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File: 566-02-09784

Citation: 2024 FPSLREB 50

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

BORIS MILINKOVICH

Grievor

and

TREASURY BOARD
(Department of Transport)

Employer

Indexed as
Milinkovich v. Treasury Board (Department of Transport)

In the matter of an individual grievance referred to adjudication

Before: David Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Andrew Astritis and Dayna Steinfeld, counsel

For the Employer: Martin Leblanc, counsel

Heard at Ottawa, Ontario,
November 24 to 26 and December 20 and 21, 2022.
(Written submissions filed July 4 and 7, 2023.)

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The parties agreed to a statement of facts as well as a joint book of documents. It was understood that they would remain free to introduce additional evidence. They reserved the right to make arguments about the meaning, use, and weight that the Federal Public Sector Labour Relations and Employment Board ("the Board") ought to attribute to the documentary evidence.

II. Introduction

[2] Boris Milinkovich ("the grievor") and his spouse were employed as inspectors by Transport Canada ("the employer") in Aviation Security Operations at Pearson International Airport ("Pearson") in Toronto, Ontario. They mainly worked three 12-hour shifts per week starting at 06:00 and ending at 18:30. They had childcare responsibilities, which they had primarily for their 3-year-old daughter as well as their 11-year-old son, after school.

[3] Following an employer-directed change to the of hours of work of the grievor and his spouse, the grievor sought an accommodation from the employer to maintain his then-current hours of work based on family status due to their childcare responsibilities and carpooling.

[4] The employer denied the accommodation request, taking the position that an employee must first attempt to reconcile any conflicts between work and childcare obligations, including exploring realistic alternatives and available childcare options, before approaching it with a workplace accommodation request.

[5] The employer concluded that the grievor did not demonstrate how he had made reasonable efforts exploring available childcare options and that the information provided was insufficient to substantiate his accommodation request.

[6] He grieved that the employer contravened article 19 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Technical Services group (expired June 21, 2011; "the collective agreement"), which prohibits discrimination, by denying his accommodation request based on family status.

A. Issue

[7] In *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, the Federal Court of Appeal (FCA) held that as part of the test for establishing discrimination in family status cases due to childcare responsibilities, a claimant must prove that he or she made reasonable efforts to meet their childcare obligations through reasonable alternative solutions and that no alternative solution was reasonably accessible.

[8] The grievor argued that based on recent Supreme Court of Canada and provincial court of appeal decisions, there should not be any variation in the legal test for *prima facie* discrimination and that the Board should apply the uniform *prima facie* test.

[9] At issue is whether to reject the *Johnstone* approach for determining discrimination in cases of an alleged employer failure to accommodate an employee based on family status due to childcare responsibilities.

[10] If the Board rejects the grievor's submissions and applies the *Johnstone* test to the facts of the case, the question becomes whether the grievor proved that he made reasonable efforts to meet his childcare obligations through reasonable alternative solutions and that no alternative solution was reasonably accessible.

[11] If the Board accepts the grievor's submissions and applies the uniform *prima facie* test, the question becomes whether on the facts of this case, the grievor proved that he met that test.

[12] The grievance referred to adjudication is dated November 21, 2012, and alleges that article 19 of the collective agreement was contravened.

B. Agreed statement of facts

[13] The parties entered into an agreed statement of facts that reads in part as follows:

> …
>
> *3. The Employer and Union are signatories to collective agreements that applied to the Grievor. The applicable collective agreement expired on June 21, 2011 ….*
>
> ***Grievor's Employment History***

4. The Grievor commenced employment with the Employer on November 28, 2005 in a PM-03 position.

5. At all time periods relevant to the grievance, the Grievor's substantive position was Technical Inspection at the TI-06 group and level. His work location was Pearson International Airport ("PIA").

6. The Grievor resigned from his employment with the Employer effective February 9, 2018.

7. At all time periods relevant to the grievance, the Grievor's wife, Renee Soeterik, also worked in the position of Technical Inspection at the TI-06 group and level at PIA.

8. Maureen Buchanan has worked as a superintendent, Aviation Security Operations, and was the supervisor of the grievor at the time of the events relevant to the Grievance.

9. Michael Dunning has worked as a superintendent, Aviation Security Operations, and was the supervisor of the grievor's wife at the time of the events relevant to the Grievance.

10. David Bayliss has worked as the Regional Director, Aviation Security, Ontario Region and was in this position at the time of the events relevant to the Grievance.

The Grievance

11. On May 25, 2012, David Bayliss sent an email regarding a change in the normal hours of work for inspectors at PIA. At this time, Inspectors worked a variety of shifts from 8 to 12 hours in length, with start times that ranged from 4:00 am to 12:30 pm and end times that ranged from 2:00 pm to 12:30 am. At the time of the May 25, 2012 email, the Grievor and Renee Soeterik were both mainly working three 12-hour shifts a week, starting at 6 am and ending at 6:30 pm.

12. The May 25, 2012 email advised that Inspectors' normal daily hours of work would be 7.5 hours with flexible hours between 0600 and 1800 from Monday to Friday, provided that Inspectors' schedules resulted in coverage between the hours of 0800-1600. The email further stated that management would consider variable hours of work options of 8.035, 8.333 and 9.375 hours each day and that requests for accommodation would be considered on a case-by-case basis ….

13. On May 27, 2012, the Grievor emailed Maureen Buchanan regarding a request for family status accommodation … The Grievor proposed an accommodation wherein he would work three 12-hour shifts between each Monday to Friday and an additional 6.5 hour makeup shift in each 28 day period. He followed up on his request by email to Maureen Buchanan on June 4, 2012 and on June 14, 2012 ….

14. Renee Soeterik also made the same request for accommodation to her supervisor on May 27th, 2012 ….

15. By email dated June 20, 2012, Ms. Soeterik provided Ms. Buchanan with additional information regarding the family status accommodation request made by the Grievor.

16. On June 28, 2012, the Grievor attended a meeting with Maureen Buchanan to discuss his accommodation request and the Employer's request for additional information.

17. There was an email exchange between Casey Allen, Labour Relations Advisor, and the Grievor between July 26, 2012 and September 25, 2012, regarding the Grievor's request for accommodation ….

18. In a meeting held on August 1, 2012 and attended by David Bayliss, Michael Dunning and Renee Soeterik, Renee Soeterik, and as documented in an email dated August 2, 2012 … Renee Soeterik was advised as follows:

> You were advised that we have reviewed the information you have provided to date and determind that your request does not meet the threshold for approving accommodation based on family status. We also advised you that we are prepared to provide an extension of up to three (3) months with the expectation that if you are able to meet the requirement sooner you will do so. As per our discussion, you are to provide Mike your requested hours of work based on the four (4) options provided within the core hours outlined in my May email as soon as possible.

*19. The Grievor, Mr. Bayliss and Ms. Buchanan attended a meeting on October 4, 2012. A summary of this discussion was provided by email from Mr. Bayliss to the Grievor on October 11, 2022 (**JBD Tab 12**). The email stated as follows:*

> You were advised that we have reviewed the information you have provided to date and determined that your request does not meet the threshold for approving accommodation based on family status. We also advised that we are prepared to provide an extension until December 1, 2012 with the expectation that if you are able to meet the requirement sooner you do so. As per our discussion, you are to providee Maureen your requested hours of work based on the four (4) options provided within the core hours outlined in my May email as soon as possible.

20. From September 1st, 2012 to December 1st, 2012, the Grievor and Renee Soeterik work mainly on the same days, from 6 am to 6:30pm, Tuesday to Thursday.

21. On October 10, 2012, the Grievor and Renee Soeterik each sent emails to their respective supervisors, requesting variable work hours commencing on December 4th, 2012 as follows:

> Tuesday, Wednesday and Thursday, from 6 am to 6pm

> And every other week Monday, Tuesday and Wednesday, from 6am to 6pm and Friday 6am to 12:30 pm.…
>
> *22. On October 22, 2012, in separate emails from Maureen Buchanan to the Grievor (**JBD Tab 13**) and from Michael Dunning to Renee Soeterik … the Employer reiterated the national guiding principles for determining hours of work at Class 1 airports and requested that the Grievor and Renee Soeterik provide requests for hours of work based on the four (4) options provided within the core hours.*
>
> *23. On November 21, 2012, the Grievor filed the grievance.*
>
> *24. The Employer issued the second level grievance response on May 31, 2013 ….*
>
> *25. The Employer issued the third level grievance response on April 4, 2014 ….*
>
> [*Sic* throughout]
>
> [Emphasis in the original]

C. Witnesses

[14] The grievor called two witnesses, himself and Renee Soeterik, his spouse. The employer called three witnesses, Maureen Buchanan, Casey Allan, and David Bayliss.

1. Mr. Milinkovich

[15] Mr. Milinkovich worked for Transport Canada from 2005 until February 2018 as a technical inspector for airport security at Pearson. As a technical inspector, he was responsible for performing inspections on air carriers and on screening authorities as well as with the air authority. He conducted infiltration testing and carried out special projects. He investigated security breakdowns of different kinds and conducted security reviews and response plans. As a duty inspector, he was the point of contact for emergency situations as well as emergency preparedness for all airports in the region.

2. Ms. Soeterik, and the family background

[16] Ms. Soeterik also works as a technical inspector in airport security operations at Pearson. She began her employment with Transport Canada in September 2003.

[17] In September 2012, three or four children were at the grievor's home. In this decision, they will be referred to by their first initials. The eldest, "N", born in 1992, had just started her post-secondary education. During the week, she lived in Toronto,

and she returned home on the weekends. “I” was born in 1995. By September 2012, she was in her teens. “W” was born in 2001. By 2012, he was 11 and attending grade school. And “P” was born in 2009. By 2012, she was 3 years of age. She was not in school and would have started kindergarten in September 2013.

3. Ms. Buchanan

[18] Ms. Buchanan was a crew superintendent. She supervised inspectors, assigned work, and liaised with the Canada Border Services Agency (CBSA) and the Canadian Air Traffic Control Association. She was the grievor’s supervisor.

4. Ms. Allan

[19] In 2012, Ms. Allan was a PE-03 generalist responsible for supporting aviation security by providing advice and guidance to management on staffing, labour relations, job postings, assessments, and performance management. She first became involved with this file in mid-May 2012. Management engaged Human Resources with respect to the change in the inspectors’ hours and aviation security.

5. Mr. Bayliss

[20] Mr. Bayliss is the employer’s regional director for security in its Ontario Region. He has been with Transport Canada 38 years. He made the decision to deny the grievor’s accommodation request with input from the Human Resources branch and the grievor’s supervisor.

III. Background

A. The events that led to the grievance

[21] In February 2010, the grievor, just back from parental leave, requested an accommodation of variable shifts, three 12-hour shifts per week, to provide care for his child, P. The request was denied; however, the reasons were not fully explained. He wanted to maintain his ability to take care of what was required at home.

[22] He had been working 10.5-hour shifts. Moving from them to 12-hour shifts meant that he would have had to leave home fewer times during the workweek, which would have allowed him and his spouse to coordinate so that there would be fewer times when someone else had to come into the home.

[23] Coming back from parental leave meant that there would have been no negative impact on the employer's operation, and it would have allowed him to have greater coverage at Pearson. There was extensive use of leave and there were extensive leaves of absence in the operations.

[24] In September 2010, Ms. Buchanan, his supervisor, informed him that she would honour his request for three 12-hour shifts. However, she advised him that a study was underway into aviation security inspectors' hours of work and that a decision was expected that fall. She advised that his hours of work could be affected should any changes be recommended to them by the study. Ms. Soeterik also worked the same accommodated work hours.

[25] In the spring of 2012, the family resided in Toronto. That spring, the grievor and Ms. Soeterik worked mainly the same three 12-hour shifts per week starting at 06:00 and ending at 18:30. They drove to work. It took them approximately 20 minutes to get to work and 30 to 35 minutes to get home. The commute was fairly consistent, barring accidents or weather. He was asked how that shift schedule impacted the childcare. The 12-hour shift schedule allowed for fewer days away from the house. His mother was able to come from Oakville to provide care when they were not at home. They also managed with leave and shift changes.

[26] Ms. Soeterik was asked how the family dealt with its childcare responsibilities when they lived in Toronto. There was a lack of childcare availability. P was put on a wait list for it. They relied on their older daughters, used leave as required, and relied on her mother-in-law for childcare.

[27] Mr. Bayliss explained that in April 2012, the employer decided to change the inspectors' hours of work at the Class I airports in Ottawa, Ontario, and Pearson, effective September 1 of that year.

[28] By way of background, after the September 11, 2001, attacks on the United States, there was a significant change in the relevant legislation. The employer had to increase the number of inspectors threefold. The employer changed the inspectors' hours of work, to provide coverage 16 hours per day, 7 days per week.

[29] After approximately seven years, the employer reviewed its then-current approach because operations had changed significantly. Operations had become more

secure, and there was no longer the need for the degree of oversight then being exercised. Its air-cargo security program had changed. An external company was hired to carry out the review, which included the inspectors.

[30] After 2001, more time was based on a regulatory approach (frequency-based framework) as opposed to a risk-based approach. The employer's Ontario Region was asked to look into a risk-assessment approach for inspectors at Pearson and the Ottawa airport. It was later adopted nationally.

[31] He referred to a report titled, "Transport Canada, Policy 16 Review, Final Report". The report was the trigger to the change in the hours of work. It recommended that the employer move from a time-based approach to a risk-based approach. Rather than inspectors being onsite 7 days per week, 16 hours per day, now there were risk-based targeted areas.

[32] The working hours were to be from 06:00 to 18:00, Monday to Friday, which were consistent with the collective agreement provisions. Any inspections outside those hours were to be risk-based. He advised the inspectors of the change in hours at a staff meeting held on April 10, 2012. He stated that the change was to take effect on September 1, 2012, and that no positions would be lost as a result.

[33] On April 27, 2012, the *National Policy Directive on Hours of Work* was amended.

[34] On May 25, 2012, he emailed the staff, outlining the national guiding principles. Employees were to work a 7.5-hour day, 5 days per week. Complete coverage was required from 08:00 to 16:00. Inspectors were offered 3 variables, namely, workdays of 8.035, 8.333, or 9.375 hours. If an employee's workday was 8.035 hours, the employee earned 1 day off every 3 weeks. If the employee's workday was 8.333 hours, the employee earned 1 day off every 2 weeks, and if the employee's workday was 9.375 hours, the employee earned 1 day off each week.

[35] Management realized that there would be a need for accommodation. The employees were to work with their supervisors. They had to review the accommodation requests as soon as possible as they were trying to implement the new hours of work by September 1, 2012. If employees had any questions, they were to speak with their supervisors or managers. Accommodation requests were to be considered on a case-by-case basis.

[36] Approximately 11 of 17 employees requested accommodation for childcare; the others were for medical reasons. All employees who asked for accommodation sought to work 12-hour shifts, 3 days per week. The grievor and his spouse were 2 of the 11 who asked for childcare accommodation.

[37] As the regional director, he was to decide whether to grant accommodation requests. The process involved the inspectors, their supervisors, the employer's regional headquarters, and a Treasury Board team. The inspectors were to send their accommodation requests to their supervisors with supporting documentation.

[38] When more information was required, the supervisor and Human Resources would review the application and then get back to the inspector. Once they had the information that had been provided, he had to decide whether to grant the application. He met with each person who requested accommodation, and their supervisors, to share the results of the decision.

B. The grievor's accommodation request

[39] On May 27, 2012, the grievor emailed Ms. Buchanan, requesting a work accommodation. His email read in part as follows:

> …
>
> *… I am requesting a work accommodation as follows:*
>
> *3 shifts per week between Monday and Friday from 0600-1730 as determined by operational needs.*
>
> *One additional shift every 3rd week of 4.5 hours.*
>
> *One additional shift every 4th week of 7.5 hours where a Stat holiday falls in that period.*
>
> *In general terms, this fully covers the hours of work over a 28 day period.*
>
> …
>
> *This accommodation is on the grounds of family status, non-availability of appropriate daycare over a 5 day/week [sic] period, and carpooling.*
>
> …

[40] The grievor explained that in his email, Mr. Bayliss had said to bring up accommodation requests before September of 2012. He proposed these changes as the employer had stated that the new hours of work would be from 06:00 to 18:00.

Previously, they were from 06:00 to 18:30. This met his and the employer's schedules and the collective agreement. He would be at work for a 12- or an 11.5-hour shift. His spouse made the same request.

C. Management's process for evaluating accommodation requests

[41] Ms. Allan explained that if accommodation requests were made outside the hours listed in the May email, they were to be submitted to the inspector's supervisors or managers. She was to help management assess the requests.

[42] Several requests were received right away, primarily relating to accommodation based on family status. Once a request was received, she worked with management to review it and examine the steps that the employees took to meet the new requirements.

[43] Management and Human Resources jointly developed a questionnaire that the employees were to complete to explain the options that they had considered before going to management. The questionnaire was designed to help an employee provide as much information as possible, so that management could review the information.

[44] She was asked how management obtained the information from employees. She stated that the employees had discussions with their supervisors. The supervisors met with the employees to go through the questionnaire.

[45] The process required management to establish what steps the employees had taken to address the accommodation need and what options they had explored. If the employees did not provide sufficient information, it was decided that management would meet with them. This was done with all employees seeking accommodation. They were met in person. There was an open dialogue.

[46] Ms. Buchanan was asked for the steps she took to look into the grievor's situation. She met with him and reviewed the questionnaire with him. Initially, she gathered information. Some of the information that he provided was spotty, and quite a few of his answers lacked detail. He did not answer some questions. She provided the information to Ms. Allan from Human Resources.

[47] The grievor stated that Ms. Buchanan had a list of questions provided to her by Human Resources that were in-depth and invasive. His answers were handwritten and

were provided to Ms. Buchanan in June 2012. Ms. Buchanan was asked whether everyone was asked the same questions. She replied that it was as equitable as possible.

[48] On June 4, 2012, the grievor emailed Ms. Buchanan, requesting that she advise him as to the status of his request. He had not heard anything from her. He was nervous. He was to go on leave with income averaging and without a response, he was not able to plan for the fall.

[49] The grievor and his family moved to Hockley, Ontario, at the beginning of July 2012. He and his spouse had agreed to purchase the property three or four months before July. Hockley is due north from Pearson via Ontario's major 400-series highways. The travel time to Pearson by car is one hour. In bad weather, it can take up to three hours.

[50] The property is located approximately 20 minutes from the nearest town. Orangeville is 20 to 25 km west of it. The travel time from Orangeville to Pearson is about 1 hour.

[51] He believed that the pace of life in Hockley would be beneficial for his family. His Hockley property included an acreage and a private lake. There were other family related reasons as well as health issues. They had thought about the move for months and months.

[52] He was asked what the plans were for childcare following the move to Hockley. He stated that as P would only be starting kindergarten the following year, the 2010 accommodation to his and his spouse's work schedule with his mother involved in supporting that arrangement would have allowed them to meet their childcare obligations.

[53] The grievor stated that on July 30, 2012, by email, Ms. Allan requested that he complete another questionnaire that was similar to the one he had completed in June. His answers had been passed on to her. She had taken documents and her laptop home with her. She had failed to secure them, and they had been stolen. That is why management asked him to complete the forms again.

