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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

OUMAR GUEYE

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

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

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Erin Sandberg, counsel

For the Employer: Kétia Calix, counsel

Heard by videoconference,
February 28 and March 1, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] Oumar Gueye ("the grievor") works for the Canada Border Services Agency as a border services officer at Pierre Elliott Trudeau Airport (Dorval), where he welcomes travellers. He is a member of a bargaining unit represented by the Public Service Alliance of Canada (PSAC). The PSAC and the legal employer, the Treasury Board, have a collective agreement. For the purposes of this decision, the Canada Border Services Agency is considered the employer because the Treasury Board has delegated that authority to it.

[2] On July 8, 2011, the grievor submitted an accommodation request to the employer because of his family status. It was denied on October 20, 2011, and the grievor filed a grievance on November 22, 2011.

[3] On October 1, 2012, the grievor and the employer signed an agreement to resolve the situation and to provide the grievor an accommodation related to his family status.

[4] On November 14, 2013, the grievor referred his grievance to adjudication before the Public Service Labour Relations Board.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the Public Service Labour Relations Board and the Public Service Staffing Tribunal.

[6] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c 9) received Royal Assent and changed the name of the Public Service Labour Relations and Employment Board and the title of the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[7] At the pre-hearing conference held in preparation for the hearing, it was agreed that the issue involved the July 8, 2011, to October 1, 2012, period. The grievor claimed that he was not accommodated during that period.

[8] At the hearing, the evidence revealed that the grievor was not fully satisfied with the accommodation agreed to. The employer raised an objection that the scope of the hearing was changed by considering the adequacy of the accommodation agreement.

[9] I allowed the grievor to present his testimony on the implementation of the accommodation agreed to in October 2012. The accommodation's adequacy will be addressed in my analysis.

II. Summary of the evidence

[10] The parties filed a joint statement of facts. The grievor testified. The employer called two witnesses, Micheline Dicaire, who held a superintendent position at Pierre Elliott Trudeau Airport in 2011, and Marc Banville, who was the chief of airport operations on an acting basis as of the events. Overall, the evidence was not contradictory, except for a few details that will be noted.

[11] The grievor has been working as a border services officer (FB-03 group and level) for the employer since 2008. Since he was hired, he has had a variable schedule, meaning that he works rotating shifts (day, evening, and night) and that he must work two weekends out of four.

[12] As of his accommodation request, in July 2011, he was the father of three children, born in 2003, 2006, and 2009. His wife was expecting a fourth child, who was born on September 4, 2011.

[13] On July 8, 2011, the employer announced the coming into force of its *Duty to Accommodate Policy*. On the same day, the grievor submitted an accommodation request (employer form), along with the Family Status Information Form.

[14] The grievor requested a day position. His wife worked from 15:30 to 23:30 as a nurse team leader at Ste. Anne's Hospital for veterans in Sainte-Anne-de-Bellevue. She could not change her schedule.

[15] At the hearing, the grievor testified about his long-standing efforts to obtain a day position. The employer objected to this evidence, since it was from before the grievance. I allowed it, to obtain a better contextual idea of his situation. He had long wanted a day position, to facilitate his family life. The request dated July 8, 2011, was made in connection with the employer's *Duty to Accommodate Policy*. The grievor saw in it the strong argument he needed to convince the employer to assign him to a day position.

[16] According to the adduced evidence, the vast majority of border services officers who greet travellers have variable schedules. Some are entitled to day positions because of their seniority. Certain positions at the same group and level (FB-03) are assigned to receiving goods; they are day positions. Also, some services, such as Nexus (which allows for the accelerated entry of approved travellers between Canada and the United States), are essentially provided during the day.

[17] On August 9, 2011, Ms. Dicaire and Mr. Banville met with the grievor to obtain more information on his request. On September 7, 2011, the employer communicated the refusal of the requested accommodation in a letter signed by Ms. Dicaire.

