportunity does not render the grievance inarbitrable, but it does limit any damages (see *Attorney General of Canada v. Duval*, 2019 FCA 290).

[46] The grievor has not established a *prima facie* case. As a parent, she had the responsibility to take care of her child. How she fulfilled that obligation was a matter of choice. She was presented with options, and some were available in the Coutts area, where her position was located. As in the *Board of Education of Regina School Division No. 4 of Saskatchewan v. Canadian Union of Public Employees, Local 3766*, 2018 CanLII 122658 ("*Regina School Division*"), in which a grievor chose the type of daycare she preferred for her child, the evidence demonstrated a preference and not the reasonable options that were available in the area of the grievor's position.

[47] The grievor's responsibility to provide daycare could have been discharged while she worked in Coutts with the resources available in the area and with the employer's proposed changes to her schedule. The problem was that she was not willing to consider that her needs could be met anywhere or in any way other than as she foresaw by moving to Edmonton.

[48] There is no evidence as to why the child's needs could have been met only in Edmonton or why the grievor's legal responsibility to provide care for her child while she worked could not be met anywhere else than Edmonton. She wanted the emotional support of her family, which is a personal choice, not a legal responsibility. Consequently, she did not meet the third factor of the *Johnstone* test. She did not exhaust or reasonably explore options in Coutts or the surrounding areas. She was steadfast in her demand that she be transferred to EIA.

[49] According to the Federal Court of Appeal in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 at para. 88 ("*Johnstone-FCA*"), a childcare obligation results in an employee being unable to meet his or her work obligations only if no reasonable childcare alternative is reasonably available to the employee: "It is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a *prima facie* case of

discrimination will be made out." Reasonable childcare alternatives should be broadly interpreted and could very well be other than a grievor's preferred option.

[50] The onus is not to exhaust all the alternatives but to exhaust all the reasonable and easily accessible ones, which the grievor did not do. Her efforts were scant, narrow, reactionary, and limited. The diligence that she demonstrated in pursuing her deployment requests was not shown in her pursuit of daycare options. Had she been diligent, she would have found daycare in Coutts or the surrounding communities.

[51] She used very narrow criteria to winnow her search. This was unreasonable, and it violated the *Johnstone* principles, which required her to exhaust all reasonable alternatives. The employer has no idea, and neither does the Board, how she conducted her search, the resources she used, or the inquiries she made and how often she made them. There is a list of daycares that she claims she contacted, but there is no information as to when she did or anything that would indicate that she actually had a conversation with anyone at a daycare. When Ms. St. Onge asked her about contacting daycares or day homes, she was very defensive and reluctant to answer. She provided no proof of waiting lists or administrative fees.

[52] The grievor claimed that babysitters and nannies cost too much, but the case law states that that did not make them unreasonable alternatives (see *Regina School Division*, at para. 107). She provided no evidence of the cost of anything, let alone that the cost of babysitters or nannies was so disproportionate that it would have adversely affected her ability to care for her child (see *Flatt v. Treasury Board (Department of Industry)*, 2014 PSLREB 2; and *Flatt v. Attorney General of Canada*, 2015 FCA 250).

[53] The evidence indicates that reasonable daycare options were available at the time when the grievor claimed there were none. Both the employer's witnesses testified as to the resources available to the grievor. The problem was that she was not interested in considering making any tangible efforts to find suitable daycare options because had she done so, she would have had no grounds to request accommodation, and she would then have had to rely on her deployment request to be moved to EIA. The employer tried to work with her to make her return to work at Coutts a success. It offered to modify her shift schedule to suit her daycare availability. She was steadfast that a transfer to EIA was the only appropriate solution. It was Edmonton or nothing.

[54] The grievor has not demonstrated a *bona fide* childcare problem that required that she be transferred to Edmonton. She had a personal preference, which the employer was not required to accommodate. Therefore, the grievance should be dismissed.

[55] In the alternative, the employer offered her a reasonable accommodation, which she refused because it was not her preferred option. She is not entitled to her preferred or a perfect accommodation but only to a reasonable or suitable one (see *Duval*, at para. 42; and *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97 at para. 134). The employer made good-faith efforts to help her meet her childcare obligations and to attend work. She rejected everything and proposed nothing other than a transfer to EIA.

[56] The grievor did not participate fully in the accommodation process, as required, and was not forthcoming in providing information in support of her request. The childcare need she described did not flow from a legal obligation but rather from her personal preference to raise her child near the child's grandparents. Ultimately, she got what she wanted through the deployment process.

IV. Reasons

[57] The grievor alleged that the employer discriminated against her based on her family status, in violation of clause 19.01 of the collective agreement, which provides that there shall be no discrimination exercised or practised with respect to an employee by reason of family status, among other grounds, as follows:

> ***ARTICLE 19***
>
> ***NO DISCRIMINATION***
>
> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*

[58] Section 7 of the *CHRA*, which has been incorporated into clause 19.01, provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground. To establish that the employer engaged in a discriminatory practice, a grievor must first establish a *prima*

facie case of discrimination, which covers the allegations made and that if believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the employer. To establish a *prima facie* case of discrimination, the grievor had the burden of demonstrating that she met one of the prohibited grounds of discrimination, in this case family status, that she experienced an adverse impact with respect to her employment, and that her family status was a factor in that adverse impact (see *Havard*, at paras. 111 and 112).