[54] Ms. Allan had entered information on the questionnaire based on the information that the grievor had previously provided. She wanted him to complete the

rest of it to ensure that management had all the information and any additional information that he would like to add for consideration. The form that was partially completed reads as follows:

> …
>
> *Q) What type of accommodation are you requesting? Please explain/elaborate on your specific circumstances.*
>
> ***Accommodation based on family status.***
>
> ****3 shifts per week between Monday and Friday from 0600-1730 as determined by operational needs.***
>
> ***One additional shift every 3rd week of 4.5 hours.***
>
> ***One additional shift every 4th week of 7.5 hours where a Stat holiday falls in that period.***
>
> ***In general terms, this fully covers the hours of work over a 28 day period.****
>
> *Q) Is your request for accommodation a permanent or temporary request?*
>
> ***Temporary.***
>
> *Q) If temporary, please provide an estimated end date for this accommodation request.*
>
> ***September 2013 or September 2014 depending on availability.***
>
> *Q) What childcare arrangements do you currently have in place for your child/children?*
>
> ***Currently rotate care between parents.***
>
> *Q) What measures have you taken to date to minimize the need for accommodation?*
>
> - *Are you currently on any waiting lists for childcare?*
> - *Please provide details (i.e. how many?)*
> - *How long have you been on each waiting list?*
> - *What is the anticipated availability date for your child/children?*
>
> ***New community does not have licensed daycare, therefore, not currently on any waiting lists.***
>
> *Q) What options or alternatives have you considered/pursued to date? (ie.* ***Home care/assistance from family, etc.)***
>
> ***The local school offers Kindergarten, however, my daughter is not potentially eligible until Sept 2013. There is no daycare integrated in to*** *[sic]* ***the school at this time and there are no licensed daycares in the community.***
>
> ***We have access to only a small amount of family care to assist.***

> *Q) What are your concerns or restrictions with these options?*
>
> *Q How far have you reached out in your community and have you reached out in any neighbouring communities?*
>
> ***Options are limited due to remote location.***
>
> *Q) Have your partner/spouse/family members reached out to their employer with respect to accommodation? What options are available to them?*
>
> ***As we are both employees of Transport Canada, we are both faced with the same situation.***
>
> *Q) What are some other ways that management can support you, other than approving a (12 hours) work schedule?*
>
> ***Telework.***
>
> *Q) Have you considered other work arrangements (ie part-time)*
>
> ***Considered this, however, this would not be financially feasible.***
>
> [Emphasis added]

[55] The grievor and his spouse returned to work in September 2012 having just been married at the end of their leave with income averaging. From September 1 until December 1, 2012, they worked from 06:00 to 18:30 on the same days of the week. His mother had offered to provide childcare three times per week for a couple of months. She had to step away from her charitable work. She felt that it was important to help the family.

[56] On September 18, 2012, the grievor emailed Ms. Allan, stating that he was asking for a variable-work hours arrangement that was within the hours of work outlined by the employer of three days between Monday and Friday, from 06:00 to 18:00, with makeup shifts as necessary. He stated that that was commensurate with the new hours of work and that it could have been of no hardship to the employer. The arrangement was crucial to him as he was a father to a three-year-old, and there were no daycares in his geographic area. His daughter was to be eligible for kindergarten in September 2013, but until then, his daycare arrangements were a patchwork, and they were heavily reliant on elderly and infirm family members.

[57] He also stated that he expected that his request would be denied as had been done for two other employees, and he requested advice as to how the decision would be reached in his case.

[58] Ms. Allan replied to him by email on September 25, 2012, indicating that she had tried to contact him; however, his mailbox was full, and she had been hoping to speak with him about his questions. She also offered to meet with him and his supervisor to go through the questions or to address any further questions that he might have. She also provided him with the opportunity to review and complete the questions in writing and to send them back to her as he had originally requested.

[59] She further advised him that the questions that were sent to him were asked to ensure that management had all the information pertaining to his request and to provide him with the opportunity to review and confirm the information for accuracy purposes and to provide further information.

[60] She testified that the questions and answers that he originally went through in his meeting with his supervisor, along with the original email accommodation request, were among the stolen items. The questions were gone through again to ensure that management's information was accurate and to give him the opportunity to provide more information. She reiterated again her willingness to meet with him. The same day, he replied by email and set out his position as follows:

> …
>
> *I am making it abundantly clear to you that I do not have daycare until Sept 2013. I live in a remote, rural area. There are NO DAYCARE CENTRES. I rely on grandparents to provide care and those arrangements are based on my shifts as they now stand. Both grandmothers are old and not in good health Renee's mother has … cancer and is receiving regular medical care. My own mother has severe issues with her back.*
>
> *I have been a shift worker for ten years and I took this position because it was a shift position. Every arrangement that Renee and I have made outside of this office is based on a shift premise. We carpool based on that premise and the care we have available to us — care for a preschooler and other school aged children, is based on and around my shift work. These arrangements have been in place for several years.*
>
> *In September 2013,* [P] *will be attending kindergarten and I will have more flexibility.*
>
> *The accommodation I have requested is within the hours of work as outlined by the employer. Please explain to me why such a request may be potentially denied if it is within the hours/days of work. The hardship to the employer is zero but the implication to me will be lost pay and leave.*

> *The employer has a responsibility to accommodate based on family status and my sense is that that responsibility is not being recognized.*
>
> *I am compelled to ask these questions in writing as I find this process to be suspect thus far. The criteria are unclear. The process is unclear. It is irregular that the matter is still in your hands when the original documentation went missing while in your care.*
>
> *To protect myself, I am requesting a response in writing. We are now only 66 days from the new "deadline' of Dec 1st.*
>
> …

[61] Ms. Allan was asked how she would characterize the level of cooperation from the grievor. She said "challenging" and stated that it would have been better to have had an open dialogue as opposed to communicating solely by email.

[62] She was asked for other options that could have been considered in terms of daycare. She replied daycare in other communities, private daycare, or nannies; the grievor and his spouse work separate shifts to eliminate some of the need for daycare.

D. The grievor's testimony on the childcare plans and efforts

[63] The grievor testified that had their accommodation requests been granted, one of the options was that he would have worked Mondays, Tuesdays, and Wednesdays and that his spouse would have worked Wednesdays, Thursdays, and Fridays. Another option was that they would have worked the same days as they had only one vehicle.

[64] During cross-examination, he was referred to his email dated May 27, 2012, to Ms. Buchanan in which he requested work accommodation. The email states, "This accommodation is on the grounds of family status, non-availability of appropriate daycare over a 5 day/week [*sic*] period, and carpooling."

[65] He was asked why he referred to carpooling. He replied that it was a known standard for scheduling for both supervisors and staff. He was asked whether he had wanted to carpool with his spouse. He replied they had wanted to commute together and work the same days. They would have had to commute only three days per week.

[66] He was asked whether when they did their planning they considered care for P three days per week. He replied that that was correct. He reiterated that when they decided to buy the house, they planned to work the same hours, so that they could

carpool. That was part of it. They planned to carpool for that period or for some part of it. He was asked to confirm that his May 2012 request was to work three 12-hour shifts continuously. He agreed and stated that he had hoped that he would be allowed to work Tuesday to Thursday, or three days per week, and for his spouse to work the same shifts.

[67] The grievor explained that had the employer accommodated his and his spouse's schedules with three 12-hour shifts, with his mother involved and supporting that arrangement, his childcare needs would have been met. If no accommodation had been approved, the impact would have been extreme had they both worked Monday to Friday. They would not have been home during the week to provide daycare for their child. Had he and his spouse worked 9.75 hours each day, it would have meant bringing someone else in 4 days per week, to provide childcare coverage.

[68] He was asked if he and his spouse each had worked 4 days per week, what the daycare situation would have been in Hockley. He replied that the closest proper licensed daycare centre was in Orangeville, which had one daycare. However, its opening and pick-up times were not aligned with his shifts. They could not drop off or pick up the child reliably. Orangeville is a 25-minute drive from Hockley.

[69] He was asked whether there were towns near Hockley with daycare facilities. There was nothing around Hockley. There was no before- or after-school care for their son in Hockley. Their daughter lived at home and went to high school in Alliston. She travelled to and from school by school bus. She did not arrive home until 16:30 or 17:00.

[70] His mother lived in Oakville, which is a 90-minute drive from Hockley. She is a retired federal public servant. She worked with charities and humanitarian efforts. She was paid for some of the work and volunteered for others. They did not have any extended family locally available.

[71] He and his spouse discussed what they would do for childcare. They decided that they would not accept placing their child into an unlicensed daycare. Their overriding concerns were safety, security, and well-being. If the daycare did not meet the standard of care of a licensed daycare, they were not comfortable leaving their child and would not entertain that choice.

[72] As he and his spouse were in inspector positions to regulate and provide oversight inspections for the travelling public, to ensure that licensing requirements were met, the same was appropriate for something like daycare.

[73] When someone places their child with someone else, they want to know that there is oversight, and that the person is providing proper care. He would not take his car to an unlicensed mechanic to fix its brakes. The same concept applies to an unlicensed daycare. He would not entertain placing his child in such a daycare. He would not compromise.

[74] He expressed concern about predators. A three-year-old child would not have the capacity to advise him of the possibility that the child was being victimized. He was not willing to roll the dice. At the time, there were several stories in the media, one in which a child had died in a fire in an unlicensed daycare and another in which a child was found sitting in filth. Those were not risks that he was willing to take.

[75] They did not hire babysitters. The older kids or his mother were the babysitters. Children of that age, three, did not have sleepovers. That did not happen until the kids were old enough. He was asked what he would have done had the only available option been to put the child in an unlicensed daycare. He replied that he would have left his job and that his family and his child's safety came first.

[76] During cross examination he was asked whether before he moved he gathered information on daycare availability. He replied that he did not know if that had actively been done. He and his spouse thought that they would work the same three days per week, commute together, and arrange care for P for those three days.

[77] When they decided to buy the house, they planned to work the same hours so that they could carpool. That was part of it. They planned to carpool for that period or for some part of it.

[78] He was asked whether they had been on any childcare waiting list. He stated that they had been on a waiting list in Toronto for childcare and that it took 6 years until a spot opened. He confirmed that they had not been on any other daycare waiting lists.

[79] He was asked whether they searched the area for childcare providers outside Hockley. He stated that his home in Hockley to Pearson is a 60-minute drive and that

there are few major communities along the way. He was asked whether they had searched for childcare in Brampton. He stated that Brampton is significantly west of Hockley and Pearson. He was asked about Vaughn. He was asked about Bolton. He replied that it is somewhere in Mississauga, beyond Pearson.

[80] On re-examination, he was asked how far Vaughn is from Hockley. He stated that it is about halfway between Pearson and his home. It was not in line with where he went. The commute from his home was about 1 hour. It took about 45 minutes to reach Vaughn. From Vaughn to Pearson took about 30 to 35 minutes, on regional roads. He stated that traffic on the 400 and the 401 interchange is a "dog's breakfast". It could take 40 minutes. He had to be at the office for 08:00 and would have had to have dropped his child off before 08:00. He then stated that under regular conditions, it is a 2-hour drive. He would feel unsafe on dirt roads and on county side roads that are not plowed. Hockley Valley is known as being in the snow belt.

[81] He was asked about daycare in Brampton. He stated that the circumstances in Brampton did not differ much from those in Vaughn. The distance was about the same.

[82] He was asked about daycare in Mississauga. He stated that he would have had to overshoot Pearson and go further to reach Mississauga. No daycares enrolled kids where he needed them. It takes 1 hour to drive to Pearson and 20 to 30 minutes to a daycare with the necessary amenities.

[83] He was asked for his concerns about taking his daughter to any of these daycares. The early hours were not appropriate for their child. He looked at what was the best for the child. Getting his child up at 04:00 was not an option. Bolton was in line with Pearson; however, their times were not aligned with his shifts. It was not an option. If there is an emergency or a threat is made, one must stay safe.

E. Ms. Soeterik's testimony on the childcare plans and efforts

[84] Ms. Soeterik also made an accommodation request with respect to hours of work on the same grounds as did the grievor. She referred to her email dated May 27, 2012, to Michael Dunning, the superintendent, aviation security operations, who was her supervisor, about schedule accommodation. She requested a work accommodation for hours of work as of September 2012 in light of Mr. Bayliss's email. She requested 3 shifts per week between Monday and Friday, from 06:00-17:30, as determined by

operational needs, 1 additional shift every 3rd week of 4.5 hours, and one additional shift every 4th week of 7.5 hours when a statutory holiday fell in the period at issue.

[85] She stated that the accommodation was "… on the grounds of family status, non-availability of appropriate daycare over a 5 day/week [*sic*] period, and carpooling." She stated that this accommodation would have allowed her to manage her hours and would have allowed her to provide childcare to the children as well as meeting operational needs. These hours of work were consistent with the hours of work that she had been working.

[86] She was asked how this shift schedule related to that of the grievor. She stated that she would have worked Mondays, Tuesdays, and Wednesdays and that he would have worked Wednesdays, Thursdays, and Fridays. Both would have been present on Wednesdays, to attend staff meetings. It would have allowed them to provide direct care by a parent four days per week. The accommodation would have been necessary only from September 2012 to September 2013, which would have limited their need to arrange for care to one day per week. This was much more viable than arranging daycare for five days per week.

[87] In June 2012, she had an in-person interview with Mr. Dunning to discuss her accommodation request. At that meeting, he had asked where she lived and about the daycare available in the area. She provided information about the available daycare resources. She emailed him on June 20, 2012, to add to the content of their interview. The email reads in part as follows:

…

> *… We have confirmed that our new community does not have available licenced [sic] daycare. The local school offers only kindergarten and* [P] *is not potentially eligible until Sept 2013. There is no daycare integrated into the school and there is no licenced [sic] daycare facility in the community. We have no choice but to provide care at home. This situation is especially stressful to us as we both work at Transport Canada and therefore we share the exact same restrictions. We have access to only a small amount of family care but the rest of it has to be balanced off between Boris and myself. In addition, we have another child in elementary school who does not have access to after-school care as this is not offered in our community.*

…

[88] She stated that theirs is one of only five houses on a lake and that she was uncomfortable leaving her son alone. She reread the email and stated that its substance was accurate. Mr. Dunning replied that the information provided would be taken into consideration. They provided a significant amount of sensitive information about their family members, and management was capricious and callous with it.

[89] She was asked how many times she met with Mr. Dunning on this issue. He was her supervisor. They met; there were many issues. She was referred to an email she received from Mr. Dunning dated June 28, 2012, with respect to her accommodation request. In it, he thanked her for meeting with him to provide additional information or clarification in support of her accommodation request. He advised her that such requests were being considered on a case-by-case basis. He reiterated that effective September 1, 2012, full coverage was expected in operations from 08:00 to 16:00, Monday to Friday, and that while her request was being reviewed, he asked that she continue to make every effort possible to meet the new hours-of-work requirements. She concluded that her request would be granted and stated, “Absolutely.” So, plans were made.

[90] With respect to childcare providers in the surrounding community, Orangeville is in the vicinity. Travel time there is approximately 20 to 25 minutes. It is a gravel road. Highway 9 into Orangeville is also available. Hockley receives a large amount snow in the winter. She was asked about how viable it would have been to travel to Orangeville for childcare. She responded that it would have been challenging from a geographic position. The daycare hours were not consistent with their shift times.

[91] She was asked to assume that the daycare opened at 06:00, which it did not. She replied that they would have had to go back to the airport road, which would have added 50 minutes each day to drop off and pick up P. For driving only from Hockley to Pearson, they allowed 1 hour. The trip took 50 to 55 minutes.

[92] She was asked if they applied to any daycare centres in Brampton. She responded that it was not part of their community. It was unknown. Brampton was not aligned with their route of travel.

[93] She stated that she had a 12-year-old at home at the time. The implication was that she would have left her 12-year-old at home to get on the school bus alone. She was not just responsible for P. She was also responsible for W. “I” was in high school in

Allison, which was a 40-minute drive by school bus. Her son was in a different school. They could not take the same school bus.

[94] She was asked about family availability. She had a sister in London, England, and her mother-in-law in Oakville. Her father was in palliative care, and her mother was in Amsterdam, in the Netherlands.

[95] The drive from Oakville to Hockley is approximately one hour. Her mother-in-law had her own life; however, she could help from time to time. It was limited by their hours of work.

[96] She was asked whether she considered unlicensed daycare providers. She stated, "Because that's my child it would be unquestionable". She and the grievor worked in enforcement. They would not take their car to an unlicensed mechanic. Absolutely they did not consider an unlicensed daycare.

[97] She was asked whether any of their other children had been placed in an unlicensed daycare. She stated that she did not want to be too ghoulish but certainly when one has kids, one hears about other situations. For example, she heard about a child who lost her life in Guelph in an unlicensed daycare. She heard about other incidents arising in unlicensed daycare centres. She had already made up her mind in the sense that she strived for the best for civilization in her career by providing oversight and investigation. The same notions applied to this situation.

[98] Had unlicensed daycare been the only option, she stated that she guessed that she would have given up her job.

[99] During cross-examination, she was referred to her email dated January 15, 2014, to Shawn Fields, a labour relations officer with the bargaining agent, and Justin Filion, a labour relations officer with the employer, which she addressed to Mr. Filion. It was sent in response to management's request for more information concerning its grievance file. The email reads as follows:

…

> *Please be advised that Mr. Milinkovich and I provided all the information requested by Management (May 25th, 2012) to Mike Dunning and Maureen Buchanan in June 2012. The information was detailed and specific - it included the name of my son's school, the time my son arrived at home, when the house was empty,*

> *when we leave for work in the morning, and a detailed synopsis of the daycare situation in our area. That information was Protected B and was lost by the Employer - specifically by a member of the HR Team from the trunk of her car.*
>
> *The loss of this information had a profound impact on our lives as we live in a remote location and took very seriously the threat of detailed, personal information in the hands of thieves.*
>
> *We also provided this information at the 3rd level hearing. The fact is that we live outside of Hockley, Ontario and we do not have access to licensed daycare. There is no daycare centre in Hockley nor is there a daycare centre in Mono Mills, the next nearest town. This left us with few options for the care of our pre-school daughter. As we indicated at the 3rd level hearing, we flew my mother in from Europe to care for our kids - this was WHILE she was receiving treatment for … cancer.*
>
> *Our son's school, Adjala Central Public School, does not offer after-school care. Therefore, we alone are responsible for providing daycare and after-school care for our 3 year old and 11 year old.*
>
> *Therefore, we feel we have provided all the information necessary to render a decision in this matter. Please advise of a decision at this level as we will proceed to the PSLRB when/if necessary.*
>
> …

[100] On August 1, 2012, Ms. Soeterik was advised that her request did not meet the threshold for approving accommodation based on family status. She was also advised that management was prepared to extend her current hours of work for up to three months. She was asked to provide her supervisor with her hours of work based on the four options available within the core hours outlined in the May email, as soon as possible.

[101] She was referred to an email from Mr. Bayliss to her, copying Mr. Dunning, entitled, "Hours of work - Record of meeting - August 1, 2012". It summarizes the discussion of Ms. Soeterik, Mr. Bayliss, and Mr. Dunning on August 1, 2012, about her accommodation request. During that meeting, she was advised that management had reviewed the information that she had provided and that it had determined that her request did not meet the threshold for approving accommodation based on family status. She was given an extension of up to three months with respect to her hours of work at that time and was asked to provide Mr. Dunning with their requested hours of work based on the four options within the core hours, as soon as possible.