[18] On October 20, 2011, the employer signed the form entitled, "[translation] Review and Agreement Concerning an Application for Accommodation". When asked about the delay between the refusal letter and the signing of the form, Ms. Dicaire explained that the employer was in the early stages of implementing its *Duty to Accommodate Policy*.

[19] In the form, the employer stated the reasons for its refusal as follows:

> [Translation]
>
> *We could take some steps, but after examining Mr. Gueye's family status, our view is that no accommodation is required at this stage, given that Mr. Gueye's spouse is currently on maternity leave. Mr. Gueye informed us that his spouse intends to return to work quickly, so that she may continue her master's studies. We believe that that decision should not affect our decision, given that in that case, he will be able to benefit in turn from the remaining paternity leave time.*

[20] The text of October 20, 2011, is about the same as that of the refusal letter of September 7, 2011, except for the following addition to the letter:

[Translation]

…

Although you told us that you do not wish to send your children to daycare, nevertheless, we encourage you to take advantage of this leave period to find alternatives to your family status. We also recommend that you contact us one month before your return to work so that we may reassess the situation and consider other accommodation options, if necessary.

…

[21] In November 2011, the grievor filed a grievance against the refusal.

[22] At the hearing, Ms. Dicaire testified that at the August 9, 2011, meeting, the grievor indicated that he had already organized his schedule to work days until September 21, 2011. The employer allowed (and still allows) border services officers to trade schedules, provided that they complete a form and give it to the employer in advance. Generally, the grievor was able to exchange his evening or night shifts with his colleagues so that he could work just day shifts, from 06:53 to 16:45.

[23] The grievor also confirmed that his spouse was expecting a child by early September and that she would take a maternity leave. The employer's refusal letter, dated September 7, 2011, came a few days after the child's birth on September 4, 2011.

[24] The grievor testified about his dissatisfaction with the employer's solution. His spouse intended to return to work and to resume her master's studies in mid-October 2011; otherwise, she would lose the scholarship awarded to her for her master's. His wife's schedule was fixed, from 15:30 to 23:30. In addition, she sometimes had to work weekends, which caused a scheduling conflict, given that he also had to work two weekends out of four.

[25] The grievor testified about his and his spouse's efforts to find someone to babysit the children. He claimed that the search was difficult. For a time, a neighbour helped them, but she moved. Neither of them has family in Montréal.

[26] In their search for a person to babysit the children, they set certain conditions. The person had to be reliable, have a certain level of education to help the children with their homework, have a vehicle with which the person could pick up the children (and their car seats) from daycare, and be available according to the grievor's variable schedule. The search was unsuccessful.

[27] The grievor also disagreed with using his parental leave when his wife returned to work. He preferred to use it during the summer, when the children were at home.

[28] Trading shifts was possible but not always easy. Some colleagues willingly accepted exchanges, while others were reluctant. The exchanges were not always ideal. To be able to work his day shifts, he sometimes worked 10 days in a row, without a day off. He was exhausted.

[29] The employer entered into evidence the grievor's work schedule from June 20 to August 14, 2011. All the shifts were during the day (06:53 to 16:45) except one Sunday from 11:53 to 21:45. Work days (W) and rest days (R) alternated as follows: 5W, 4R, 5W, 3R, 4W, 3R, 2W, 2R, 4W, 3R, 3W, 2R, 5W, 5R.

[30] In fact, in the end, the grievor's spouse did not return to work in mid-October 2011. She took her full maternity leave, which caused problems with the scholarship to pursue the master's. Despite everything, she has since completed her master's and now has a different job.

[31] In September 2011, Mr. Banville sent the grievor an offer for a term position in postal services. The grievor responded that the advertisement referred to variable schedules, which he did not want. Mr. Banville replied that the work hours were mostly during the day and that the grievor should speak to the manager for more details. The offer was not followed up.

[32] I noted earlier that the evidence was not contradictory, except for a few details. I will mention them at this point, but in my opinion, they are inconsequential.