[59] To establish a *prima facie* case of discrimination based on family status resulting from childcare obligations, a grievor must show that a family member is under his or her care and supervision, that the family obligation at issue engages his or her legal responsibility for that person (as opposed to being a personal choice), that the grievor has made reasonable efforts to meet those family obligations through reasonable alternative solutions that have proved not reasonably accessible, and that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with fulfilling those obligations (see *Johnstone-FCA*, at para. 93; and *Flatt*, at para. 177).

[60] The case law in the area of accommodation is quite settled. An employee seeking accommodation has a duty to assist in obtaining an appropriate one. I do not believe that the grievor did so. She moved to Edmonton before her child was born with the intention of never returning to Coutts. It was a personal choice for which she sought relief, quite rightly, under the employer's deployment process. The grievor did not pursue accommodation until years later, despite the employer indicating to her in response to her initial deployment request what information it required from her in that regard. Nor did she establish that her family status was a factor in the consideration of her deployment request during this time.

[61] It is clear to me that the grievor never intended to return to Coutts and that she never seriously sought daycare options in that area. Her statement that her child could not be in daycare for more than 9.5 hours per day was without any legislative or scientific reference other than that she saw it on the Internet. The shift-schedule change and the employer's commitment that her post assignment would be adjusted to prevent her from being held beyond the end of her shift would have allowed her to meet this exigency. As the Federal Court of Appeal directed in *Duval*, I am mindful that a reasonable and not a perfect accommodation was required. The employer's proposal

certainly would have met this standard, in my opinion, without relocating her position to EIA. Accommodation need not be to the point of undue hardship if it can be accomplished reasonably before that point is reached.

[62] Furthermore, all the evidence, including the grievor's, which was shaky, and she waffled on cross-examination, was that daycare options were available in the Coutts area but that she put unusual restrictions on whether they were suitable. She was unable to explain things on the stand, such as why she insisted on the daycare being licensed and accredited and then insisted that either would have been acceptable. Then it was a question of whether the daycare would accept her provincial daycare subsidy. She claimed that she did not put her name on waiting lists because of the cost, but according to Mr. Singer, who was a very credible witness, he put his name on waiting lists for daycare in the Coutts area and never had to make a deposit. In essence, the grievor's evidence was just not credible. As stated, she never intended to return to Coutts and did nothing to cooperate with the employer to enable her to return to work there.

[63] In determining whether the duty to accommodate has been fulfilled, the complainant's conduct must be considered. While there is a need to accommodate, there is no need to accommodate to the point of undue hardship if another reasonable means of accommodation is available. The duty to accommodate is not absolute (see *Andres v. Canada Revenue Agency*, 2014 PSLRB 86). While it would not have been reasonable for the employer to expect the grievor to travel to Lethbridge before and after each shift to secure daycare, as was the preposterous proposition put to her on cross-examination, the employer's accommodation proposal was reasonable; it was a change to full-time day shifts for as long as she required daycare at her assigned work location at Coutts. She did not have the right to demand a transfer to EIA because that was where she preferred to live.

[64] As was stated in *Regina School Division*, not all childcare needs flow from a legal obligation. Some, such as the grievor's choice to raise her child in Edmonton surrounded by her extended family and not in Coutts, result from personal choices. The grievor had to establish through clear evidence that not moving to Edmonton would have adversely affected her ability to discharge her legal obligations to her child and that there were no reasonable alternatives available to her in the Coutts area. She did not do so. In argument, her representative stated that had the employer been

aware of a reasonable alternative for daycare that met her needs, it should have secured the opportunity for her. It was not the employer's role or obligation to find daycare for the grievor. It was her legal obligation, which in this case she chose to discharge by invoking her personal preference.

[65] For these reasons, I find that the grievor has not established a *prima facie* case of discrimination since she failed to establish that she met both the second and the third steps enumerated in *Johnstone-FCA*, that she made reasonable efforts to meet her childcare obligations through reasonable alternative solutions, and that no alternative solution was reasonably accessible. Her case is built on the assumption that her accommodation needs could be met only through her personal choice of living in Edmonton. She was not prepared to consider, in any meaningful way, any other option, which, in my opinion, would have been reasonable in the circumstances.

[66] The grievor relied heavily on *Johnstone* at the Canadian Human Rights Tribunal and Federal Court of Appeal levels to support her argument. The situation in this case and the fact situation in *Johnstone* are diametrically opposed. I agree with counsel for the employer that she provided no concrete evidence that she could not meet her enforceable childcare obligations while continuing to work in Coutts and that an available childcare service or an alternative arrangement was not reasonably accessible to her that would have met her work needs.

[67] The grievor sought damages pursuant to the *CHRA* dating to 2012, when she first sought to be deployed to EIA. She used the deployment process in 2012 and only sought accommodation under the employer's accommodation policy years later despite having had the opportunity to seek relief under it much earlier. As preposterous as the proposal was concerning travel to Lethbridge from Coutts for daycare, I find this one equally preposterous. The employer cannot be held liable for damages for discrimination under the *CHRA* when the grievor did not even attempt to establish the characteristics recognized for protection under the *CHRA* at that point. The employer cannot be found to have retroactively discriminated against her in the circumstances of this case. Regardless, as the grievor did not establish that there was discrimination, she is not entitled to any damages.

[68] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[69] The grievances are dismissed.

March 10, 2020.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board