[102] Ms. Soeterik stated that her request was denied. She was home on income averaging at the time and viewed the situation as incredibly challenging. She saw herself as reasonable and hopeful. She thought that the accommodation of asking to work within the hours of operations was reasonable. It was shot down. It left them scrambling before their wedding.

[103] She said that no elaboration was provided as to how they did not meet the threshold. They asked a number of times. It was never explained. The goalposts were moved. The only requirement was that the scheduled hours of work take place between the operational hours of 06:00 to 18:00.

[104] She was asked if the employer asked for any additional information at the August 1, 2012, meeting. She stated that she could not recall.

F. The grievor's request for accommodation denied

[105] On October 4, 2012, the grievor was also advised that his request did not meet the threshold for family leave accommodation. He was provided with the three-month extension of his current hours of work and was requested to provide his supervisor with his hours of work based on the four options.

[106] The grievor referred to an email from Mr. Bayliss dated October 11, 2012, which summarized his discussion with the grievor and Ms. Buchanan on October 4, 2012, about his accommodation request. It reads in part as follows:

> …
>
> *As discussed, we recognize the transition from shift work to day time hours has been stressful, however, this was a national decision that we must respect. We apologize for the length of time it has taken to review your accommodation request and are making every reasonable effort to ensure we are doing our due diligence to conduct a thorough review, and consult as appropriate on your request.*
>
> *You were advised that we have reviewed the information you have provided to date and determined that your request does not meet the threshold for approving accommodation based on family status. We also advised you that we are prepared to provide an extension until December 1, 2012 with the expectation that if you are able to meet the requirement sooner you will do so. As per our discussion, you are to provide Maureen your requested hours of work based on the four (4) options provided within the core hours outlined in my May email as soon as possible.*

…

[107] The grievor was asked whether the employer provided any details as to why the threshold for approving accommodation based on family status had not been met. He replied that it provided none.

G. The employer's consideration of the accommodation requests

[108] Mr. Bayliss was asked about the steps he took to determine the grievor's accommodation request. The trigger was that the grievor submitted his request. His supervisor would have involved Human Resources to review it. In his case, based on family status, he did not provide any additional information. The supervisor and the Human Resources team wanted to determine the additional information required to understand the situation. He was asked if they went back and forth and about some of the challenges obtaining the information. They wanted fulsome information. Some of the questions were not answered.

[109] The process was followed until it was communicated that there was no additional information to be provided. There was no daycare in the immediate community. Not much else was provided. There was a bit of a gap. The grievor was on leave in June, July, and August. The discussion started in earnest in September.

[110] He had the information that there was no childcare in the grievor's immediate community. So he met with the grievor and his supervisor on October 4, 2012, to communicate his decision that the grievor's request was denied, based on the information he had to that date. He advised the grievor that he would extend the period from September to December with the expectation that were the grievor able to meet the requirement sooner, he would. The additional time was to provide a way for the grievor to provide additional information in support of his request. He was referred to his email dated October 11, 2012, to the grievor in which he summarized the October 4 discussion.

[111] As discussed at the meeting, he recognized that the transition from shiftwork to daytime hours was stressful; however, it was a decision of national scope. He apologized for the time taken to review his request, but management took the time to gather as much information as it could. He tried to do his due diligence.

[112] As noted, he advised the grievor that the information that he had provided to date did not meet the threshold and that he was open to receive any additional information that the grievor wished to provide or to be able to make the necessary arrangement for childcare before December 1.

[113] Mr. Bayliss was asked what he meant when he stated that the grievor had not met the threshold for approving accommodation based on family status. At the outset, when the grievor asked for accommodation, the employer asked for supporting documentation. It is a collaborative process. It needed to understand his accommodation needs. In this case, it did not receive the information that was necessary to understand the challenges that he faced. The questions were not answered in a fulsome manner.

[114] For example, what daycares did they reach out to, and in what communities, i.e., Woodbridge or Mississauga? Were there any daycares along their route from Hockley to Pearson? What efforts did they make? Did the grievor and his spouse work different days? If they were caring for their child themselves, what efforts did they make to meet the change in hours?

[115] If the grievor and his spouse contacted any daycares, they might not have had availability, and they would have had to have been put on a waitlist. The employer received no information about any such efforts. What about not carpooling every day? They could have worked 7.5-hour days, given the daycare's hours. Did they examine those options and state all the things that they had done; i.e., "Here is the evidence. We tried. Now we can see if we can work something out"?

[116] That is what the employer expected but not what it received. It never got to the point that it could offer options. That's what he meant when he stated that the grievor had not met the threshold.

[117] Mr. Bayliss understood that the grievor's spouse made an accommodation request identical to the accommodation that the grievor had requested. Her original request was similar and was denied for the same reasons as the grievor's was, which was based on the lack of information provided at the time.

[118] He met with her on August 1, 2012. He recognized that the transition was stressful. He indicated to her that the accommodation application had not met the

threshold. He extended the date to December 1. It was very much the same messaging used with the grievor. He was asked why he had granted the extension to December 1. He said that he had wanted to do two things. He wanted to give the grievor and his spouse additional time to provide information that could have changed his determination or to make childcare arrangements, given the change of hours of work coming into effect on December 1.

[119] He was asked about their schedules of work before the change. They had different work hours. The grievor started at 04:00. Ms. Soeterik started at 06:00. Sometimes, they worked the same days. In March 2012, they both started at 06:00. Some days, they worked the same shifts; on other days, they did not.

[120] The shift schedule for fiscal year 2012-2013 started on March 19, 2012. That week, Ms. Soeterik worked from 06:00 to 18:30 on the Monday, Tuesday, and Thursday. The grievor worked the same hours on the Tuesday, Thursday, and Friday. In some weeks, neither would work the Wednesday. That pattern continued. On some days, they worked the same shift, from 06:00 to 18:30.

[121] In June, they started working the same hours on the same days, 06:00 to 18:00, until they went on leave with income averaging. In September 2012, they worked the same hours on the same days, 06:00 to 18:30, continuing on mostly Tuesdays, Wednesdays, and Thursdays until December.

[122] He understood that the grievor and Ms. Soeterik moved at the end of May or June. Other than that, he was not aware of any other change to their circumstances.

[123] He granted them an extension so that they could continue their 12-hour shifts until December. He gave them the latitude to choose their hours of work, the same choices as were offered in April 2012 of 7.5-hour or a number of variable-hour shifts, including a variable-hour shift of 9.375 hours.

[124] During cross-examination, Mr. Bayliss was referred to a document entitled, “Duty to Accommodate Requests”. He was asked if he had seen it. He stated that he likely had but that he did not specifically remember. He was referred to page 4 of it and the section titled, “Steps for Managers”, in particular step 2, which states, “The manager must seek additional information, if necessary.” He stated that the employee has to provide the information.

[125] He was asked if management had specific questions and if it would have sought the information from the grievor. He stated that there were questions. Earlier in the day, there was a discussion about daycare in other locations. He replied in the affirmative. That was one of the questions asked. It might have led to other questions.

[126] He was asked to confirm that he was not involved in the information gathering. He asked the grievor if he had received all the information that they would receive. He responded that the grievor told him that they had. He was asked if he was comfortable. He stated that he was comfortable. He was satisfied that he would not receive any more information.

[127] He was asked about the process followed in the grievor's case. He said that there was a gap as the grievor was on leave with income averaging. The grievor was not as forthcoming as the employer would have liked. His supervisor and Human Resources had difficulty obtaining information from him.

[128] He was asked to confirm that the grievor met with Ms. Buchanan in June 2012 and that he was aware that some information had been stolen. He stated that he knew that and acknowledged that there had been a theft from the Human Resources advisor. He stated that that is why Human Resources went back to the grievor and asked for the information. He did not know whether it asked for additional information, but he knew that the employer did go back to the grievor

H. Grievor requests variable work hours

[129] On October 10, 2012, the grievor wrote to Ms. Buchanan, requesting variable work hours commencing December 4, 2012. He requested Tuesdays, Wednesdays, and Thursdays, 06:00 to 18:00. He referenced clause 25.05 of the collective agreement, which provides that subject to operational requirements, as determined by the employer, an employee shall have the right to select and request flexible hours between 06:00 and 18:00 and that his variable-work-hours request fell within the core hours based on operational requirements. The same day, in an email to Mr. Dunning, Ms. Soeterik requested the same shifts.

[130] Ms. Buchanan sent her answer on October 22, 2012. She again recited the national guiding principles for determining hours of work set out in Mr. Bayliss's May 25, 2012, email that were reiterated during their October 4 discussion. She asked him

to resubmit his variable-workweek request such that it aligned with one of the options of 8.035, 8.333, or 9.375 hours of work each day.

[131] Mr. Bayliss was referred to an email dated October 10, 2012, from Ms. Soeterik to Mr. Dunning, in which she requested variable work hours commencing December 4, 2012, on Tuesdays, Wednesdays, and Thursdays from 06:00 to 18:00 and, on every other week, Mondays, Tuesdays, and Wednesdays from 06:00 to 18:00 and Fridays from 06:00 to 12:30.

[132] Mr. Dunning replied on October 22 that she was to provide him with their requested hours of work based on the 4 options provided within the core hours as soon as possible, namely, 8.035, 8.333, or 9.375 hours each day.

[133] The grievor stated that when his request was denied, he chose the longest variable shift of 9.375 hours per day, 4 days per week. He was asked how he dealt with his childcare obligations. He stated that his mother-in-law came from the Netherlands to be a live-in caregiver for the children. There was some complication because she had been undergoing chemotherapy in the Netherlands. He stated there was no other option other than one of them leaving their work. His mother-in-law stayed with them for more than a year until P started kindergarten and they no longer required all-day daycare for P.

[134] After December 1, 2012, the grievor and Ms. Soeterik started to work four days per week, from 06:00 until 16:00. Mr. Bayliss did not receive any further information or further requests.

I. The grievance

[135] On December 5, 2012, the grievor filed the grievance, which read, “I am grieving under Article 19 of The Collective Agreement.” Under “Corrective action requested”, he stated: “To be made whole I want my rights respected and all expenses and pain [and] suffering covered”.

[136] The employer issued the second-level grievance response on May 31, 2013, denying the grievance. It issued the third-level grievance response on April 4, 2014, denying the grievance. The third-level response states in part as follows:

…

> *… the employer has a responsibility to identify and remove discriminatory barriers that may have an adverse impact on an individual's ability to perform their job and to accommodate the employee to the point of undue hardship if the request is substantiated.*
>
> *On the other hand, it is the employee's responsibility to communicate the need for accommodation to one's manager; cooperate with the organization by providing relevant and appropriate information to support the request for accommodation; and advise the employer if accommodation measures need to be changed. The employee must first attempt to reconcile any conflicts between work and childcare obligations, including exploring realistic alternatives and available options, before approaching the employer with a request for workplace accommodation. A refusal by the employee to allow the employer to obtain the necessary information could be a deciding factor in determining whether the employer has met its legal responsibilities pertaining to the duty to accommodate.*
>
> *Management provided you with a questionnaire seeking clarification in regard to the nature of the conflict between your work and parental obligations as well as the steps you have first taken in exploring realistic alternatives and options available to you outside of the workplace. While the change in hours of work may have required you to make adjustments to your family schedule and make arrangements for childcare, management explained that you have not demonstrated how you have made reasonable efforts and undertaken reasonable steps in exploring available options outside of the workplace before approaching Transport Canada. As such, the information provided was insufficient to substantiate your request for accommodation. Nevertheless, management has provided you with an extended period of notice and several options to assist you in securing appropriate childcare arrangements.*
>
> *…*

IV. Issue — should the *Johnstone* approach be rejected?

[137] In *Johnstone*, the FCA held that as part of the test to establish discrimination in family status cases due to childcare responsibilities, a claimant had to prove that he or she made reasonable efforts to meet their childcare obligations through reasonable alternative solutions and that no alternative solution was reasonably accessible.

[138] The grievor submitted that based on recent Supreme Court of Canada and provincial court of appeal decisions, there should not be any variation in the legal test for *prima facie* discrimination and that the Board should apply the uniform *prima facie* test, which requires the human rights complainant to establish the following:

a) that they have a characteristic protected from discrimination;
b) that they experienced an adverse impact; and
c) that the protected characteristic was a factor in the adverse impact.

[139] If the Board rejects the grievor's submissions and applies the *Johnstone* test to the facts of the case, the question becomes whether he proved that he made reasonable efforts to meet childcare obligations through reasonable alternative solutions and that no alternative solution was reasonably accessible.

[140] If the Board accepts the grievor's submissions and applies the uniform *prima facie* test, on the facts of this case, the question becomes whether the grievor proved that he met that test.

A. The grievor's argument

[141] In *Johnstone*, the FCA held that the test for *prima facie* discrimination can be adapted for different discrimination grounds, citing *Syndicat Northcrest v. Amselem*, 2004 SCC 47, for the proposition that a *prima facie* case of discrimination will be established taking into account the nature of the prohibited ground at issue. On that basis, the Court articulated this test specifically for establishing *prima facie* discrimination on family status grounds:

a) the child must be under the individual's care and supervision;
b) the childcare obligation at issue must engage the individual's legal responsibility for the child, as opposed to a personal choice;
c) the individual must have made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and no such alternative solution is reasonably accessible; and
d) the impugned workplace rule must interfere in a manner that is more than trivial or insubstantial with fulfilling the childcare obligation.

[142] The Board must depart from the test articulated in *Johnstone* for discrimination on the basis of family status. This issue falls within the narrow exception to the doctrine of *stare decisis* — in light of new legal issues raised as a consequence of significant developments in the law, as well as evidence that fundamentally shifts the parameters of the debate, the test in *Johnstone* is no longer applicable. (Note: The principle of *stare decisis* (to stand by things decided) requires that judges follow the previous decisions (precedents) of other judges in higher courts that exercise supervisory authority over them and the Supreme Court of Canada on the same issue. The Federal Court of Appeal exercises supervisory authority over the Board.)

[143] The Supreme Court of Canada's jurisprudence has evolved since *Johnstone*. It has moved away from an approach that permits any adaptation of the *prima facie* test for discrimination. This fundamental shift in the law is also reflected in decisions on family status in other jurisdictions, as well as in the academic commentary on the issue.

[144] Generally, the Board is constrained by the doctrine of vertical *stare decisis* to follow the FCA's judgments. A lower court or tribunal can depart from a higher court's precedent in only these two narrow circumstances (from *Canada (Attorney General) v. Bedford*, 2013 SCC 72):

> 1) "… new legal issues are raised as a consequence of significant developments in the law …", or
> 2) "… there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."

[145] In *Gueye v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 41, the Board was asked to depart from *Johnstone* and apply the uniform, three-part *prima facie* test. However, the Board did not consider whether that case fell within the exceptions to the doctrine of *stare decisis* in that decision, concluding that the result would be the same regardless of which test it applied.

1. Developments in the law

[146] In *Bedford*, the Supreme Court of Canada explained that a lower-level decision maker could depart from a binding precedent following significant developments in the law, explaining that "[t]his balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role."

2. The Supreme Court of Canada's jurisprudence since *Johnstone*

[147] In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, which was rendered a few months after *Johnstone*, the Supreme Court of Canada was asked to directly address the level of proof required at the *prima facie* stage of the discrimination analysis. It held that there is only one test for *prima facie* discrimination and that it cannot be changed based on the ground of discrimination being alleged.

[148] Although *Bombardier* was decided in the context of the Quebec *Charter of human rights and freedoms* (chapter c-12; "the *Charter*"), it has since been applied in the federal context by the Federal Court and the Canadian Human Rights Tribunal ("the Tribunal").

[149] In *Stewart v. Elk Valley Coal Corp*, 2017 SCC 30, the Supreme Court of Canada repeated that the three-part test for *prima facie* discrimination could not be altered, holding as follows: "… I see no basis to alter the test for *prima facie* discrimination by adding a fourth requirement of a finding of stereotypical or arbitrary decision making." Most recently, in *Fraser v. Canada (Attorney General)*, 2020 SCC 28, the Court once again affirmed a "unified approach" to proving discrimination.

[150] The Supreme Court of Canada's jurisprudence since *Johnstone* reflects a significant shift in the law with respect to the discrimination analysis. It simply leaves no room for a modified legal test for *prima facie* discrimination based on the specific prohibited ground raised. In light of this jurisprudence, the Board must disregard the test in *Johnstone* and apply the uniform *prima facie* test articulated by the Supreme Court of Canada.

3. Family status cases in other jurisdictions

[151] Courts and tribunals in other jurisdictions have followed the noted guidance from the Supreme Court of Canada and have refused to apply a different legal test for *prima facie* discrimination to cases of family status discrimination.

[152] In *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229, the Human Rights Tribunal of Ontario rejected the notion that a different legal test applies in cases of family status discrimination compared to other forms of discrimination. That decision has been cited with approval, including by the Alberta Court of Appeal in *United Nurses of Alberta v. Alberta Health Services*, 2021 ABCA 194.

[153] In *United Nurses of Alberta*, the Alberta Court of Appeal considered the approach in *Johnstone* in light of the developments in the law, including the most recent Supreme Court of Canada jurisprudence. The Court ultimately rejected the *Johnstone* approach, affirming the current state of the law that there should not be any variation in the legal test for *prima facie* discrimination.

[154] The Board must follow these developments in the law. Applying the approach from those decisions, it must reject the *Johnstone* test in favour of the uniform *prima facie* test.

4. The academic commentary

[155] The question of the proper legal test for discrimination in the family status context has been the subject of academic commentary since the FCA's judgment in *Johnstone*. Scholars have identified many of the critical flaws noted earlier in this decision and have raised other fundamental concerns with applying a different test to family status discrimination than to discrimination on other prohibited grounds.

[156] First, they argue that the analysis in *Johnstone* is inconsistent with the broad and purposive approach to interpreting human rights obligations. Second, they explain how the *Johnstone* approach results in a hierarchy of protected grounds, which runs contrary to any reasonable interpretation of human rights. Third, they argue that the approach in *Johnstone* distorts the proper analysis of adverse-effects discrimination, resulting in an intrusive, one-sided inquiry.

[157] In *Bedford*, the Supreme Court of Canada explained that evidence may fundamentally shift the parameters of the debate with respect to an issue, again permitting a departure from an otherwise binding precedent. The evidence in the present case fundamentally shifts the parameters of the debate. This type of evidence was not led or considered in *Johnstone* and illustrates why the *Johnstone* approach to family status accommodation is irreparably flawed.

[158] Taken together, the Supreme Court of Canada's jurisprudence, decisions in other jurisdictions, and the academic commentary lead inexorably to the conclusion that the law has fundamentally shifted from the approach in *Johnstone*.

[159] Moreover, the evidence in that case fundamentally shifted the parameters of the debate. In *Johnstone*, the Federal Court of Appeal did not directly address the question of who assesses whether a childcare option is a reasonable alternative that is reasonably accessible, as that issue did not arise in the facts of that case. It was left to be determined on a case-by-case basis. In this case, the employer second-guessed and overruled the grievor's parenting decisions.