[33] The employer's documentary evidence includes a letter, the full text of which is as follows:

> [Translation]
> *August 9, 2011*
>
> *To whom it may concern,*
>
> *My wife works at Ste. Anne's Hospital (Veterans Affairs), and I authorize Micheline Dicaire or Marc Banville to contact Human Resources for information about my wife's job.*

Oumar Gueye
Canada Border Services Officer
Pierre-Elliott Trudeau Airport

[34] The grievor testified that Ms. Dicaire presented the letter to him and that he refused to sign it because it was illegal — it was not his responsibility to give the employer permission to ask his spouse's employer questions about her work situation. Only she could consent.

[35] For her part, Ms. Dicaire said that she had no recollection of writing such a letter. Instead, she believed that the grievor would have written it.

[36] Mr. Banville shared that opinion. He noted that a letter from management would not indicate the airport's name that way. The rules were very strict on the proper way to identify the airport.

[37] Regardless of the author, the testimonies aligned on two points. The letter was never signed or used. The testimonies demonstrated that during the August 9, 2011, discussion, the subject of the job of the grievor's spouse was discussed to see whether it was possible for her and the grievor to organize their schedules differently. The grievor responded firmly that no, his wife's schedule could not be changed.

[38] Ms. Dicaire testified that she had inquired with her sister, who worked for the Human Resources department of the hospital at which the grievor's wife worked, about the general organization of nursing positions at the hospital. It is apparent from Ms. Dicaire's testimony and that of the grievor that the position of responsibility that his spouse held at night would not have been the same during the day, meaning that she would have earned less.

[39] Another point on which the testimonies were inconsistent was Ms. Dicaire's attitude when she met with the grievor to give him the refusal letter on September 7, 2011. According to him, she simply stood up to leave the meeting and turned off the light switch in the room they were in. She denied being so rude.

[40] I am not sure of the tone of that meeting. There is no doubt that the grievor was displeased. In any case, regardless of Ms. Dicaire's behaviour, the refusal itself is important, and it led to the grievance. Regardless of whether Ms. Dicaire made a gesture of impatience, it did not change the letter, since it had already been written.

[41] Another noteworthy discrepancy is that the employer seemed to state that the grievor did not want to have his children babysat, while the grievor said that he could not have his children babysat.

[42] The grievor acknowledged that he told Ms. Dicaire that he did not really want to have his children babysat — they were already in school and daycare all day. It was preferable for a parent to take care of them during their time at home. That said, he made efforts to find a babysitter but to no avail.

[43] Finally, the last discrepancy noted in the testimonies is that Mr. Banville's handwritten notes of the August 9, 2011, meeting mention that the CPE [*Centre de la petite enfance*] is open from 06:30 to 20:00. However, the grievor was very clear — it closes at 18:00. When cross-examined on this subject, Mr. Banville did not remember, 11 years later, why he wrote 20:00 instead of 18:00. This discrepancy is of minor importance, given that the daycare's closing time seemed to be accepted as 18:00, because the employer was prepared to have the grievor work day shifts when his spouse's maternity leave ended.

[44] On June 19, 2012, the grievor made a new accommodation request, in anticipation of his spouse's return to work on September 10, 2012. The description of the accommodation needs reads as follows:

> [Translation]
>
> *Wife works at a hospital as a nurse team leader (15:00-23:30). Four children between nine years and nine months old. The daycare closes at 18:00. Pick up the child from the daycare — help the child with homework. Difficult to find a babysitter to pick up the children at the daycare, serve dinner, and put them to bed at 20:00.*

[45] The description of the accommodation sought reads as follows:

> [Translation]
>
> *Day schedule / Work on Christmas or New Year's Day because my wife is required to work on one of them / Start date is September 10, 2012 / Transfer if possible to P.E. Trudeau cargo. Schedule to allow me to take care of the children in the evening.*

[46] The grievor and the employer entered into an agreement on October 1, 2012, which was renewed on April 26, 2013. He signed both agreements without adding any

comments. He had refused to sign the form dated October 20, 2011, and added the following comment to it: "[translation] I do not wish to sign the document because I do not agree with the action that my employer has taken."