[160] The Board must decline to apply the *Johnstone* test. Instead, it should apply the uniform *prima facie* test for discrimination articulated by the Supreme Court of Canada.

B. The employer's argument

[161] The grievor alleged that he was discriminated against because of his family status related to childcare obligations.

[162] In *Johnstone*, the FCA established the nature of the evidence that must be presented to make it possible to meet the requirements of the several elements of the analysis in discrimination cases in the particular context of childcare accommodation. Since *Johnstone*, the Board and the Tribunal have constantly followed the approach that the FCA set out.

[163] Contrary to what was stated on the grievor's behalf, Board Member Perrault made it clear as follows in her recent decision in *Gueye* that *Johnstone* still stands:

> …
>
> *[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.***
>
> …
>
> [Emphasis added]

[164] In *Bird v. Paul First Nation*, 2022 CHRT 17, the Tribunal indicated this: "The Respondent is correct that the *Johnstone* case has established the applicable test for *prima facie* discrimination based on childcare obligations under the *CHRA*."

[165] The grievor argued that the Supreme Court of Canada has moved away from the approach established in *Amselem*, which the FCA referred to in *Johnstone*. However, the Supreme Court of Canada referred to *Amselem* in 2018 in its decision *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32.

[166] Recent Supreme Court of Canada jurisprudence has not invalidated *Johnstone*. On the contrary, the decisions that followed confirmed the FCA's proposed approach in *Johnstone*, while citing with approval *Amselem*, which the FCA relied on when rendering *Johnstone*.

[167] The *Johnstone* criteria do not modify the *prima facie* test for discrimination articulated by the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61. Rather, they help federal decision makers populate how an applicant can show that their circumstances fall within the definition of "family status" in the same way that the Supreme Court of Canada in *Amselem* defines "freedom of religion" and describes the evidentiary requirement to prove it.

[168] With respect to the protected ground of family status, in *Johnstone*, the FCA expressly stated that there are limits to the scope of protection under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*") at the *prima facie* stage, as follows:

> …
>
> *[68] … the precise types of childcare activities that are contemplated by the prohibited ground of family status need to be carefully considered.* ***Prohibited grounds of discrimination generally address immutable or constructively immutable personal characteristics, and the types of childcare needs which are contemplated under family status must therefore be those which have an immutable or constructively immutable characteristic.***
>
> *[69]* ***It is also important not to trivialize human rights legislation by extending human rights protection to personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities.****…*
>
> …
>
> *[88] Normally, parents have various options available to meet their parental obligations. Therefore, it cannot be said that a childcare obligation has resulted in an employee being unable to meet his or her work obligations unless 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.***
>
> …
>
> [Emphasis added]

[169] By stating that, clearly, the Court appreciated that not every asserted conflict between one's family life and the workplace constitutes *prima facie* discrimination. Rather, each case requires a specific factual analysis. While often used informally, the term "self-accommodation" is misleading as it conflates the *prima facie* discrimination onus demanded of an applicant with the rebuttal onus required of a respondent. No duty to accommodate arises until the applicant demonstrates a need based on a protected ground. If the applicant is able to find reasonable alternative solutions for caregiving situations, then the barrier to employment is not caused by family status but rather by one's lifestyle or preference. Lifestyle and preferences cannot form the basis of *prima facie* discrimination.

[170] The grievor relied on paragraph 69 of *Bombardier* to argue that the Supreme Court of Canada has held that there is only one test for *prima facie* discrimination and that it cannot be changed depending on the ground of discrimination. Paragraph 69 of *Bombardier* should be read in response to the argument that the Commission des droits de la personne et des droits de la jeunesse made in its factum and that the Court repeated as follows at paragraph 57 and others:

> …
>
> *[55] As we mentioned above, an application under the* Charter *involves a two-step process that successively imposes separate burdens of proof on the plaintiff and the defendant. However, this Court has never clearly enunciated the degree of proof associated with the plaintiff's burden.* ***It must also be acknowledged that the use of the expressions "prima facie discrimination" and "prima facie case of discrimination" may have caused some confusion about the scope of the degree of proof****.*
>
> *[56] In our opinion, even though the plaintiff and the defendant have separate burdens of proof in an application under the* Charter*, and even though the proof required of the plaintiff is of a simple "connection" or "factor" rather than of a "causal connection",* ***he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities.***

> *[57] In its factum, the Commission supports its arguments on this point by citing to passages from* O'Malley *and* Moore *that deal with* prima facie *discrimination, but the conclusions it draws from those passages about the degree of proof required of the plaintiff are ambiguous. At the hearing, the Commission defined a* prima facie *case as [TRANSLATION] "sufficient proof absent an answer that a discriminatory ground was a factor in the occurrence of the adverse effect": transcript, at pp. 11-12.* ***It submitted that "the* prima facie *test must be flexible and must take account of the context" and that "[t]he context therefore influences the articulation of a plaintiff's burden and the required degree of proof":*** **ibid.***, at p. 16. In the Commission's view, "there will be a low threshold of proof for the circumstantial evidence that must be produced by the plaintiff":* **ibid.***, at p. 18. The Commission added that* **prima facie** ***discrimination does not therefore have to be established in accordance with the standard of proof on a balance of probabilities, and that it is only where the defendant adduces evidence to the contrary — thus providing an explanation for his or her decision — that the Tribunal is required to apply that standard. In essence, the Commission's argument is that the concept of* prima facie *discrimination lowers the required degree of proof.***
>
> *[58] Bombardier counters that the proof required by the concept of a* prima facie *case of discrimination is not [TRANSLATION] "approximate" proof of discrimination, but "proof [that] in itself, where no contradiction is shown, is complete and sufficient … to establish, on a balance of probabilities, a connection between the decision whose basis is challenged and the prohibited … ground of discrimination": transcript, at p. 89. In Bombardier's view, the Tribunal must determine whether, having regard to the evidence as a whole, the plaintiff has established discrimination on a balance of probabilities. If the Tribunal finds that the plaintiff has done so, the defendant can still present a defence of justification, which he or she must then establish.*
>
> *[59]* ***In our opinion, Bombardier is right that the standard of proof that normally applies in the civil law, namely that of proof on a balance of probabilities, applies in this case. In a discrimination context, the expression "*prima facie*" refers only to the first step of the process and does not alter the applicable degree of proof. This conclusion is inescapable in light of this Court's past decisions.***
>
> …
>
> [Emphasis added]

[171] This brief review of the case law shows that the use of the expression "*prima facie* discrimination" can be explained quite simply on the basis of the two-part test for discrimination complaints under the *Canadian Charter of Rights and Freedoms* (enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.)). This expression

concerns only the three elements that a plaintiff must prove at the first part. If no justification is established by the defendant, proof of these three elements on a balance of probabilities will be sufficient for a tribunal to find that s. 10 of the *Charter* was violated. If, on the other hand, the defendant succeeds in justifying his or her decision or conduct, there will have been no violation, not even if *prima facie* discrimination is found to have occurred. In practical terms, this means that the defendant can either present evidence to refute the allegation of *prima facie* discrimination or put forward a defence justifying the discrimination, or both.

[172] Thus, the use of the expression "*prima facie* discrimination" must not be considered as a relaxation of the plaintiff's obligation to satisfy a tribunal in accordance with the standard of proof on a balance of probabilities, which he or she must still meet. This conclusion is in fact supported by the passage from *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*"), quoted earlier, in which the Court stated that the case must be "complete and sufficient"; that is, it must correspond to the degree of proof required in civil law.

[173] *Johnstone*, in setting out evidentiary frameworks to guide decision makers in assessing a *prima facie* case, does not create a "hierarchy of rights"; it recognizes that the evidentiary requirement will necessarily vary according to the factual component of the ground at issue and provides clarity to decision makers on how to approach this task when presented with a family status claim. That approach is compliant with *Bombardier*.

[174] In *Flatt v. Canada (Attorney General)*, 2015 FCA 250, the FCA confirmed as follows that the *Johnstone* test is compatible with *Moore*:

> …
>
> *[26] Whether sex or family status are alleged as grounds of discrimination, complainants are required to present first a* prima facie *case disclosing that they have a characteristic protected from discrimination, that they encountered an adverse impact with respect to employment and that the protected characteristic was a factor in the adverse impact. If this demonstration is successful, the employer must show that the practice or policy is a* bona fide *occupational requirement and that those affected cannot be accommodated without undue hardship in order to rebut the allegation (*Johnstone *at paragraph 76).*
>
> *[27] At the hearing of this application, both parties agreed as to how to apply this test. The issue of* prima facie *discrimination*

> *should be decided in light of the factors enunciated in* Johnstone, *no matter the basis on which the alleged discrimination is examined,* i.e.*, sex or family status. I agree.*
>
> *[28] This said, these factors should not be applied blindly without regard to the particular circumstances of the applicant whose situation differs greatly from that of Ms. Johnstone. The application of the facts to this test is dispositive of the grievance keeping in mind that the test that concerns* prima facie *discrimination "is necessarily flexible and contextual because it is applied in cases with many different factual situations involving various grounds of discrimination" (*Johnstone *at paragraph 83). The* Johnstone *factors should also be applied contextually.*
>
> …

[175] The Supreme Court of Canada dismissed the application for leave to appeal the FCA's judgment in *Flatt*.

[176] Contrary to *Stewart*, *Johnstone* does not add a requirement to the test for *prima facie* discrimination, such as adding a fourth one of a finding of stereotypical or arbitrary decision making.

[177] With respect to other jurisdictions, it cannot be claimed that *Johnstone* is no longer a benchmark. For example, in a recent decision, the Human Rights Tribunal of Ontario referred to *Johnstone* and stated that generally, the courts have held that family status under human rights legislation covers childcare obligations that engage a parent's legal responsibility for a child. In 2018, after the *Misetich* decision, the Ontario Superior Court of Justice applied the *Johnstone* and *Misetich* tests and reached the same conclusion. In the appeal, the Ontario Divisional Court branch of the Superior Court of Justice mentioned that the reasons for decision in the first instance discussed two leading lines of authority in Ontario concerning discrimination on the basis of family status, being *Johnstone* and *Misetich*.

[178] In *Board of Education of Regina School Division No. 4 of Saskatchewan v. Canadian Union of Public Employees, Local 3766*, 2018 CanLII 122658 (SK LA), the decision maker indicated this:

> …
>
> *100. For the reasons that follow, we conclude that the Grievor has not made out a case of* prima facie *discrimination on the basis of family status. In arriving at this conclusion, we were of the view that the first three* Johnstone *factors for childcare obligations*

> *under the ground of family status best help guide the first element of the three-part* Moore *test, while the fourth* Johnstone *factor helps guide the second element of the* Moore *test.*
>
> …

[179] Nor can it be claimed that the *Moore* test is the sole approach outside *Johnstone*. In 2022, the Supreme Court of British Columbia, in a judicial review of an order of the British Columbia Human Rights Tribunal dated November 3, 2020, related to family status discrimination, indicated in *Gibraltar Mines Ltd. v. Harvey*, 2022 BCSC 385 (CanLII) at para. 110, as follows:

> *[110] Even if* Suen's *references to the first part of the two-part test are* obiter*, there is nothing incidental or collateral about them. In my view, in affirming* Campbell River *as establishing a two-part test that includes a requirement for a change in a term or condition of employment, the Court of Appeal in* Suen *clearly intended to provide guidance. This part of the decision must be treated as authoritative and is therefore binding. It follows then that* Suen *and* Campbell River *cannot be read consistently with the* Moore *test and I must conclude that the Tribunal's interpretation of BC's test for* prima facie *family status discrimination in employment was incorrect.*

[180] Finally, the evidence in the present case does not differ in a significant way from that in *Johnstone* or the other cases that the Board, the Tribunal, and the Federal Court have decided based on *Johnstone*.

[181] Consequently, the Board must follow the doctrine of *stare decisis* and apply *Johnstone*, as indicated in *Gueye*, at para. 81.

C. Developments after the hearing

[182] On June 13, 2023, the FCA issued its decision in *Tarek-Kaminker v. Attorney General of Canada*, 2023 FCA 135, in which it reviewed the Board's treatment of Ms. Tarek-Kaminker's discrimination allegation on the basis of family status. The FCA discussed the applicable test for establishing a *prima facie* case of discrimination on the basis of family status at the federal level and applied the *Johnstone* decision.

[183] Ms. Tarek-Kaminker argued that the Board improperly applied the test for *prima facie* family status discrimination that resulted in a more onerous test being imposed on her than the one that applies with respect to other grounds of discrimination. It

required her to expose herself to a highly intrusive inquiry into all aspects of her life. She was required to demonstrate an exceptionally high level of self-accommodation.

[184] The following is an extract from that decision, at pages 26 to 28:

> …
>
> *[91] While the test for family status discrimination is not uniform across the country, the parties agree that the applicable test for establishing a* prima facie *case of discrimination on the basis of family status at the federal level is that set out in this Court's decision in* Johnstone, *above.*
>
> *[92] In* Johnstone, *this Court held that there should be no hierarchy of human rights. Consequently, the test that should apply to a finding of* prima facie *discrimination on the ground of family status should be substantially the same as the test that applies to the other enumerated grounds of discrimination:* Johnstone, *above at para. 81.*
>
> *[93] This Court went on in* Johnstone *to adopt the definition of a "*prima facie *case" provided by the Supreme Court of Canada in* Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al., *1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536. There the Supreme Court held that a* prima facie *case of discrimination was one that "covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer": at para. 28.*
>
> *[94] Because* prima facie *discrimination on different prohibited grounds can arise in a variety of different factual situations, the test to be applied must necessarily be flexible and contextual:* Johnstone, *above at paras. 81, 83. As was noted by this Court in* Canada (Attorney General) v. Canada (Human Rights Commission), *2005 FCA 154, a flexible legal test for* prima facie *discrimination "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 [in] employment": at para. 28.*
>
> *[95] This Court further recognized that 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, above at para. 84.*
>
> *[96] With this in mind, this Court held at paragraph 93 of* Johnstone *that in order to make out a* prima facie *case of workplace discrimination based on the prohibited ground of family status resulting from childcare obligations, the claimant 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.*
>
> *[97] This Court elaborated on the third element of the test in* Johnstone *(sometimes referred to as the duty to "self-accommodate"), explaining that a claimant will have to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work. The claimant will also have to show that available childcare services or alternative arrangements are not reasonably accessible to them to enable them to meet their work needs, such that he or she is facing a* bona fide *childcare problem. This is a highly fact-specific question, and each case must be reviewed on an individual basis, having regard to all of the relevant circumstances:* Johnstone*, above at para. 96.*
>
> *[98] Not every conflict between one's professional obligations and one's family responsibilities constitutes* prima facie *discrimination. Parents usually have various options available to meet their parental obligations. As a result, it cannot be said that a childcare obligation has resulted in an employee being unable to meet his or her work obligations unless no reasonable childcare alternative is reasonably available to the employee. It is only where 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 on the basis of family status will be made out:* Johnstone*, above at para. 88.*
>
> …

[185] On June 20, 2023, the Board wrote to the parties, requesting their submissions on the relevance, if any, of the FCA's decision in *Tarek-Kaminker*.

1. Submissions for the grievor

[186] The decision in *Tarek-Kaminker* has no relevance to the primary legal question before the Board in this matter. The primary question is whether the Board must depart from the test articulated in *Johnstone* for discrimination on the basis of family status, based on the narrow exception to the doctrine of *stare decisis*. The grievor's position is that the Board must depart from *Johnstone*, due to the significant developments in the law related to the analysis of *prima facie* discrimination, and due

to the evidence in subsequent cases that fundamentally shifts the parameters of the debate.

[187] The appropriate test for family status discrimination was not at issue in *Tarek-Kaminker*. Rather, as the Court noted at paragraph 91, the parties proceeded on the basis that the applicable test for establishing a *prima facie* case of discrimination on the basis of family status at the federal level is set out in *Johnstone*. The ground for judicial review related to the family status issue in *Tarek-Kaminker* was that the Board erred in its application of the third component of the *Johnstone* test by imposing an unduly onerous evidentiary burden that was not required under *Tarek-Kaminker*. Accordingly, the Court simply reiterated its existing case law on this point, having received no arguments to suggest that it ought to depart from the test in *Johnstone*.

[188] Accordingly, none of the arguments raised in the present case about departing from *Johnstone* were advanced before the Court in *Tarek-Kaminker*. Thus, the grievor reiterated his submissions, including on the exceptions to the doctrine of *stare decisis*, and his position that this is an appropriate case for the Board to depart from *Johnstone*.

2. Submissions for the employer

[189] The FCA upheld the Board's decision, finding that the Board did not err in its analysis of family status discrimination. The FCA concluded that the Board's decision was both reasonable and procedurally fair.

[190] As for family status, the Court reaffirmed the *Johnstone* test and determined that the evidence presented by Ms. Tarek-Kaminker was insufficient to demonstrate that she had made reasonable efforts to find alternative childcare solutions. The FCA held that the Board had properly applied an intersectional analysis, but based on the evidence available, Ms. Tarek-Kaminker had not established a *prima facie* case of discrimination. Consequently, her judicial review application was dismissed.

[191] In *Tarek-Kaminker*, the FCA reaffirmed the continued applicability of the *Johnstone* test for family status discrimination at the federal level. It is true that the parties to *Tarek-Kaminker* agreed that the test for establishing a *prima facie* case of family status discrimination at the federal level is the one outlined in *Johnstone*. It is notable that the FCA did not disturb this point or move away from this approach.

[192] Nevertheless, the FCA recognized that although there may be variations in the test for family status discrimination across different jurisdictions, by adopting it in its reasons, it was acknowledged that the *Johnstone* test is the applicable one in the federal context.

[193] The Board is a federal administrative tribunal, and the FCA reviews its decisions. The Board should not depart from its jurisprudence. The Supreme Court of Canada has not overturned *Johnstone*. By adopting *Johnstone* in its reasons, the FCA reaffirmed that it still stands, and the Board is bound by it.

V. Analysis

[194] The issues in dispute in this case relate to both questions of law and fact**.**

[195] The grievor alleged that the employer discriminated against him based on his family status, in violation of article 19 of the collective agreement, which reads as follows:

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.*	***19.01*** *Il n'y aura aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire exercée ou appliquée à l'égard d'un employé-e du fait de son âge, sa race, ses croyances, sa couleur, son origine nationale ou ethnique, sa confession religieuse, son sexe, son orientation sexuelle, sa situation familiale, son incapacité mentale ou physique, son adhésion à l'Alliance ou son activité dans celle-ci, son état matrimonial ou une condamnation pour laquelle l'employé-e a été gracié.*
…	[…]

[196] Section 226(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) provides that the Board may interpret and apply the *CHRA*. Section 7 of the *CHRA* provides that it is a discriminatory practice in the course of employment to differentiate adversely in relation to an employee on a prohibited ground. Section 3(1) of the *CHRA* sets out the prohibited grounds of discrimination. The grounds are race,

national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

[197] In *Johnstone*, at para. 93, the FCA articulated the test specifically for establishing *prima facie* discrimination on the grounds of family status.

[198] The grievor argued that the Board must depart from the *Johnstone* test for discrimination on the basis of family status. He submitted that based on recent Supreme Court of Canada and provincial court of appeal decisions, there should not be any variation in the legal test for *prima facie* discrimination, and that the Board should apply the uniform *prima facie* test.

[199] The employer argued that the Supreme Court of Canada has not overturned *Johnstone* and that the Board must follow *stare decisis* and apply *Johnstone*.

[200] The grievor acknowledged that the Board is constrained by the doctrine of vertical *stare decisis* to follow the FCA's judgments and argued that it can depart from a higher court's precedent only in two narrow circumstances, being when new legal issues are raised as a consequence of significant developments in the law or when a change in the circumstances or evidence occurs that fundamentally shifts the parameters of the debate (see *Bedford*, at para. 42. He argued that this case falls within the narrow exception to the doctrine of *stare decisis* due to both the significant developments in the law and the evidence in subsequent cases that fundamentally shifts the parameters of the debate.

[201] The employer argued that in her recent decision in *Gueye*, at paras. 80 and 81, Board Member Perrault made it clear that *Johnstone* still stands, that the Board is a federal administrative tribunal, and that the FCA reviews its decisions, so it would have difficulty departing from its jurisprudence. The Board also noted that the Supreme Court of Canada had not overturned *Johnstone*.

[202] Ms. Tarek-Kaminker, not unlike the grievor in this case, argued before the FCA that the Board improperly applied the test for *prima facie* family status discrimination, which resulted in a more onerous test being imposed on her than the one that applies with respect to other grounds of discrimination, which exposed her to a highly

intrusive inquiry and required her to demonstrate an exceptionally high level of self-accommodation.

[203] The FCA expressly recognized that the test for family status discrimination was not uniform across the country, stating as follows at paragraphs 91 to 95:

> *[91] While the test for family status discrimination is not uniform across the country, the parties agree that the applicable test for establishing a* prima facie *case of discrimination on the basis of family status at the federal level is that set out in this Court's decision in* Johnstone, *above.*
>
> *[92] In* Johnstone, *this Court held that there should be no hierarchy of human rights. Consequently, the test that should apply to a finding of* prima facie *discrimination on the ground of family status should be substantially the same as the test that applies to the other enumerated grounds of discrimination:* Johnstone, *above at para. 81.*
>
> *[93] This Court went on in* Johnstone *to adopt the definition of a "*prima facie *case" provided by the Supreme Court of Canada in* Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al., *1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536. There the Supreme Court held that a* prima facie *case of discrimination was one that "covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer": at para. 28.*
>
> *[94] Because* prima facie *discrimination on different prohibited grounds can arise in a variety of different factual situations, the test to be applied must necessarily be flexible and contextual:* Johnstone, *above at paras. 81, 83. As was noted by this Court in* Canada (Attorney General) v. Canada (Human Rights Commission), *2005 FCA 154, a flexible legal test for* prima facie *discrimination "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 [in] employment": at para. 28.*
>
> *[95] This Court further recognized that 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, *above at para. 84.*

[204] While it is correct to state that as argued by the grievor, the parties to *Tarek-Kaminker* proceeded on the basis that the applicable test for establishing a *prima facie* case of discrimination on the basis of family status at the federal level is that set out in

Johnstone, the Court recognized that the test was not uniform across the country but nevertheless adopted *Johnstone* in its reasons.

[205] The Court reiterated its view that *Johnstone* adopted the definition of a *prima facie* case set out in *O'Malley*. It reiterated the principle that there should be no hierarchy of human rights and that the test to be applied to a finding of *prima facie* discrimination on the grounds of family status should be substantially the same as the test applied to other grounds. However, the test to apply must be flexible and contextual.

[206] In *Flatt*, the FCA adopted the reasoning in *Johnstone* and confirmed that that test is compatible with *Moore*, as follows:

> *[26] Whether sex or family status are alleged as grounds of discrimination, complainants are required to present first a* prima facie *case disclosing that they have a characteristic protected from discrimination, that they encountered an adverse impact with respect to employment and that the protected characteristic was a factor in the adverse impact. If this demonstration is successful, the employer must show that the practice or policy is a* bona fide *occupational requirement and that those affected cannot be accommodated without undue hardship in order to rebut the allegation (*Johnstone *at paragraph 76).*
>
> *[27] At the hearing of this application, both parties agreed as to how to apply this test. The issue of* prima facie *discrimination should be decided in light of the factors enunciated in* Johnstone*, no matter the basis on which the alleged discrimination is examined,* i.e.*, sex or family status. I agree.*
>
> *[28] This said, these factors should not be applied blindly without regard to the particular circumstances of the applicant whose situation differs greatly from that of Ms. Johnstone. The application of the facts to this test is dispositive of the grievance keeping in mind that the test that concerns* prima facie *discrimination "is necessarily flexible and contextual because it is applied in cases with many different factual situations involving various grounds of discrimination" (*Johnstone *at paragraph 83). The* Johnstone *factors should also be applied contextually.*

[207] In *Flatt v. Attorney General of Canada*, 2016 CanLII 24872, the Supreme Court of Canada dismissed the application for leave to appeal the FCA's judgment in *Flatt*.

[208] I carefully reviewed the jurisprudence cited by the grievor in support of his proposition that since the judgment in *Johnstone*, the jurisprudence has moved from that approach and no longer permits any adaptation of the *prima facie* test, together

with the jurisprudence cited by the employer that the jurisprudence has not invalidated *Johnstone*.

[209] As the grievor pointed out, a lower court or tribunal can depart from a higher court's precedent only in two narrow circumstances, being that new legal issues are raised as a consequence of significant developments in the law or that there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. Based on my review of the jurisprudence that both parties cited and that is noted in this decision, I am not persuaded that the grounds for me to depart from the FCA's *Johnstone* decision have been satisfied.

[210] I am unable to conclude that new legal issues have been raised as a consequence of significant developments in the law. It is clear that as the FCA stated in *Tarek-Kaminker*, the test for family status discrimination is not uniform across the country. Proponents of the different tests at the court of appeal level each assert that the test it has adopted conforms with the uniform *prima facie* test that the Supreme Court of Canada has articulated.

[211] As well, in *Fraser v. Canada (Attorney General of Canada)*, 2020 SCC 28, a case that dealt with parental status, the Supreme Court of Canada noted at paragraph 118 that "[t]he question of what constitutes a *prima facie* case of family status discrimination has been the source of considerable 'uncertainty and controversy' in the human rights arena …". At paragraph 119, the Court went on to note that there were almost no submissions before it about whether or how the unsettled state of the human rights jurisprudence does or should affect the recognition of family/parental status under the *Charter*. In my view, there has been no clear, consistent, or significant development in the law.

[212] I have also carefully considered the argument that the evidence in this case has fundamentally shifted the parameters of the debate with respect to the *Johnstone* approach to family status accommodation. The grievor argues that employees must go to extraordinary lengths to exhaust all potential alternatives for childcare, including alternatives that are incompatible with their fundamental parenting decisions about the type of care that their child receives. In this case, the grievor and his spouse would not consider unlicensed daycare. In my view, the evidence in this case does not differ in any material way from the evidence in *Johnstone*, *Smolik v. Seaspan Marine*

Corporation, 2021 CHRT 11, or *Chin v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 53.

[213] Therefore, I conclude that I am not able to depart from the FCA's precedents set in *Johnstone*, *Flatt*, and *Tarek-Kaminker* and that by the principle of *stare decisis*, I am required to apply the test set out in *Johnstone*, at para. 93, as follows:

> *[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.*

A. The first *Johnstone* factor: Were the children under the grievor's care and supervision?

[214] The grievor argued that there can be no reasonable dispute that the first factor of the *Johnstone* test is satisfied as he had the children under his care and supervision.

[215] The employer submitted that the first factor requires a claimant to show that he or she stands in such a relationship to the child at issue that his or her failure to meet the child's needs will engage the individual's legal responsibility. In the case of parents, this will flow from their status, and in the case of de facto caregivers, there will be an obligation to show that their relationship with the child is such that they have assumed the legal obligations of a parent. See *Johnstone*, at para. 94.

[216] With respect to the first factor, the employer admitted that P, as the grievor's daughter, was under his care and supervision. However, a filiation with respect to W, who is not the grievor's biological son, was not established as there was no evidence to establish that he had assumed a parent's legal obligations.

[217] The grievor replied that he repeatedly referred to W as his son, and Ms. Soeterik referred to W as "their son" and as "our son". They both used "we" to describe having an elementary-school-aged child. In his direct evidence, the grievor identified that he

and Ms. Soeterik had three or four children living in their home in September 2012, with the variation in number depending on the status of their eldest daughter, who was in university. Ms. Soeterik similarly identified that their children numbered four in the home in 2012 and referenced "all four of our kids … our family as a whole".

[218] Ms. Soeterik's direct evidence was that she and the grievor shared the parenting duties since June 14, 2009. This was not challenged by the employer in cross-examination; nor at any time did the employer ask the grievor or Ms. Soeterik for information about the basis for the grievor's childcare obligations to their son.

[219] On a balance of probabilities, as the grievor and his spouse repeatedly referred to W as their son during their testimonies, and as the employer did not cross-examine them on the issue or raise it as an issue in the case before final argument, I am satisfied that on a balance of probabilities, the grievor established that he had childcare obligations to W.

B. The second *Johnstone* factor: Did the grievor demonstrate that the childcare obligation engaged his legal responsibility as opposed to a personal choice?

[220] The grievor argued that there can be no reasonable dispute that the second factor of the *Johnstone* test has been satisfied as the grievor's childcare obligations engaged his legal responsibility for the children as opposed to a personal choice.

[221] The employer argued that the second factor requires demonstrating an obligation that engages the individual's legal responsibility for the child. The grievor must show that the child has not reached the age at which he or she can reasonably be expected to care for himself or herself during the parent's work hours, and the grievor must demonstrate that the childcare needs at issue flow from a legal obligation as opposed to resulting from personal choices (see *Johnstone*, at para. 95)

[222] According to the employer, the grievor's accommodation request resulted from personal choices. He would not have considered unlicensed daycare even if licensed daycare was not available in their rural community. He and his spouse did not provide any reasonable and objective consideration that would have prevented them from using the services of unlicensed home daycare. He was not on any daycare waiting lists. He did not look at daycare in other communities between his residence and workplace. He made the choice to move to a rural community, when he knew that a possible change in working hours was coming.

[223] In *Bzdel v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 27, the Board found that the grievor never seriously sought daycare options, restricted her research to licensed and accredited daycares while living in a rural community where daycare was primarily available in private homes, and did not put her name on any licensed daycare waiting lists.

[224] The Board found that that grievor did not establish a *prima facie* case of discrimination since she failed to establish that she met both the second and third factors in *Johnstone*. Her case was built on the assumption that her accommodation needs could be met only through her personal choice of living in Edmonton, Alberta. She was not prepared to consider in any meaningful way any other option that would have been reasonable in the circumstances.

[225] One of a parent's legal responsibilities is to care for his or her child. How they fulfil it is a question of choice. In some circumstances, if no other options are available, the choice is no longer a choice — it is a legal responsibility; see *Board of Education of Regina School Division No. 4 of Saskatchewan*, at para. 104, and *Syed v. Canada (Attorney General)*, 2020 FC 608 at para. 53.

[226] According to the employer, the grievor did not establish that he met the second part of the *Johnstone* test.

1. Analysis

[227] In *Johnstone*, after determining that discriminatory practices based on family status require accommodation for childcare obligations, the Court went on to describe the precise types of childcare activities contemplated by the prohibited ground of family status that requires accommodation at paragraphs 68 to 74, as follows:

> *[68] … the precise types of childcare activities that are contemplated by the prohibited ground of family status need to be carefully considered. Prohibited grounds of discrimination generally address immutable or constructively immutable personal characteristics, and the types of childcare needs which are contemplated under family status must therefore be those which have an immutable or constructively immutable characteristic.*
>
> *[69] It is also important not to trivialize human rights legislation by extending human rights protection to personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities. These types of activities would be covered by family status according to one of*

> *the counsel who appeared before us, and I disagree with such an interpretation.*
>
> *[70] 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 ss. 215(1) of the* Criminal Code*, R.S.C., 1985, c. C-46;* R. v. Peterson *(2005), 34 C.R. (6th) 120, 201 C.C.C. (3d) 220 (Ont. C.A.) at para. 34;* R. v. Popen *[1981] O.J. No. 921 (QL), 60 C.C.C. (2d) 232 (C.A.), at para. 18.*
>
> …
>
> *[72] Voluntary family activities, such as family trips, participation in extracurricular sports events, etc. do not have this immutable characteristic since they result from parental choices rather than parental obligations. These activities would not normally trigger a claim to discrimination resulting in some obligation to accommodate by an employer:* International Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc. (Bender Grievance) *[2009] O.L.A.A. NO. 447, 186 L.A.C. (4th) 180 (Power Stream), at paras. 65-66.*
>
> …
>
> *[74] In conclusion, the ground of family status in the* Canadian Human Rights Act *includes parental obligations which engage the parent's legal responsibility for the child, such as childcare obligations, as opposed to personal choices.…*

[228] The Court set out at paragraph 93 the factors previously recited that an individual advancing a workplace-discrimination claim on the prohibited ground of family status resulting from childcare obligations must demonstrate. In particular, with respect to the second factor, the Court stated this at para. 95:

> *[95] The second factor requires demonstrating an obligation which engages the individual's legal responsibility for the child. This notably requires the complainant to show that the child has not reached an age where he or she can reasonably be expected to care for himself or herself during the parent's work hours. It also requires demonstrating that the childcare need at issue is one that flows from a legal obligation, as opposed to resulting from personal choices.*

[229] Applying the proper legal test, the Court concluded that Ms. Johnstone had made out a *prima facie* case of discrimination on the basis of family status and that she had satisfied the four factors of the test. With respect to the second factor, the Court stated as follows at paragraph 102:

> *[102]* ***Second****, both children were toddlers for whom she and her husband were legally responsible. She and her husband could not leave the children on their own without adult supervision during their working hours without breaching their legal obligations towards them. As a result, they were legally required to provide their children with some form of childcare arrangement while they were away to attend to their work with the CBSA. As a result, Ms. Johnstone's childcare obligations engaged her legal responsibilities as a parent towards her children, as opposed to a personal choice. As such, Ms. Johnstone satisfied the second leg of the test.*
>
> [Emphasis in the original]

[230] In *Flatt*, the Court dealt with a judicial review application of the Board's decision in *Flatt v. Treasury Board (Department of Industry)*, 2014 PSLREB 2, denying the applicant's grievance. After her one-year maternity leave ended, the applicant requested permission to telework, to continue breastfeeding her child. She and the employer failed to establish a suitable work schedule that would have met both their needs. As a result, she filed a grievance claiming that the failure to accommodate her was discriminatory on the basis of sex and family status. The grievance was denied at all levels of the grievance process.

[231] The Board concluded that "… discrimination on the basis of breastfeeding, if it is discrimination, is discrimination on the basis of family status rather than of sex or gender" (at paragraph 157); the Court agreed.

[232] In determining whether the grievor made out a *prima facie* case of discrimination on the basis of family status, the Board applied the four elements of the *Johnstone* test. After determining that the first condition was satisfied in that case, the Board stated that the second and third conditions were problematic. In particular, with respect to the second condition, the Board stated this at paragraph 181:

> ***181*** *Dealing with the second condition, a parent's legal responsibility is to nourish his or her child. How a parent fulfills that responsibility is a question of choice. Breastfeeding is one such choice, but it is not the only one. Sometimes the range of choices may shrink to one — for example, when the physical needs or*

> *illnesses of the child, as in* Cole *or* Carewest*, dictate that nourishment be supplied by way of breastfeeding. In such cases, the choice is no longer a choice, it is a legal responsibility. But in the case before me, there was no evidence to suggest that the grievor's choices were so restricted. Her child was one year old. There was no evidence of any physical condition or illness that made breastfeeding a necessity. Indeed, on the grievor's own evidence, the child was — or at least was to be — in daycare. Such evidence goes no further than establish that the grievor wanted — chose — to continue breastfeeding her child after he reached the age of one. It does not establish that her choice amounted to a legal responsibility.*

[233] In *Board of Education of Regina School Division No. 4 of Saskatchewan*, the grievor claimed that she was discriminated against by her employer based on family status. On returning from maternity leave, she asked for an accommodation, to retain her home-based position instead of working in the division office. Her three-year-old son was having difficulties coping day to day due to sensory overload, and she claimed that he would not cope well in third-party daycare.

[234] The arbitration board denied the grievance, concluding that the grievor had not made out a case of *prima facie* discrimination on the basis of family status. Its reasons were stated as follows at paragraphs 100 to 109:

> *100. For the reasons that follow, we conclude that the Grievor has not made out a case of* prima facie *discrimination on the basis of family status. In arriving at this conclusion, we were of the view that the first three* Johnstone *factors for childcare obligations under the ground of family status best help guide the first element of the three-part* Moore *test, while the fourth* Johnstone *factor helps guide the second element of the* Moore *test.*
>
> *101. Not all childcare obligations will be found to be characteristics protected under the family status ground in legislation. With the* Johnstone *factors guiding the* Moore *test, we find that the Grievor's particular childcare problem is not a protected characteristic.*
>
> *102. Pursuant to the first* Johnstone *factor, the Grievor has demonstrated that her children are under her care and supervision. This flows from the Grievor's status as the parent to her children.*
>
> *103. Under the second* Johnstone *factor, the Grievor's children have not reached an age where they can reasonably be expected to care for themselves during their parents' work hours. However, the Grievor has not demonstrated that the childcare need at issue is one that flows from a legal obligation, as opposed to resulting*

from personal choices. On this point, we adopt the line of reasoning of Arbitrator Richardson in Flatt.

104. One of a parent's legal responsibilities is to provide care for his or her child. How a parent fulfills that responsibility is a question of choice. Remaining at home with the children is one such choice, but it is not the only one. Sometimes the range of choices may narrow to one — for example when the medical needs of the child dictate that the child's care can only be provided in the home and by the parent. In such circumstances, the choice is no longer a choice; it is a legal responsibility. However, in the Grievor's circumstances, there was insufficient evidence to suggest that the Grievor's choices were so restricted. The Grievor presented her subjective assessment of what is best for Hudson, i.e. *home care provided by the Grievor. Beyond that, the Grievor offered a medical note indicating that "Hudson does not fair [sic] well in a social setting in a daycare etc." Such evidence goes no further than to establish the Grievor's preference to care for Hudson herself in her own home; it does not establish that this choice amounted to a legal responsibility.*

105. Under the third Johnstone *factor, the Grievor has not demonstrated that reasonable efforts have been expended to meet her childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible. In other words, the Grievor has not demonstrated that she is facing a* bona fide *childcare problem. The Grievor remained steadfast in her original request for a home-based accommodation and did not make a reasonable effort to find a viable solution.*

106. Prior to the Grievor going on maternity leave for her second child, the Employer notified the Grievor that her position was to be relocated to the Division Office. The Grievor did not raise any concerns at that time. In the final month of her maternity leave, the Grievor requested a home-based accommodation on the basis of family status. It was only at this point, and at the request of the Employer, that the Grievor reached out to five childcare providers between August 22, 2016 and September 1, 2016. Additionally, the Grievor did not consider the option of a home-based nanny.