[47] The agreement entered into on October 1, 2012, which was renewed in April 2013, describes the accommodation granted as follows:

> [Translation]
>
> *After a meeting with Oumar GUEYE, it was decided by mutual agreement that at the beginning of each eight-week schedule, Mr. GUEYE would do everything possible to trade shifts with his colleagues. After that, for days that have not been changed, he will be granted days shifts, namely, D7 (06:53-16:45)*

[48] The grievor testified that sometimes, the superintendent responsible for schedules appeared unaware of the agreement. He entered into evidence an email that showed that on July 15, 2013, he asked the superintendent to change the next two days (July 16 and 17, 2013) into day shifts. The superintendent replied, "[translation] Why are you making this request?" However, once things were explained, the change took place.

[49] Another email exchange with the same superintendent in June 2014 suggests that the superintendent would have preferred fewer requests from the grievor for day schedules.

[50] It seems that that situation was also settled. In the end, the grievor was always able to manage to obtain day shifts, per the concluded agreement.

[51] In cross-examination, Ms. Dicaire's attention was drawn to the employer's *Duty to Accommodate Policy*, particularly the following parts:

> [Translation]
>
> …
>
> ***Managers and supervisors must:***
>
> *• consult the employee/candidate to determine the nature of the required accommodation;*
>
> *• individually evaluate the employee's accommodation needs and handle each request case by case;*
>
> *• consult the regional disability management and accommodation coordinator, if applicable;*

> *• actively review and consider alternative solutions and approaches to respond to the employee's/candidate's accommodation needs;*
>
> *• initiate the accommodation process when it becomes clear that an employee or candidate requires accommodation but that for some reason, the person is unable to express that need;*
>
> *• consider all options to meet the accommodation needs, including adaptive devices and technologies, modified workstations, a quiet place to pray, modified work schedules, etc.;*
>
> *• if implementing accommodation measures may take some time, early in the process, consider whether interim measures may be implemented temporarily;*
>
> …
>
> *• grant accommodation requests in a timely manner, as long as there is no undue hardship, by providing the employee or candidate reasonable accommodation and a related transition plan (if applicable);*
>
> *• follow up on requests for permanent or temporary accommodation;*
>
> …
>
> *• ensure that all work-related activities are fully accessible to all participants, to the point of undue hardship.*
>
> [Emphasis in the original]

[52] Ms. Dicaire believes that she complied with those guidelines. She consulted the head of Human Resources to determine the appropriate accommodation measures. According to her analysis and that of Human Resources, the grievor's childcare needs were met as his spouse was to be on maternity leave starting in September 2011. In addition, she made it clear in her letter that if the circumstances changed, the employer could reconsider its position.

[53] Mr. Banville responded essentially the same way with respect to the *Duty to Accommodate Policy*. It was known and kept in mind, but in the grievor's specific case, when September 2011 arrived, no accommodation need was present, since his spouse began her maternity leave.

III. Summary of the arguments

A. For the grievor

[54] The grievor suffered an adverse impact because the employer denied him a fixed day schedule. The situation was stressful and sometimes led to long periods of work without rest days, and adjustments were constantly needed.

[55] In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court of Canada established the *prima facie* discrimination test in the following terms, at paragraph 33:

> ***33*** *…to demonstrate* prima facie *discrimination, complainants are required to show that they have a characteristic protected from discrimination under the* Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.…*

[56] The respondent, in this case the employer, then has the burden of demonstrating that the rule is justified and that accommodation would cause undue hardship.

[57] Under that test, the complainant is not required to demonstrate his or her accommodation efforts. That factor comes into play only when the court assesses the reasonableness of the proposed accommodation measures.

[58] The employer relied on the Federal Court of Appeal's decision in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, to demonstrate that there was no *prima facie* discrimination. In that decision, the Federal Court of Appeal established a four-part test to determine whether *prima facie* discrimination took place. Notably, it requires complainants to demonstrate that reasonable efforts were made to resolve the conflict between their parental and professional obligations.