107. The Grievor's evidence that the cost of the U of R childcare centre would take her entire paycheck does not alone establish that it was not a reasonable alternative. As noted by Arbitrator Richardson in Flatt, *the fact that one might have to work to cover the cost associated with a particular choice is not in and of itself sufficient to make that choice unreasonable. There was no evidence to the effect that the cost of the daycare was so disproportionate that it would have adversely affected the ability of the Grievor and her spouse to provide the other necessities for their children.*

108. For the reasons set out above, we conclude that the Grievor's childcare obligation is not a protected characteristic under the family status ground. For greater certainty, we do not intend to say that childcare obligations would never be a protected

> *characteristic under the family status ground. Rather, in these particular factual circumstances and in light of the evidence, or lack thereof, provided do we conclude that the Grievor has not brought her childcare obligations under the family status ground.*
>
> *109. This conclusion is sufficient to dispose of the Grievance as the Grievor has not made out a case for* prima facie *discrimination under the first step of the* Moore *test. However, in the event that we are wrong in our conclusion, we would also conclude that the Employer met its burden that the* prima facie *discriminatory practice is a BFOR.*

[235] In my view, the arbitration board misapplied the second factor set out by the Court in *Johnstone*. At paragraph 74, it concludes that the ground of family status includes parental obligations that engage a parent's legal responsibility for a child such as childcare obligations, as opposed to personal choices.

[236] At paragraph 69, the Court provides examples of personal choices that would not engage a parent's legal responsibility, namely, a child's participation in dance classes, sports events like hockey tournaments, and similar voluntary activities.

[237] At paragraph 70, the Court stated that the childcare obligations at issue are those that a parent cannot neglect without engaging his or her legal liability. Thus, a parent cannot leave their young child without supervision at home to pursue their work since doing so would constitute a form of neglect that in extreme examples could even engage the *Criminal Code* (R.S.C., 1985, c. C-46).

[238] The arbitration board in *Board of Education of Regina School Division No. 4 of Saskatchewan*, at para. 104, determined that "[o]ne of a parent's legal responsibilities is to provide care for his or her child." It then determined that how a parent fulfils that legal responsibility is a question of choice. It reasoned that remaining at home with the child is one choice but that it is not the only one. However, it noted that sometimes, the range of choices may narrow to one, when the child's medical needs dictate that their care can be provided only in the home by the parent, and in such circumstances, the choice is no longer a choice — it is a legal responsibility.

[239] Having acknowledged that the responsibility to provide care for a child is a legal responsibility and that how a parent fulfils that responsibility is a question of choice, the arbitration board determined that only in some circumstances does the choice becomes a legal responsibility.

[240] It was not disputed in that case that the children were under the grievor's care and supervision and that they had not reached an age at which they could reasonably be expected to care for themselves during the parent's work hours. Based on those facts, I do not see how it could be said that the childcare needs at issue in that case did not flow from a legal obligation. Nor do I understand how a parent's decision on how to fulfil his or her childcare obligations does not constitute a legal obligation.

[241] In my view, the arbitration board was mistaken when it determined that the grievor had not met the second factor in the *Johnstone* test and conflated it with the test for the third factor, which requires a grievor to demonstrate that reasonable efforts have been expended to meet childcare obligations through reasonable alternative solutions and that no such alternative solution is reasonably accessible.

[242] The grievor demonstrated that on a balance of probabilities, P, at age three, had not reached the age at which she could reasonably have been expected to care for herself during the grievor's and his spouse's work hours. He also demonstrated that the childcare need at issue flowed from a legal obligation as opposed to personal choices such as a child's participation in dance classes, sports events like hockey tournaments, and similar voluntary activities.

[243] With respect to W, he was 11.5 to 12 years of age during the relevant period. Had his parents carpooled three days per week or had they had overlapping shifts, he would have been responsible for getting on the school bus on his own either one or three days per week. Without further evidence as to his maturity, it is not clear that he had not reached the age at which he could reasonably have been expected to care for himself during that period. I understand that there is no law in Ontario prescribing a minimum age below which a child cannot be left alone.

C. The third *Johnstone* factor: Did the grievor make reasonable efforts to meet his childcare obligations through reasonable alternative solutions, and was no such alternative solution reasonably accessible?

1. The grievor's submissions

[244] The Board must apply the third element of the *Johnstone* test consistently with the grievor's fundamental right as a parent to determine safe and appropriate childcare for his children. *Johnstone* did not directly address the question of who assesses whether a childcare option is a "reasonable alternative" that is "reasonably

accessible", as that issue did not arise in the facts of that case. However, later cases have confirmed that it is for the parent or guardian to decide whether a particular childcare option is reasonable for their child or children.

[245] In *Chin*, the Board considered a grievance about an employer's refusal to implement a requested shift change to accommodate the overlapping work schedules of the grievor and her child's other caregivers. The Board rejected the employer's argument that that grievor did not make reasonable efforts to explore other childcare options, as follows:

> …
>
> *[112] In this regard, the commentary at paragraph 84 of* Smolik *resonates with me: "The Tribunal should give some deference to a Complainant who is presumed to have the best knowledge of his children."*
>
> *[113] Despite the employer's arguments, I have no reason to second-guess the grievor's decision to place childcare duties in the hands of the three people she knew were best able to provide it. Doing so was not taking the easy way out; on the contrary, this childcare choice entailed a great deal of work. She had to liaise with her employer, as well as her husband's, to put the plan in place. She had to request a letter from the Peel Regional Police Service about her husband's duties, to justify the childcare plan to her employer.*
>
> …

[246] This analysis and conclusion apply directly to the circumstances of the present case. Like the grievor in *Chin*, Mr. Milinkovich and his spouse did not take "the easy way out"; on the contrary, they went to extraordinary lengths to arrange childcare that fit within their determination of what was best for their child.

[247] As in *Johnstone*, the grievor and his spouse investigated regulated childcare providers both near their geographic area in the community of Orangeville and in other communities — efforts that were not challenged by the employer on cross-examination. None of the options provided services at hours that would have allowed them to meet both the drop-off and pick-up times and attend work for the hours required for their shifts.

[248] The grievor and his spouse made efforts with family members, including their daughters and the grievor's mother, but consistent help from family was not available

for the required minimum period of one year. As in *Johnstone*, the grievor's spouse was also not able to provide the required childcare reliably, in this case because she worked for the same employer and was subject to the same hours-of-work requirements.

[249] The grievor and Ms. Soeterik were unchallenged in their testimonies that as professionals who worked in the area of safety regulation and believed in the importance of government oversight and licensing, unlicensed daycare was not a safe childcare option for their family, as follows:

…

> *Q: If the only available option was to put your kid in unlicensed care, what would you do?*
>
> *A: I still wouldn't. I would have been forced to leave my job in some capacity through long-term extended leave or quit my job. Under no circumstances was I going to roll the die [sic] on my child's safety for a paycheck. It's a terrible place to be, where you have to decide between putting food on the table or your child's safety. Realistically, your child's safety comes first. [Unlicensed care] wasn't an option.*

…

[250] This clearly satisfies the third criterion of the *Johnstone* test as the grievor made reasonable efforts to meet his childcare obligations through reasonable alternative solutions, but no such alternative solution was reasonably available.

[251] This conclusion is further supported by the the Tribunal's decision in *Smolik*. In that case, after the death of one parent, the sole remaining parent concluded that he was the only suitable caregiver for his children, and as a result, he could no longer go to sea for one to three weeks at a time, for work. The employer claimed that the complainant did not make reasonable or sufficient efforts to identify childcare alternatives.

[252] The Tribunal accepted that a parent's assessment as to what constitutes suitable care for their children rises above the level of personal preference. The Tribunal noted that the complainant had rejected childcare alternatives for thoughtful and considered reasons and accepted his "… belief that his childcare obligations were best met by him at the time he first indicated he was ready to return to work."

[253] As noted in *Chin* and *Smolik*, a parent is presumed to know what is best for their children. It is not for the employer to second-guess the grievor's decision in that respect. In the present case, the grievor and his spouse explored all reasonable alternatives and found that no alternative was reasonably accessible. They were not cross-examined on that testimony.

[254] Again, it is apparent that the grievor met the third requirement of the *Johnstone* test from the fact that he had to exercise a plainly unreasonable alternative when the new hours of work were implemented effective December 1, 2012 — flying his mother-in-law from the Netherlands while she was undergoing chemotherapy. While this allowed the grievor and his spouse to remain in their jobs, it was only through great sacrifice and significant difficulty. Their ability to provide childcare remained a patchwork, as they had to juggle his mother-in-law's chemotherapy appointments and the times she was too ill following chemotherapy to care for their youngest daughter and son. They took significant amounts of leave when his mother-in-law helped with the childcare because it continued to be an unreasonable solution even with her living with their family. As Ms. Soeterik testified:

> *It was piecemeal. The Employer's failure to accommodate my family status created uncertainty and chaos. When my mom had chemo, she was a trooper. More than half of the times, she would drive to the appointment and would get treatment and would drive herself home. Other times she wouldn't be well enough to do that. So I would use leave or Boris would use leave. Sometimes we had to use leave to help with the next day as well. There were visits to the ER in the middle of the night when my mom was coughing up blood. Chemo takes its toll in more ways than you can imagine.*

2. The employer's submission

[255] The evidence before the Board demonstrated the following about the grievor:

[256] He would not consider an unlicensed daycare, even if licensed daycare supposedly was not available in his rural community.

[257] He informed his employer that he was not on any daycare waiting list.

[258] He did not look into daycares (either licensed or unlicensed) in other communities between his home and his workplace.

[259] He wanted to work the same days as his spouse did so that they could carpool to work (rather than alternating their workdays), and, in fact, he worked the same 3 shifts per week as did his spouse from September 1 to December 1, 2012, and he worked the same 4 shifts per week after December 1, 2012.

[260] His spouse wanted to work 12-hour shifts so that they would have to go to work only 3 times per week. (They could have worked regular 7.5-hour days and could have tried to find a daycare closer to their work, as do most parents, but they did not explore that option.)

[261] He indicated that when they bought their new house in Hockley, their plan was to work the same 3 days so that they could carpool and then figure out an arrangement to ensure childcare 3 days per week until September 2013. (As they were able to figure out an arrangement to ensure 3 days of childcare, their option to work compressed 4-day weeks (of 9.375-hour shifts) would have allowed them to fulfil their parental childcare obligation. That option was made available to them as early as May 25, 2012. One parent could have worked Mondays to Thursdays, and the other could have worked Tuesdays to Fridays. Including the planned 3 days of childcare, it would have allowed covering the full week.)

Possible arrangement for P's childcare				
Monday	Tuesday	Wednesday	Thursday	Friday
The grievor (compressed)	Childcare	Childcare	Childcare	Ms. Soeterik (compressed)

[262] All these elements demonstrate that the grievor did not make reasonable efforts to meet his childcare obligations through reasonable alternative solutions and that alternative solutions were in fact reasonably accessible.

[263] Consequently, the grievor did not satisfy the third factor of the test, as was decided in *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4, *Havard v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 36, *Guilbault v. Treasury Board (Department of National Defence)*, 2017 PSLREB 1, *Grant v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 84, *Bzdel*, *Syed*, and *Board of Education of Regina School Division No. 4 of Saskatchewan*.

[264] Again, the grievor failed to establish that he met this factor.

[265] All these elements demonstrate that the grievor did not make reasonable efforts to meet his childcare obligations through reasonable alternative solutions and that alternative solutions were in fact reasonably accessible.

3. The grievor's reply: Response to the general assertion with respect to working the same shifts

[266] A general assertion made throughout the employer's submissions was that "… when they moved to Palgrave/Hockley, [the grievor] and his spouse have [*sic*] planned to work the same days …". This appeared to be an effort by the employer to argue that the grievor did not have a childcare need related to the change in hours of work, which the employer attempted to buttress with reliance on the purported "admission" that the grievor "… had someone to take care of his children three days per week."

[267] That assertion is not supported by the evidence. The evidence of the grievor and Ms. Soeterik was that their plans changed as the workplace situation changed, as follows:

[268] In the period before they moved to Hockley, their plan for managing their childcare needs from September 2012 to September 2013 after moving was to work overlapping shifts one day per week and address that one day through a combination of leave, the grievor's mother, and their eldest daughters. After the change in hours of work was announced, they made accommodation requests that would have allowed them to schedule their shifts to overlap only one day per week, such that the plan was essentially consistent in that period.

[269] In the period of their move during their leave with income averaging, as they had not yet received responses to their accommodation requests, they began to put other plans in place and asked the grievor's mother to take leave from her work and provide childcare until December 1, 2012.

[270] In the period from September 1 to December 1, 2012, as a result of the sacrifice that the grievor's mother made, the grievor and his spouse were able to work the same three days per week — they did not anticipate that sacrifice when they moved to Hockley on July 1, 2012.

[271] For the period in which the change in hours of work was implemented, from December 1, 2012, forward, the grievor and his spouse had to make more plans to

ensure that they could provide childcare and keep their jobs. The plans began before the implementation date. Since no response to the grievor's request was received, and with the deadline approaching, they took the extraordinary measure of flying the grievor's mother-in-law from Amsterdam in the middle of chemotherapy treatments.

[272] The employer suggested that the grievor and his spouse had childcare available for the period after December 1, 2012. The idea that flying a relative with cancer in from the Netherlands to provide live-in care constituted, in the employer's mind, having someone to take care of children three days per week and is entirely illustrative of the impossible lengths it expects employees to go to before it will even consider engaging in the accommodation process. It is telling that in its written submissions, the employer never articulated that "someone" or the circumstances under which Ms. Soeterik's mother provided childcare assistance.

[273] The employer's assertion that "… when they moved to Palgrave/Hockley, he and his spouse have [*sic*] planned to work the same days …" was, at best, based on vague and broad questions in cross-examination that failed to make it clear what period was being referenced in relation to the plans that were put in place. It is true that once the grievor and his spouse moved to Hockley, they planned to work the same days, but **only** as a direct reaction to the delayed response to their accommodation requests that led them to ask the grievor's mother to take leave from her work. They actioned their plan once Ms. Soeterik's accommodation request was denied.

[274] Given the nuance of which plans were considered at what time, the employer could not rely on the purported "admissions" given in response to questions that did not account for these nuances, when these issues were clearly addressed in examination-in-chief.

[275] The employer stated that as early as 2010, the grievor knew that it was studying hours of work and that a meeting was held in April 2012 about a forthcoming announcement about the study's results. Similarly, at paragraph 49 of its arguments, the employer argued that despite being aware in 2010 that there "might be changes in working hours", the grievor and his spouse decided to move to Hockley. This was the response for the grievor:

…

> *• The only information the Grievor had in 2010 was that there was "a study underway regarding the hours of work for aviation security inspectors". He learned this at the time that his request for family status accommodation in the form of three 12-hour shifts a week was granted. The decision to grant that accommodation included a statement that there would be a review of the accommodation when the change of hours of work was implemented including to make sure that the Employer continued to meet the Grievor's needs. The Grievor reasonably believed that, at the time of any change, his accommodation would be reviewed so that it would continue to meet his needs. He did not need to make any changes to that accommodation to facilitate the move to Hockley. In this context, the idea that the Grievor and his spouse would not decide to move for [sic] Hockley for the intensely personal reasons that drove that decision because of a vague plan for a change in hours of work that did not materialize as planned in the fall of 2010 is preposterous.*
>
> *The Grievor and his spouse had already purchased the Hockley house by the time of the meeting in April 2012 but, regardless, David Bayliss testified that the information given at that meeting was that there would be "a change to working core hours 0600-1800 consistent with the collective agreement". The family status accommodation already in place for the Grievor and his spouse at that time was consistent with that announcement.*
>
> *…*

[276] The employer stated that the grievor did not provide much detail to support his accommodation request. Similarly, it argued that "… the grievor failed in his duty to collaborate in the accommodation process." This was the response for the grievor:

> *…*
>
> *• The Grievor testified that he provided answers to the questions Maureen Buchanan asked when they met, and detailed that he answered "all manner of questions" about his family, family situation, where they lived, what their children's schedules were, their work schedules, and what they had done to look for childcare. This was not challenged in cross examination.*
>
> *• In her direct examination, Maureen Buchanan stated that the Grievor "cooperated just fine". While Ms. Buchanan stated that it was "just hard to get some of the information we were looking for", Casey Allen confirmed that, at least as of September 25, 2012, the Grievor provided answers to all of the questions in the Employer's questionnaire. The Employer did not ask the Grievor to answer any additional questions, despite the expectation of the ultimate decision maker, David Bayliss, that if the Employer wanted to know certain information, he expected a representative of the Employer would ask the question.*
>
> *…*

[277] The employer asserted that the grievor was contacted about his accommodation request because there were "some missing answers". This was the response for the grievor: "This was only the case because the record of the information the Grievor provided in his meeting with Maureen Buchanan was stolen out of Casey Allen's car."

[278] The employer submitted that the grievor replied to Ms. Allen's email with a "confrontational tone". This was the response for the grievor:

> …
>
> *• This ignores the context that the Grievor was reasonably upset over the fact that a Human Resources representative had failed to safeguard private information about him and his family. The Grievor explained in cross examination that the "smaller bit" of his upset was having to start the process over again but "the larger bit of it was the fact that my personal information and that of my family had been compromised by the negligence of an HR Member."*
>
> …

[279] The employer argued that the grievor and his spouse did not look into daycare in other communities and asserted that they could have worked regular 7.5-hour days and tried to find daycare closer to their work. Similarly, at paragraph 50 of its arguments, it stated that they did not inquire into daycare in the area before moving there. This was the response for the grievor:

> …
>
> *• In an email sent before they moved to Hockley, Ms. Soeterik advised Mr. Dunning that they had already confirmed that their new community did not have licensed daycare and that there was no daycare or before- or after- school care integrated into the school.*
>
> *• During the time that the Grievor and Ms. Soeterik were seeking accommodation, the Employer never asked about other communities. The Grievor gave clear testimony as to why daycare in other communities was not available based on the required hours of work and the commuting distances. A 7.5 hour shift would not have solved this problem – the Grievor explained that it was not possible to make both drop-off and pick-up times work and still meet the Employer's required hours of coverage. Just as the Board recognized in* Bzdel *that it was a "preposterous proposition" to expect the grievor in that case to travel to Lethbridge from Coutts before and after each shift to secure daycare, it would have*

> *been equally preposterous for the Grievor to travel to Vaughan, Brampton, Mississauga or Bolton.*
>
> *In answer to the question in cross examination about whether he looked at daycare in the surrounding information [sic] before moving to Hockley, the Grievor explained: "When I say we didn't have any information, it's that we didn't have any viable options from a licensed daycare perspective."*
>
> …

[280] The employer stated that the grievor and his spouse "could have availed themselves of [the 9.375 hours] option". This was the response for the grievor:

> …
>
> • *The 9.375 variable hours of work option still left them without childcare for a minimum of three days a week, as the Employer recognizes at paragraph 92 of its argument. The only way they could provide the necessary childcare was to fly Ms. Soeterik's mother in from Amsterdam in the midst of her* [medical treatment].
>
> …

[281] The employer argued that the extension to implementing the change in hours from September 1 to December 1, 2012, "… following the receipt of the request for accommodation …" was "an accommodation in itself". This was the response for the grievor: "Casey Allen acknowledged that this was a generic extension extended to all employees."

[282] The employer asserted that the grievor was "invited" to provide more information and that Mr. Bayliss indicated that "… it was possible to provide additional information …".

[283] In cross-examination, Mr. Bayliss acknowledged that the decision email did not ask for any more specific information, did not state "if you have more information, please share it", and did not identify any specific questions coming out of the process that the employer required an answer to. Mr. Bayliss acknowledged that the same was true of the decision email that he sent to Ms. Soeterik.

[284] The employer stated that "… the grievor did not manifest to his employer that he would be in a critical position if his request was not accommodated." This was the response for the grievor:

…

> *• The Grievor advised that he did not have daycare until September of 2013 and that denial of the accommodation would mean lost pay and leave. The Grievor stated that the accommodation was "crucial" to him and detailed the significant challenges in having to rely on elderly and infirm grandparents. Casey Allen admitted that this information was known to the Employer in advance of the decision to deny the accommodation request.*

…

4. Analysis of the third factor in *Johnstone*

[285] In *Johnstone*, the FCA set out what was required for a grievor to demonstrate that he or she met the third factor, set out as follows at paragraph 96:

> *[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.*

[286] When it determined that Ms. Johnstone had satisfied the third factor, the Court referred to the serious but unsuccessful efforts that she had made to secure reasonable alternative childcare arrangements. She investigated numerous regulated and unregulated childcare providers, both near her home and work, including family members; however, none provided services outside the standard work hours.

[287] Ms. Johnstone worked a shift plan that rotated through six different start times over the course of days, afternoons, and evenings with no predictable pattern, and she worked different days of the week throughout the duration of the schedule. Her husband also worked a variable shift schedule. Their shifts were not coordinated.

[288] The Court adopted the Tribunal's finding that the work schedules of Ms. Johnstone and her husband were such that neither could provide the required childcare reliably. The alternative of a live-in nanny was not an appropriate option in

the circumstances, since Ms. Johnstone's family would have had to move into a home that could have accommodated another adult (see the Tribunal's decision at paragraph 83).

[289] The grievor argued that the Board must apply the third element of the *Johnstone* test consistently with his fundamental right as a parent to determine safe and appropriate childcare for his children. He argued that although the issue did not arise directly in *Johnstone*, later cases have confirmed that that it is for the parent or guardian to decide whether a particular childcare option is reasonable, relying on the Board's decision in *Chin* and the Tribunal's decision in *Smolik*.

[290] In *Smolik*, the Tribunal dealt with a complaint in which Mr. Smolik, a marine engineer, claimed that his employer, Seaspan Marine Corporation, a marine transportation company, contravened s. 7 of the *CHRA* by failing to accommodate him with the work schedule that would have allowed him to fulfil his childcare obligations.

[291] Mr. Smolik worked on vessels chartered by Seaspan to Seaspan ferries and worked 12-hour shifts, 5 to 7 days per week. He and his spouse had a daughter and son. His wife's employer permitted flexible work hours, which allowed them to meet their childcare obligations themselves. His wife passed away, and Mr. Smolik became the sole caregiver for his children, aged 9 and 6, and he went on bereavement leave.

[292] When he was ready to return to work, he told Seaspan that he could not work on its coastal vessels because of his lack of childcare options and his children's emotional needs, which prevented him from being away from his children for the two to three weeks required to work on a coastal vessel. He told Seaspan that he required either a job like his previous one, in which he worked 12-hour shifts, which was no longer available, or another schedule that was flexible enough to allow him to do most school pick-ups.

[293] He wanted to preserve his family unit. He considered relatives to provide childcare, included a brother with four children and another brother, who was a bachelor and who he felt could not look after his children for extended periods. He believed that his mother-in-law could not provide much childcare beyond school pick-ups. He considered hiring a nanny but felt that he could not trust one to care for his children for multiple weeks at a time on an erratic schedule. He would have been able to meet his childcare obligations through alternative childcare for a number of hours,

including overnight, in the that event he took a callout shift, received a scheduled 12-hour shift, or received a 7- to 8-day shift position.

[294] Seaspan offered him a proposal for callout work for a one-year term, which he accepted. The amount of work from this proposal ended up being far less than what Mr. Smolik had expected. He believed that there was enough work at Seaspan to employ him almost full-time; however, in his view, Seaspan was not willing to provide a sufficient amount of work to meet his financial needs.

[295] At the hearing, Seaspan argued that Mr. Smolik did not make reasonable efforts to satisfy his childcare obligations through reasonable alternative solutions, arguing that although it was Mr. Smolik's legal obligation to provide childcare, it did not mean that he was the only one who could provide it.

[296] The Tribunal concluded that it would be too onerous to expect family members to provide childcare if Mr. Smolik was at sea for one to three weeks at a time. Nor could he reasonably expect them to be able to provide childcare on short notice on unstructured schedules. The Tribunal stated this, at paragraph 84:

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

[297] The Tribunal concluded that Mr. Smolik made reasonable efforts to meet his childcare obligations through alternative solutions and that no such alternative solutions had been reasonably accessible.

[298] In *Chin*, the Board considered a case in which the grievor alleged that the employer had discriminated against her based on her family status. She was employed with the CBSA as a border services officer at Pearson. Her mother was also employed by the CBSA as an immigration clerk at Pearson, and her husband was employed as a police constable with the Peel Regional Police force.

[299] The grievor worked shifts. She gave birth to her first child in 2011 and took maternity leave the following year. Six months before she returned to the workplace, she contacted her employer, requesting to work on a crew with opposite shifts to those

of her mother so that she could fulfil her caregiving responsibilities to her young child. The request was granted on December 9, 2011.

[300] In October of that year, the employer provided possible shift schedules to the grievor. She selected a 05:00 or 06:00 start time. She advised that her husband was also a shift worker and requested six shift changes from January to June of the following year to care for her child while her husband worked. In January 2012, she changed her request to five shift changes.

[301] On January 23, 2012, she was advised that the accommodations committee had rejected the request and that the employer believed that there were reasonable alternatives to change shifts with a colleague, take time off, or investigate alternate care for her child.

[302] The grievor responded, indicating that daycare was not an option for her young child since the four daycares she identified required a Monday-to-Friday enrolment and were not available for one day per month at a 05:00 drop-off time and that the cost of full-time enrolment at those daycares was allegedly too much for her family. The employer did not respond the request.

[303] She was able to find alternative childcare arrangements for her February 8, 2012, shift. However, she wrote to the employer, stating that the pool of employees to change shifts with was limited and was not guaranteed every month. She did not need the shift change that she had requested for February 21, 2012.

[304] On April 24, the grievor attended work but took two hours off at the end of the day for childcare.

[305] In May, the grievor explored the possibility of an assignment to a different location, to facilitate her childcare responsibilities. She made extensive efforts to find a border services officer with whom she could trade shifts for May 30, but to no avail. Ultimately, her chief intervened and arranged a shift change for the grievor for that date.

[306] With respect to the June shift schedule, the grievor used vacation leave to take the day off and to care for her child.

[307] In November, her husband was called to duty and would not be available to provide childcare while she was at work; nor was her mother available. She required three hours of leave to attend to her childcare needs. Her application was denied. She attended work but was upset about not finding a solution to her problem. She spoke with her superintendent and was advised that if she left work, she could be considered absent without leave and subject to disciplinary action. Noting how upset she was, he suggested that she avail herself of sick leave.

[308] The employer argued that the grievor did not make reasonable efforts to meet her childcare obligations, alleging that she did not want to consider any option other than care at her hands or those of her husband or her mother, that she could have done more to secure a caregiver's services, and that her inflexible approach was not reasonable. The combined incomes of the grievor and her husband were more than sufficient to pay for childcare, but it was not done, and investigating different daycare centres was not sufficient to discharge her obligation to show that all reasonable childcare alternatives were explored.

[309] The Board concluded that the grievor satisfied the third factor in *Johnstone*, stating the following at paragraphs 113 and 117:

> *[113] Despite the employer's arguments, I have no reason to second-guess the grievor's decision to place childcare duties in the hands of the three people she knew were best able to provide it. Doing so was not taking the easy way out; on the contrary, this childcare choice entailed a great deal of work. She had to liaise with her employer, as well as her husband's, to put the plan in place. She had to request a letter from the Peel Regional Police Service about her husband's duties, to justify the childcare plan to her employer.*
>
> …
>
> *[117] In terms of finding alternative care, the grievor explained to Superintendent Lebrun that finding such alternative care was difficult for one day a month. In this regard, I find the grievor's explanation about daycare centres reasonable. The evidence was that the daycares she contacted would not accept her child for only one day per month. At the same time, I accept that it is not a reasonable solution to pay for full time daycare enrollment when the childcare need is only for one day per month.…*

[310] The Board stated this at paragraph 112: "In this regard, the commentary at paragraph 84 of *Smolik* resonates with me: 'The Tribunal should give some deference to a Complainant who is presumed to have the best knowledge of his children.'"

[311] *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97, stands for the proposition that the person seeking accommodation must be open to different options. In the context of a claim that the employer discriminated against the grievor on the grounds of his disability, the Board stated at paragraph 134 as follows:

> *[134] Many employees, like the grievor, think that finding an accommodation is carte blanche to be given the position of their choice because of the employer's duty to accommodate them to the point of undue hardship. This is a misconception; employees are not entitled to their preferred accommodations. They are entitled to reasonable accommodations that meet their identified needs. The employer in this case made the effort to find a reasonable accommodation based on the medical information it had been provided. The grievor was not willing to consider the options being put forward, and he delayed the process.*

[312] The grievor contended that it is for the parent or guardian to decide whether a particular childcare option is reasonable for their child or children, relying on the decisions in *Smolik* and *Chin*. In *Smolik*, based on the facts of that case, the Tribunal stated that it should give "… some deference to a Complainant who is presumed to have the best knowledge of his children."

[313] There is a significant distinction between the proposition that it is the parent or guardian who must decide whether a particular childcare option is reasonable and the proposition that a tribunal should give some deference to a complainant's decision.

5. Analysis of the evidence and conclusion: Review of the evidence and conclusions with respect to the efforts that the grievor and his spouse made exploring the available childcare options

[314] The grievor testified that before moving to Hockley in July 2012, he did not actively seek information with respect to daycare availability. He had been alerted as early as September 2010 to the fact that there was a study underway that could affect the hours of work and his accommodation.

[315] At a staff meeting on April 10, 2012, the employees were advised that the hours of work would change from a 12-hour shift, 3 days a week to a 7.5-hour workday, 5

days a week. It was confirmed in writing on May 25, 2012. The grievor testified that he and his spouse had agreed to purchase the property in Hockley 3 or 4 months before July 2012, at or about the time he was advised of the change in shift hours that could impact his childcare accommodation. It appears to me that it was shortsighted in the circumstances for the grievor to not seek information concerning available childcare options in Hockley.

[316] He and his spouse decided that they would not accept placing their child into an unlicensed daycare; as they held inspector positions in their employment, their overriding concerns were safety, security, and well-being. While I understand the jurisprudence that states that the Board should give some deference to a complainant who is presumed to have the best knowledge of his or her children, the circumstances of this case are not analogous to those in *Smolik* or *Chin*. The evidence of the grievor and his spouse, both oral and documentary, was vague as to whether the inquiries that were made related solely to licensed daycares or to both licensed and unlicensed daycares. Given their strong feelings about unlicensed daycares, I conclude that their inquiries were limited to licensed daycares.

[317] It appears to me that given that Hockley is located in a rural area where the grievor and his spouse chose to relocate, it would have been reasonable to investigate and ascertain whether there were unlicensed daycares in Hockley or its vicinity, and if so, to interview daycare providers and seek references, in order to make an informed decision about the appropriateness of the childcare.

[318] There was no licensed daycare in Hockley. There was one in Orangeville, which is a 20- to 25-minute drive from Hockley. The grievor and his spouse stated that the opening and pick-up times were not aligned with their shifts. It was not clear from the evidence what shifts they were referring to. Whether they were referring to shifts commencing at 06:00, as they sought in their accommodation request, or a shift with a later start time, was not specified.

[319] As Mr. Bayliss testified, the grievor could have considered working 7.5-hour shifts with start times of 08:00, to meet the opening and pick-up times of the daycare. The only evidence was that the daycare in Orangeville did not open at 06:00. If a slight accommodation in the hours of work would have been required to meet those drop-off

and pick-up times, it should have been brought to the employer's attention, and an accommodation could have been requested.

[320] Hockley is located some 20 to 25 minutes east of Orangeville. Highway 9 is a paved road. The driving time from both Orangeville and Hockley to Pearson is approximately 1 hour. I understand that Hockley is in a snowbelt area. While travelling time may increase due to bad weather on occasion during the winter months, I am not persuaded that the grievor exercised due diligence by rejecting this option.

[321] Other than being on a childcare waiting list in Toronto, they were not on any other waiting lists.

[322] The grievor testified that there was nothing around Hockley with daycare facilities. There were few major communities between Hockley and Pearson. He did not search in Brampton for childcare as it is significantly west of Hockley and Pearson. Nor did he search in Vaughn or Bolton.

[323] In re-examination, he stated that Vaughn is about halfway between Pearson and his home but that it was not in line with where he went. He had to be at the office for 08:00 and would have had to have dropped his child off before then.

[324] Brampton did not differ much from Vaughn. Bolton was in line with Pearson; however, their times were not aligned with his shifts. He would have had to overshoot Pearson and go further to reach Mississauga.

[325] His mother lived in Oakville, which is a 90-minute drive from Hockley. She worked with charities and humanitarian efforts but could assist from time to time. They did not have any extended family locally available. They did not hire babysitters.

[326] I am not persuaded that any serious effort was made to look for a licensed daycare in any of the communities that were in line with his travel from Hockley to Pearson other than the small community of Mono Mills. Again, if there was a problem with respect to drop-off and pick-up times, he could have requested a 7.5-hour workday and a minor accommodation with respect to hours of work.

[327] In terms of the childcare plans, assuming that the accommodation request was granted, the evidence adduced on his behalf was contradictory. During the grievor's examination-in-chief, he stated that he and his spouse considered two options. One

was that he would work Mondays, Tuesdays, and Wednesdays and that his spouse would work Wednesdays, Thursdays, and Friday. The other option was that they would work the same days, as they had only one vehicle.

[328] During cross-examination, as his accommodation request referred to carpooling, the grievor was asked why he had made that reference. He replied that he and his spouse had wanted to carpool, commute together, and work the same days and that they would have had to commute only three days per week. He confirmed that when they decided to buy the house in Hockley, they planned to work the same hours and days, so that they could carpool. He also confirmed that when they were planning childcare for P, it was for three days per week, and that his mother would provide the daycare.

[329] It has been argued on behalf of the grievor that with respect to that exchange, the questions were vague, and the time frames were not specific. I am not persuaded that this was the case. The questions were not ambiguous, and the time frames were specific. In my view, the answers that the grievor provided were clear and specific.

[330] Ms. Soeterik stated that her accommodation request would have allowed her to manage her hours and to provide childcare as well as meeting operational needs. In terms of how her shift schedule related to the grievor's, she would have worked Mondays, Tuesdays, and Wednesdays, and he would have worked Wednesdays, Thursdays, and Fridays, and both would have been available on Wednesdays to attend staff meetings. It would have allowed them to provide direct care by a parent four days per week.

[331] In his accommodation request dated May 27, 2012, he stated, in part, "This accommodation is on the grounds of family status, non-availability of appropriate daycare over a 5 day/week period, and carpooling."

[332] In his email to Ms. Allan on September 25, 2012, the grievor stated this, in part:

> …
>
> … ***I rely on grandparents to provide care and those arrangements are based on my shifts as they now stand.*** *Both grandmothers are old and not in good health. Renee's mother has … cancer and is receiving regular medical care. My own mother has severe issues with her back.*

> ***I have been a shift worker for ten years and I took this position because it was a shift position. Every arrangement that Renee and I have made outside of this office is based on a shift premise. We carpool based on that premise and the care we have available to us — care for a preschooler and other school aged children, is based on and around my shift work. These arrangements have been in place for several years.***
>
> …
>
> [Emphasis added]

[333] Based on the evidence, both documentary and on cross-examination, on a balance of probabilities, I am persuaded that the grievor's main preoccupation and objective was to maintain his status as a shift worker, working 3 days a week, 11.5 or 12 hours a day and carpooling with his spouse those same 3 days, and that he had planned for childcare 3 days a week.

[334] Given that the plan was that he and his spouse would work the same 3 days and the same hours as they had childcare arranged for 3 days, he could have considered the option in which they could have worked a compressed workweek of 4 days, working 9.375 hour shifts, under which one parent could have worked from Monday to Thursday, and the other from Tuesday to Friday. They would have fulfilled the planned 3 days of childcare, with each parent being available to cover one additional day, and their childcare obligations for the week would have been covered, without any need for accommodation. He did not consider this option.

[335] For all the foregoing reasons, I am not persuaded that on a balance of probabilities, the evidence demonstrated that the grievor made any serious attempt to reconcile any conflicts between his work and childcare obligations, including exploring realistic alternatives and the available options, before seeking a workplace accommodation. He sought to maintain the status quo, despite that the employer changed the workplace hours from being shift-based to a regular five-day-a-week schedule.

D. The fourth *Johnstone* factor: Did the workplace rule interfere with the grievor's childcare obligations in a manner that was more than trivial or insubstantial?

1. The grievor's submissions

[336] Finally, the workplace rule interfered with the grievor's childcare obligations in a manner that was more than trivial or insubstantial. The new hours of work left him

and his spouse in a situation in which their 11-year-old son and 3-year-old daughter were to be without childcare multiple days per week, every week. This was true under the so-called new "normal hours of work" as well as under the limited variable-work-hour options provided by the employer. While they might have had occasional assistance through the help of the grievor's mother and their eldest daughters, it was not consistent or reliable. Every week, for at least a year, the grievor and his spouse had to choose between working those shifts and taking extended amounts of leave or even leaving their employment entirely. The only solution was the extraordinary step they took to fly his mother-in-law from the Netherlands to Canada while she was undergoing medical treatment.

[337] Accordingly, even under the elevated threshold set out in *Johnstone*, the grievor established that he experienced *prima facie* discrimination based on his family status.

[338] Since, as already noted, the employer led no evidence that the grievor could not have been accommodated without incurring undue hardship and did not assert that it encountered undue hardship, the grievance must succeed.

2. The employer's submissions

[339] The fourth and final factor is that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with fulfilling the childcare obligation. The underlying context of each case in which the childcare needs conflict with the work schedule must be examined, to ascertain whether the interference is more than trivial or insubstantial.

[340] As previously mentioned, during his cross-examination, the grievor confirmed that he and his spouse had planned to work the same days once they moved to Hockley in July 2012. In fact, the 2012 and 2013 work schedules revealed that they worked the same 12-hour shifts, from Tuesday to Thursday, once they returned to work in September 2012, after their summer leave.