[59] In a recent decision (*United Nurses of Alberta v. Alberta Health Services*, 2021 ABCA 194), the Alberta Court of Appeal found that it was wrong to impose this obligation. According to that decision, the *Moore* test must apply in all discrimination cases. It is inappropriate to apply another test for discrimination based on family status. The grievor argued that the Board should apply the *United Nurses* decision, not *Johnstone*, when it makes its analysis.

[60] However, even if applying *Johnstone*, the Board should conclude that *prima facie* discrimination occurred. I will return to the jurisprudence in my analysis. The crux of the grievor's argument is that the variable schedule imposed on him impeded his ability to take care of his children.

[61] However, the employer did not demonstrate that granting him a fixed day schedule would constitute undue hardship. It was determined that some employees at his group and level were entitled to such a schedule.

[62] The accommodation granted was unsatisfactory. The grievor continued to do what he had always done, with the stress that it caused. The employer did not consider any interim or permanent measures to enable him to achieve work-family balance.

B. For the employer

[63] It is clear that the grievance involves the July 2011 to October 2012 period. No accommodation was granted in response to the July 2011 request because the employer felt that the grievor did not demonstrate his need, given that his spouse on maternity leave could look after the children. In October 2012, the grievor signed the accommodation agreement without further comment and without any further grievances.

[64] Given the hierarchy of courts, the Board is bound by *Johnstone*. Thus, the test set out in that decision should be applied. According to the employer, only the first factor applies. There was no interference with the grievor's parental responsibilities. Again, I will return to the details of the *Moore* and *Johnstone* tests in my analysis.

[65] The employer relied on some of the Board's decisions (*Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4; *Havard v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 36; and *Guilbault v. Treasury Board (Department of National Defence)*, 2021 FPSLREB 21) to suggest that the grievor did not take sufficient steps to find solutions to his daycare problems.

C. The grievor's rebuttal

[66] The grievor responded to the decisions that the employer cited, stating the efforts to make when distinguishing them. His children were young as of the grievance, which distinguishes *Nash*. In *Guilbault*, the grievor's spouse did not work. In *Havard*, the complainant asked for a schedule opposite to that of her spouse and did not

appear to have considered practical solutions, daycare, or a change to the spouse's schedule, who worked for the same employer. In this case, the grievor and his spouse had already made childcare arrangements during the day and certainly made efforts to reconcile work and family. As for his spouse, her schedule could not be changed.

IV. Analysis

[67] The grievor invoked the employer's *Duty to Accommodate Policy* in an attempt to demonstrate that it was not followed. The employer did not deny its duty to accommodate, to avoid discriminating against an employee.

[68] However, the accommodation need not be perfect. It must be sufficient. It must also be necessary.

[69] I note that the grievor signed the agreements dated October 2012 and April 2013 and that he added no comments. He indicated some difficulties with implementing the agreement. One manager seemed to have forgotten it, while another asked for an update on the grievor's needs. However, he confirmed that in the end, he always managed to secure day shifts, and that the employer could find him a day shift when he was unable to trade with a colleague.

[70] If one period remains in dispute, it is the one from July 8, 2011, to October 1, 2012. The grievor filed a grievance because he was denied the accommodation he requested, which was a fixed day position.

[71] Consider first the state of the law. The grievor greatly emphasized the Alberta Court of Appeal's decision in *United Nurses*. The employer insisted that I am bound by the Federal Court of Appeal's decision in *Johnstone*.

[72] In *Johnstone v. Canada Border Services Agency*, 2010 CHRT 20, the Canadian Human Rights Tribunal (CHRT) concluded that the Canada Border Services Agency (CBSA) had discriminated against Ms. Johnstone within the meanings of ss. 7 and 10 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) because of her family status by refusing to adjust her work schedule to consider her childcare needs. The Federal Court of Canada (in 2013 FC 113), and the Federal Court of Appeal in *Johnstone*, affirmed that decision.

[73] Essential to the decision is establishing that the employer has a duty to find reasonable accommodation when employees, despite their efforts, cannot reconcile their work with their legal obligation to provide care to their children.