[341] The grievor also indicated during his cross-examination that his intent was to work the same three 12-hour shifts as did his spouse at least until September 2013, when P was to start kindergarten. That would have allowed the grievor and his spouse to carpool and to be away from their home less often. The grievor's intention was also

corroborated by the emails that he and his spouse sent to their respective supervisors on October 10, 2012. Both emails read as follows:

> …
>
> *I am requesting variable work hours commencing December 4th, 2012 as follows:*
>
> *Tue, Wed, Thu 06:00-18:00*
>
> *And every other week Mon, Tue, Wed from 06:00-18:00, and Friday 06:00- 12:30.*
>
> …

[342] The grievor confirmed during his cross-examination that their October 10, 2012, requests covered the period from December 2012 to September 2013. He confirmed that they had an arrangement that allowed them to work those shifts and ensure childcare. That means that they were able to rely on someone to take care of their children, 3 days per week, at least 14 hours per day, as they lived a 1-hour drive from their workplace, for a total of 42 hours of external childcare per week (not provided directly by the parents).

[343] In Mr. Bayliss's email dated May 25, 2012, the employer offered employees the option of working compressed 4-day weeks by working 9.375 hours per day. The grievor and his spouse could have availed themselves of this option to meet their parental obligations. It was available without even having to make an accommodation request.

[344] Had the grievor and his spouse taken advantage of this option, one could have worked from Monday to Thursday, and the other could have worked from Tuesday to Friday. As they would have worked 9.375 hours per shift, the childcare need would have remained at 3 days per week but for only 12 hours, as their shifts would have been shorter; including the commute, it would have reduced the number of external childcare hours to 36 (not provided directly by the parents).

[345] Consequently, the impugned workplace rule did not interfere in a manner that was more than trivial or insubstantial with fulfilling the childcare obligation. In fact, the change of working hours and the options offered to the grievor and his spouse should have facilitated fulfilling that obligation, given all the circumstances. The grievance must be denied.

3. Analysis of the fourth factor in *Johnstone*

[346] In *Johnstone*, at para. 97, the Court explains the fourth factor as follows:

> *[97] The fourth and final factor is that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation. The underlying context of each case in which the childcare needs conflict with the work schedule must be examined so as to ascertain whether the interference is more than trivial or insubstantial.*

[347] The Court observed that the Tribunal found that Ms. Johnstone's regular work schedule interfered in a manner that was more than trivial or insubstantial with fulfilling her childcare obligations. It noted as follows at paragraph 107:

> *[107] The Tribunal notably relied on the evidence of Martha Friendly, who was qualified as an expert on childcare policy in Canada, including childcare availability for people who work rotating and fluctuating shifts on an irregular basis: Tribunal's decision at paras.174 to 195. Ms. Friendly testified that unpredictability in work hours was the most difficult factor in accommodating childcare, and that it made finding a paid third-party provider of childcare, regulated or unregulated, almost impossible: Tribunal's decision at paras. 178 and 179. She also testified that the next most difficult factor was the need for extended work hours outside standard operating hours, which also rendered childcare availability virtually impossible to find: Tribunal's decision at para. 180. She concluded that Ms. Johnstone's situation was "one of the most difficult childcare situations that she could imagine" based on different shifts at different times and different days including weekends, overtime, shifts at all hours of the day or night, and the fact her husband worked a similar type of job schedule: Tribunal's decision at para. 195.*

[348] None of the factors present in *Johnstone* is present in the circumstances of this case. The grievor and his spouse did not work rotating and fluctuating shifts on a regular basis. They had a great deal of latitude to determine their work hours, which were not unpredictable. Nor under the new policy was there a need to work extended hours outside the standard operating hours.

VI. Conclusion: the *Johnstone* test is not satisfied

[349] I have already concluded on the facts that on a balance of probabilities, the grievor's main preoccupation and objective was to maintain his status as a shift

worker, working 3 days a week, 11.5 or 12 hours a day and carpooling with his spouse those same 3 days, and that he had planned for childcare 3 days a week.

[350] He could have exercised one of the variable options to work 9.375 hours a day, 4 days a week, with his spouse working the same option, which would have allowed them to meet their childcare obligations without the need for accommodation. In the circumstances, I cannot conclude that the grievor's work schedule, had he opted for the variation that was within his power to choose, would have interfered in a manner that was more than insubstantial.

[351] Despite my conclusion that I am bound to follow the Federal Court of Appeal's decision in *Johnstone* and that the grievor did not satisfy the *Johnstone* test, I will apply the test set out in *Moore* to the conclusions of fact that I have reached in this case.

VII. *Prima facie* case

A. Submissions of the grievor

[352] The grievor has plainly satisfied this test and has established *prima facie* that he experienced discrimination in his employment, based on his family status.

[353] The grievor had parental obligations to his 4 children, including to his son, who at 11 years old was not legally of an age to care for himself or his younger sister, and to their youngest daughter, who was 3 years old and could not have cared for herself. These childcare responsibilities are protected under the ground of family status.

[354] The employer applied to the grievor the new hours-of-work policy articulated in Ms. Bayliss's May 25, 2012, email. That new policy's implementation meant that the grievor and his spouse could no longer work three, 12-hour shifts a week (overlapping only 1 or 2 days a week) as they had been since that accommodation was put in place in 2010. Instead, the new normal hours of work meant that the grievor and his spouse were required to work 7.5-hour days, 5 days a week. The grievor's testimony on this point bears repeating:

> *Working Monday to Friday, it would have been both of us, both my wife and I, because she was subject to the same email, the same policy. We would be in a position where we just wouldn't be home for the week to provide care for our child. That would put us in a very tough spot.*

[355] The only other alternative under the new policy was to choose from one of the available variable work-hour options that at best, would have allowed them to work 9.375-hour days, 4 days a week. That would not have adequately addressed the grievor's childcare needs.

[356] The grievor's spouse was subject to the same policy, as a fellow technical inspector at Pearson, and therefore was similarly unavailable to provide care for their children during the required hours of work.

[357] The policy's implementation left the grievor with the choice of remaining in his job or leaving, to ensure that his children would be cared for. He and his spouse were unequivocal about the impact of the policy on their family, stating, "It felt like we were going to potentially be left with some really hard decisions between caring for our children or feeding our kids. That is the grim reality if you're not earning money," adding this:

> *It was incredibly stressful to us, incredibly toxic to us to try to figure it out, how to choose between going to work versus providing care … we would have been in a position where one of us would have* [had] *to leave our work. There were no other options at that point.*

[358] The grievor plainly expressed to the employer that the policy's impact was lost income.

[359] The fact that ultimately, the grievor and his spouse were able to remain in their jobs through assistance from family is only further evidence of *prima facie* discrimination. It was possible only because of the extraordinary lengths to which their family members went to help with childcare. It first took the form of the grievor's mother taking a 3-month leave from her work so that she could drive 90 minutes each way from her home in Oakville to care for the grievor's son and youngest daughter during the week. It required her to "move heaven and earth" and was not a long-term solution, as she could not drive in dark, winter-driving conditions.

[360] At the end of that temporary assistance, the grievor and his spouse had no other option than to bring Ms. Soeterik's mother from Holland to provide live-in care. Not only did it mean that Ms. Soeterik's mother had to uproot her life and travel from another continent, but also, it required her to move to Canada in the middle of

chemotherapy treatments for cancer. It was logistically challenging from the perspective of renting the home that she owned in Holland, residency and insurance coverage requirements under OHIP (the Ontario provincial health insurance plan), and the transfer of medical care, but more fundamentally, it was an exceptional sacrifice. It was a so-called "option" that was exercised only because, as the grievor testified, they had no one else.

[361] It was not a minor disruption; it had long-reaching and significant implications. As Ms. Soeterik testified, as follows: "I struggle with that. My mom did ultimately pass away. I have had occasion to ask myself, if I had not interrupted that course of chemo, would she have had more time?"

[362] The grievor was faced with that choice because of his parental obligations. Therefore, the rule adversely affected him. Since the employer did not prove that it could not accommodate him without incurring undue hardship and confirmed that it does not allege that it incurred undue hardship, the grievance must be allowed.

[363] Because of his family status, the test for *prima facie* discrimination is met.

B. Submissions of the employer

[364] Should the Board decide that the *Johnstone* test is no longer applicable, as the grievor proposes, then the employer submits that the grievor did not establish a *prima facie* case of discrimination based on the test elaborated in *Moore*.

[365] In *Moore*, at para. 33, Abella, J. delivered the Court's judgment, stating as follows:

> *[33] As the Tribunal properly recognized, 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. Once a* prima facie *case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.*

[366] However, as stated earlier, the expression "*prima facie* discrimination" must not be considered a relaxation of the grievor's obligation to satisfy the tribunal in

accordance with the standard of proof on a balance of probabilities, which he or she must still meet.

[367] When the Board must decide whether a complainant has met the burden of proof for his or her case, it must consider the evidence in its entirety. This also includes the evidence filed by the employer. In other words, evidence presented before the Board by the grievor and the employer should not be analyzed in silos. Consequently, the Board may decide that the grievor failed to meet the burden of proof for his case if (1) in the absence of a response from the employer, he failed to present sufficient evidence that met the burden of proof for his case, or (2) the employer was able to present evidence that refuted the grievor's allegations and consequently prevented him from meeting the burden of proof for his case.

1. Having a characteristic protected from discrimination

[368] With respect to the particular circumstances, the grievor did not have a characteristic protected from discrimination.

[369] In *Board of Education of Regina School Division No. 4 of Saskatchewan*, the decision maker stated as follows:

> …
>
> *100. For the reasons that follow, we conclude that the Grievor has not made out a case of* prima facie *discrimination on the basis of family status.* ***In arriving at this conclusion, we were of the view that the first three*** **Johnstone** ***factors for childcare obligations under the ground of family status best help guide the first element of the three-part*** **Moore** ***test, while the fourth*** **Johnstone** ***factor helps guide the second element of the*** **Moore** ***test.***
>
> ***101. Not all childcare obligations will be found to be characteristics protected under the family status ground in legislation. With the*** **Johnstone** ***factors guiding the*** **Moore** ***test, we find that the Grievor's particular childcare problem is not a protected characteristic.***
>
> *102. Pursuant to the first* Johnstone *factor, the Grievor has demonstrated that her children are under her care and supervision. This flows from the Grievor's status as the parent to her children.*
>
> *103. Under the second* Johnstone *factor, the Grievor's children have not reached an age where they can reasonably be expected to care for themselves during their parents' work hours.* ***However, the Grievor has not demonstrated that the childcare need at issue is one that flows from a legal obligation, as opposed to***

resulting from personal choices. On this point, we adopt the line of reasoning of Arbitrator Richardson in Flatt***.***

104. ***One of a parent's legal responsibilities is to provide care for his or her child. How a parent fulfills that responsibility is a question of choice.*** *Remaining at home with the children is one such choice, but it is not the only one. Sometimes the range of choices may narrow to one — for example when the medical needs of the child dictate that the child's care can only be provided in the home and by the parent. In such circumstances, the choice is no longer a choice; it is a legal responsibility. However, in the Grievor's circumstances, there was insufficient evidence to suggest that the Grievor's choices were so restricted. The Grievor presented her subjective assessment of what is best for Hudson,* i.e. *home care provided by the Grievor. Beyond that, the Grievor offered a medical note indicating that "Hudson does not fair well in a social setting in a daycare etc." Such evidence goes no further than to establish the Grievor's preference to care for Hudson herself in her own home; it does not establish that this choice amounted to a legal responsibility.*

105. Under the third Johnstone *factor, the Grievor has not demonstrated that reasonable efforts have been expended to meet her childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible.* ***In other words, the Grievor has not demonstrated that she is facing a*** **bona fide** ***childcare problem. The Grievor remained steadfast in her original request for a home-based accommodation and did not make a reasonable effort to find a viable solution.***

106. Prior to the Grievor going on maternity leave for her second child, the Employer notified the Grievor that her position was to be relocated to the Division Office. The Grievor did not raise any concerns at that time. In the final month of her maternity leave, the Grievor requested a home-based accommodation on the basis of family status. It was only at this point, and at the request of the Employer, that the Grievor reached out to five childcare providers between August 22, 2016 and September 1, 2016. Additionally, the Grievor did not consider the option of a home-based nanny.

107. The Grievor's evidence that the cost of the U of R childcare centre would take her entire paycheck does not alone establish that it was not a reasonable alternative. As noted by Arbitrator Richardson in Flatt, *the fact that one might have to work to cover the cost associated with a particular choice is not in and of itself sufficient to make that choice unreasonable. There was no evidence to the effect that the cost of the daycare was so disproportionate that it would have adversely affected the ability of the Grievor and her spouse to provide the other necessities for their children.*

108. ***For the reasons set out above, we conclude that the Grievor's childcare obligation is not a protected characteristic under the family status ground. For greater certainty, we do***

> ***not intend to say that childcare obligations would never be a protected characteristic under the family status ground. Rather, in these particular factual circumstances and in light of the evidence, or lack thereof, provided do we conclude that the Grievor has not brought her childcare obligations under the family status ground.***
>
> *109.* ***This conclusion is sufficient to dispose of the Grievance as the Grievor has not made out a case for*** **prima facie** ***discrimination under the first step of the*** **Moore** ***test.****…*
>
> *…*
>
> [Emphasis added]

[370] In *Flatt*, at paras. 31 to 37, the Federal Court of Appeal made it clear that parental choices are not characteristics protected from discrimination compared to a need, as follows:

> *[31] In the case at bar, there can be no doubt that the applicant's young son is under her care and supervision. But I have not been persuaded that the applicant has met her burden on the second and third factors. The applicant has been arguing that the equivalent for her of Ms. Johnstone legal obligation to care for her child is her "legal obligation to nourish her son by breastfeeding him" (applicant's Memorandum of Fact and Law at paragraph 96)*
>
> *[32] Here, this comparison is inapt. I accept that* ***there could be*** *cases where breastfeeding is seen as part of a mother's legal obligation to care, and more precisely, to feed her child. As a result, I also accept the applicant's position that breastfeeding* ***can*** *fall under both prohibited grounds of discrimination. Here, and without adopting all of its reasoning, I can find no error in the Board's ultimate conclusion that* ***Ms. Flatt was breastfeeding her child out of a personal choice and that discrimination on that basis, if it was discrimination, was discrimination on the basis of family status.*** *I do not share the applicant's view that the Board misapprehended* Johnstone *and misapplied the* Johnstone *factors. I need not further discuss the Board's analysis of case law dealing with the question of whether work requirements that impact an employee's breastfeeding schedule constitute discrimination on the basis of sex or family status.*
>
> *[33] It seems to me that* ***to make a case of discrimination on the basis of sex or family status related to breastfeeding, an applicant would have to provide proper evidence, foreseeably divulging confidential information****. For example, such information may address* ***the particular needs of a child or particular medical condition requiring breastfeeding; the needs*** *of an applicant to continue breastfeeding without expressing her milk; and the reasons why the child may not continue to receive the benefits of human milk while being bottle-fed. This list of examples, of course, is not exhaustive. The purpose of such*

> *evidence would be to establish that returning to work at the workplace is incompatible with breastfeeding.*
>
> *[34] Here,* ***such information about the young infant is absent*** *from the record but for a medical note from Doctor Josephine Smith, stating that she supports the applicant's choice to continue breastfeeding her child for a second year (applicant's Record, Tab 10 at page 167, note of December 18, 2012). A second note states that due to the applicant's inability to pump her milk, breastfeeding should occur twice over a* [*sic*] *8-hour period to ensure that the milk supply is maintained (*ibidem*, Tab 18 at page 191, note of May 28, 2013). The applicant also wrote in one of her emails that she wanted to breastfeed the child past her one-year maternity leave because her second child had had health issues and she felt that her young son's immune system would benefit from breastfeeding (*ibidem*, Tab 11 at page 168, email of January 25, 2013)*
>
> *[35]* ***Having carefully examined the record, I conclude that the applicant's evidence does not meet the second factor of*** **Johnstone*****. In her particular circumstances, breastfeeding during working hours is not a legal obligation towards the child under her care. It is a personal choice.***
>
> *[36] Moreover, the applicant has made no reasonable effort to find a viable solution. As mentioned earlier, she never addressed the employer's reasonable concerns with her proposal to leave the office twice a day for 45 minutes to breastfeed her child during paid hours and simply reverted to her original position. She does not meet the third factor of* Johnstone*.*
>
> *[37]* ***I therefore conclude, as did the Board, that the applicant has not made her case of*** **prima facie** ***discrimination and that the Board's application of the facts to the*** **Johnstone** ***factors was reasonable****. I need not discuss the second stage of the test for discrimination dealing with the employer's answer.*
>
> [Emphasis added]

[371] As stated, the grievor's legal responsibility was to provide care for his child. How he decided to fulfil that responsibility was a question of choice, as there was no evidence that the child had particular needs. The grievor's personal choice or preference are not protected characteristics. Therefore, the first step of the *Moore* test is not met.

2. Experiencing an adverse impact

[372] This factor does not apply to the grievor. As set out in earlier in this decision, the grievor did not experience an adverse impact. He and his spouse planned to work the same days when they decided to move to Hockley, which they did. He testified that

they managed to have someone to take care of the child three days per week. The options available to him and his wife allowed them to.

3. The protected characteristic was a factor in the adverse impact

[373] If there is an adverse impact, it is not considered the protected characteristic, as the grievor would have been able to maintain the childcare need to three days per week, as stated previously. Carpooling and wanting to work the same shift as his spouse and be home as much as possible are not protected characteristics.

4. Conclusion: no *prima facie* discrimination

[374] The second and third factors do not apply to the grievor's situation. He did not demonstrate that he experienced discrimination in accordance with the standard of proof on a balance of probabilities, which a grievor must meet. There is a significant discrepancy between his testimony and that of his spouse. The documentary evidence supports his testimony to the effect that their plan was to work the same days, which they did. The Board must conclude that there was no discrimination.

VIII. Analysis of the application of the *Moore* test

A. The first factor: Did the grievor have a characteristic protected under human rights provisions?

[375] Under the *Johnstone* analysis, I have already concluded that the grievor had a characteristic protected under human rights provisions. There is no doubt that his family status as a parent of P and his childcare obligations were among the categories protected by the collective agreement and the *CHRA*.

B. The second factor: Did the grievor suffer an adverse employment-related impact?

[376] The second factor does not apply to the grievor. For the reasons already set out in the *Johnstone* analysis, based on the evidence, both documentary and on cross-examination, I am persuaded that on a balance of probabilities, the grievor's main preoccupation and objective was to maintain his shift-worker status, working 3 days a week, 11.5 or 12 hours a day and carpooling with his spouse on those same 3 days, and that he planned for childcare 3 days a week.

[377] Given that the plan was that he and his spouse would work the same 3 days and the same hours as they had childcare arranged for 3 days each week, he could have

considered the option in which he and his spouse could have worked a compressed workweek of 4 days of 9.375-hour shifts, by which one parent could have worked from Monday to Thursday and the other from Tuesday to Friday. They would have fulfilled the planned 3 days of childcare, with each parent being available to cover one additional day, and their childcare obligations for the week would have been covered, without any need for accommodation. He did not consider this option. I conclude that he did not suffer an adverse employment-related impact.

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

(The Order appears on the next page)

IX. Order

[379] The grievance is denied.

April 4, 2024.

David Olsen,
a panel of the Federal Public Sector
Labour Relations and Employment Board