[74] Ms. Johnstone had a variable schedule, like the grievor, but she could not fully care for her children because her spouse, who also worked for the CBSA, also had a variable work schedule. So, she asked the employer for a fixed day schedule. It offered her one but of 34 rather than 37.5 hours per week. The decrease in hours meant that Ms. Johnstone would go from being a full-time to a part-time employee and that she would lose salary and benefits. The employer recognized its duty to accommodate with a fixed full-time schedule for other reasons; i.e., medical or religious reasons. It refused to do it for childcare.

[75] The CHRT concluded that *prima facie* discrimination was demonstrated, given that the employer applied to Ms. Johnstone a rule (a choice between a variable schedule or a fixed schedule with reduced hours) that adversely affected her job (loss of income, promotion opportunities, and benefits) because of her family status. The employer failed to justify its refusal by demonstrating that there was a bona fide occupational requirement, and it did not establish that Ms. Johnstone's requested accommodation would have caused it undue hardship. The employer simply refused to recognize its legal duty to provide reasonable accommodation.

[76] The CHRT's *Johnstone* decision gave rise to the *Duty to Accommodate Policy*, which came into force in July 2011. The employer's witnesses acknowledged that while noting that the employer's duty to accommodate existed well before then. The main change was recognizing the duty to find accommodation when family status is likely to interfere with employment.

[77] In *Johnstone*, the Federal Court of Appeal set out as follows the legal test to apply when determining whether *prima facie* discrimination exists in a family status situation and in the employment context:

…

> *[93] I conclude from this analysis that in order to make out a* prima facie *case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare*

> *obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is* ***more than trivial or insubstantial*** *with the fulfillment of the childcare obligation.*
>
> …
>
> [Emphasis added]

[78] The Federal Court of Appeal recognized that the same test should apply in any discrimination case to establish *prima facie* discrimination but added that it must be adapted to the circumstances, as follows:

> …
>
> *[81] I agree that the test that should apply to a finding of* prima facie *discrimination on the prohibited ground of family status should be substantially the same as that which applies to the other enumerated grounds of discrimination. There should be no hierarchies of human rights. However, though the test should be substantially the same, that test is also necessarily flexible and contextual, as aptly noted by the Canadian Human Rights Commission in its submissions before this Court.*
>
> …

[79] The Federal Court of Appeal explained the third factor, which would be criticized in *United Nurses*, as follows:

> …
>
> *[96] The third factor requires the complainant to demonstrate that reasonable efforts have been expended to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible. A complainant will, therefore, be called upon to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or an alternative arrangement is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a* bona fide *childcare problem. This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances.*
>
> …

[80] In *United Nurses*, the Alberta Court of Appeal held that the *Johnstone* test for determining *prima facie* discrimination is wrong because the third factor creates in a way a self-accommodation obligation for the complainant, which does not meet the test that the Supreme Court of Canada set out for *prima facie* discrimination in *Moore*. The accommodation measure is part of the defence's analysis, because if the employer has a duty to accommodate, the duty is nevertheless shared — the complainant must participate in the research and accept a measure that although not perfect is reasonable.

[81] The grievor encouraged me to depart from *Johnstone* and to use the analysis in *United Nurses*. Since the Board is a federal administrative tribunal, and the Federal Court of Appeal reviews its decisions, I find it difficult to see how I could depart from its jurisprudence. The Supreme Court of Canada has not overturned *Johnstone*. It still stands.

[82] In any event, in this case, I do not think that the choice of applying one or the other test, from *Moore* or *Johnstone*, would change anything in my final decision. Regardless of the test applied, I cannot conclude that *prima facie* discrimination occurred.

[83] Returning to the *Johnstone* test, it is applied to the grievor's situation as follows:

> (i) A child is under the grievor's care or supervision. This factor applies in this case. The grievor is responsible, with his wife, for four children.
> (ii) The childcare obligation at issue engages his legal responsibility for that child, as opposed to a personal choice. The children were young, and caring for them was not a choice but an obligation.
> (iii) The grievor made reasonable efforts to meet his childcare obligations through reasonable alternative solutions, and no such alternative solution was reasonably accessible. It seems to me that this factor also applies. The grievor's requirements were not unreasonable. He looked for someone mature enough to take care of four children, with a vehicle to transport them, who would be available intermittently, according to his schedule. Realistically, it is difficult to imagine someone meeting the required qualifications and accepting such an uncertain schedule.
> (iv) The impugned workplace rules interfered in a manner that was more than trivial or insubstantial with the fulfilment of his childcare obligations.

[84] In my view, the fourth factor does not apply to the grievor. The rule in question would be the grievor's variable schedule. However, the evidence demonstrated that that schedule could be changed and that the employer allowed exchanging shifts.

When the accommodation request was made, at the time the grievor's spouse was taking maternity leave, there was no interference with childcare.

[85] Looking now at how the *Moore* test would apply:

> (i) The grievor has a characteristic protected under human rights provisions. There is no doubt that his family status as a parent of young children and his childcare obligations were among the categories protected by the collective agreement and the *CHRA*.
> (ii) The grievor suffered an adverse employment-related impact.
> (iii) The protected characteristic was a factor in the adverse impact.

[86] The second factor does not apply to the grievor. He preferred a fixed day schedule, which he was denied. I agree that it is inconvenient to have to negotiate with one's colleagues for day shifts, but I cannot see how that is really an adverse impact. Clearly, the grievor had to organize his schedule for day shifts, but the employer never hindered such an approach. On the contrary, it was encouraged. The grievor always managed to make arrangements and was never deprived of salary or benefits (unlike Ms. Johnstone's situation).

[87] As of the grievor's July 2011 request, his spouse was seven months pregnant. In the time it took to consider the issue (and I do not find that it was unreasonable to meet on August 9 and to make a decision on September 7, given that the grievor had organized his schedule until September 21), his wife began her maternity leave. There was no situation to resolve; the children were receiving care. The employer indicated that it would be prepared to reconsider the situation once the maternity and parental leaves ended.

[88] The grievor was not satisfied. According to him, had he had day shifts, his wife could have returned to work and resumed her master's studies earlier. I heard no evidence about his spouse's decision to extend the maternity leave. Had the grievor raised a status change earlier, the employer had committed to reconsidering the situation.

[89] That happened in 2012, when the grievor's spouse returned to work. The grievor and the employer signed an accommodation agreement, which ensured that he would be on day shifts. He would have to make an effort, but the employer would make up for it if he could not make arrangements with his colleagues.

[90] The grievor attempted to demonstrate that the agreement was not perfect and that some of the employer's representatives forgot about it or asked him for an update on his accommodation needs. And the discomfort of having to ask colleagues to trade shifts remained.

[91] However, the grievor was always able to work day shifts. He signed the October 2012 agreement and its renewal. In my view, the agreement settled his grievance.

[92] I am not prepared to grant the grievance for the July 2011 to October 2012 period. Again, I conclude that no discrimination took place. The children were taken care of as long as his wife was at home; the employer was prepared to review the situation when conditions changed, which it did.

[93] The grievor spoke at length about the difficulty of reconciling work and family responsibilities, given that the children could not have extracurricular activities because of their parents' schedules and the fact that his spouse was unable to resume her master's studies shortly after giving birth.

[94] With all due respect, those facts are part of the reality of being a parent, and for his spouse, of the choice of adding graduate-school studies to her work obligations. The employer allowed the grievor to organize his schedule to work only day shifts and recognized its duty to propose an accommodation. I cannot find that discrimination occurred because the employer did not grant the grievor his preferred accommodation; i.e., a fixed day schedule. To meet the service's needs, most border services officers work on a rotation. Given that reality, the employer still made it possible for the grievor to make arrangements to work days, which he did. Again, I see no adverse effect, so therefore, neither the *Moore* nor the *Johnstone prima facie* discrimination criteria have been met.

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

(The Order appears on the next page)

V. Order

[96] The grievance is denied.

May 25, 2022.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board