File: 11-12

NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF The Northwest Territories Human Rights Act,

S.N.W.T. 2002, c.18, as amended

BETWEEN:

A.B.

Appellant

-and-

THE CITY OF YELLOWKNIFE

Respondent

-and-

NORTHWEST TERRITORIES HUMAN RIGHTS COMMISSION

Party

Reasons for Decision

Before: Sheldon Toner, Adjudicator, Human Rights Adjudication Panel

Place of Hearing: Yellowknife, Northwest Territories

Date of Hearing: November 16 to 20, 2015

A.B. for herself, with E.F., support person

Michelle Thériault, Counsel for the Respondent, the City of Yellowknife

Yacub Adam, Northwest Territories Human Rights Commission

Introduction:

[1] This decision involves a claim of discrimination against the City of Yellowknife ("the City") on the basis of family status, in regards to terms and conditions of employment.

[2] The complainant (A.B.) has a child (C.D.) who has been diagnosed with autism spectrum disorder. The complainant asked to have the summer off work to care for her child. The City was not prepared to grant the request and proposed schedules which would allow the complainant to work evenings and weekends. The parties were unable to reach an agreement, and the complainant resigned.

[3] The hearing took place at Yellowknife, Northwest Territories, from November 16 to 20, 2015. The complainant gave evidence and called two education workers to outline her child's situation. The respondent called the following four employees as witnesses: Human Resources Officer, Programs Manager, Facilities Manager and Human Resources Manager. The parties entered several documents into evidence, including doctors' notes, Child Development Team reports, meeting memoranda, leave request forms and e-mails.

Decision:

[4] The complainant has established the City subjected her to discrimination on the basis of family status regarding her employment. The respondent failed to meet its duty to accommodate.

Issues:

[5] The issues addressed in these reasons for decision are as follows:

1. Did the complainant establish a *prima facie* discrimination based on family status?
2. Did the respondent establish a *bona fide* occupational requirement for the complainant to work evenings and weekends?
3. Did the respondent accommodate to the point of undue hardship?

Summary of Evidence:

[6] The witnesses presented evidence regarding the complainant's employment with the City. The relevant facts are uncontested and are summarized as follows:

- The complainant worked about twenty hours per week as a cashier-receptionist for the City from 2006 to 2010.
- The respondent's witnesses knew A.B. had a child with special needs related to autism. They did not either question or inquire into the child's diagnosis.
- The complainant and her husband managed childcare around their work schedules.
- The complainant moved to the position of full-time booking clerk in September 2010, reporting to the Programs Manager.
- In the summer of 2011, the complainant asked for the entire school break off and was allowed to do so through a combination of annual leave and leave without pay.
- The Programs Manager and the Human Resources Officer recognized A.B. had a child with autism and could not find someone to care for her child. The leave was approved as an accommodation based on family status.
- The complainant's position came under supervision of the Facilities Manager from fall 2011 to spring 2012.
- In fall 2011, the complainant asked for the December school break off and was again allowed to take the time off work.

[7] There was conflicting evidence as to whether or not the parties agreed the complainant would be allowed all school breaks off work. The complainant said she reached such an agreement when she interviewed for the full-time booking clerk position in 2010. The Human Resources Officer and the Programs Officer attended the interviews and denied entering into such an agreement. The Human Resources Officer acknowledged she said she would accommodate childcare concerns, but did not make any specific commitment as to how this would work.

[8] I find there was a general understanding the respondent would accommodate the complainant, as opposed to a specific agreement. The understanding was reinforced by the respondent's granting the complainant time off during school breaks in 2011. I cannot conclude there was anything more concrete in place, especially since neither party documented the discussion until long after the interview process.

[9] The subject matter of the complaint arises from complainant's request for time off in summer 2012. The witnesses offered conflicting characterizations and perceptions of the discussions that followed. The essential facts were uncontested, however, and are summarized as follows:

- On March 28, 2012, the complainant met with the respondent to discuss her request.
- When the complainant indicated that working evenings and weekends would leave her too stressed and tired, the Human Resources Officer said she would have to get a doctor's note to explain why she could not work.
- On April 19, 2012, the complainant met with the respondent with letters from Dr. Ewan Affleck and the Northwest Territories Disabilities Council.
- Dr. Affleck supported the complainant's request on the basis that requiring the complainant to work as proposed would have a "deleterious impact" on the child.
- The Northwest Territories Disabilities Council could not support the child in its summer camps because of the child's complex needs and behavioural risks.
- On May 18, 2012, the complaint met again with the respondent with a further letter from Dr. Affleck.
- Dr. Affleck provided more detail about the child's disability and concluded the complainant's request for accommodation was "medically merited".
- The complainant said she could work 20 hours, but immediately retracted this proposal.
- On June 19, 2012, the complainant met again with the respondent with a letter from Dr. Nicole Radziminski, which explained the child's need for a routine and proximity to "people he is comfortable with and who are capable of managing his needs".
- The respondent deemed the letters provided by the complainant insufficient, since they did not come from the complainant's own doctor or establish her own medical need.

- The complainant resigned in mid-July after using the last of her annual leave.

[10] The parties entered copies of the respondent's proposed schedules into evidence, but it is not clear when these were presented. The complainant believed she received a print-out with four proposed schedules in early July, ranging from 33 to 37.5 hours per week. The Programs Manager remembered presenting A.B. with two additional options ranging from 20 to 25 hours per week. He could only speculate, however, as to when he presented the schedules.

[11] Since the two additional options appear below the four options on the same form of document, I conclude the respondent started with full-time options before proposing the part-time options towards the end of the discussions.

[12] There is conflicting evidence about comments made by the complainant during one of the earlier meetings. The complainant described how working evening and weekends would affect her quality of life. She had unable to have dates with her husband and working would prevent her from having a family vacation. The Human Resources Officer perceived the complainant's comments as clear admissions the complainant felt entitled to summer vacation and "date nights".

[13] This is a good example of how the parties disagreed on characterizations and perceptions. The exact words of the discussion may be lost in time. Regardless, the end result is the respondent was concerned the complainant was asserting preferences, whereas the complainant believed she was explaining her needs.

[14] The complainant and education workers presented evidence regarding the complainant's childcare situation in 2012. The relevant facts are uncontested and are summarized as follows:

- The complainant attended numerous appointments with doctors, speech therapists, and occupational therapists as well as special needs assistants at the child's school.
- The complainant researched her child's condition and took a course in child psychology.
- The complainant also spent time trying to socialize her child during play dates and hikes with other children, as well as at school.
- The complaint's child was in grade two in the 2011-2012 school year. He was unable to

attend class, since his condition meant he could be disruptive or violent towards other students. He worked independently outside class with two education assistants

- The complainant worked with health and education workers on a Child Development Team which developed an Independent Education Plan.
- The objective was to have the child attend class 15% percent of the time by the end of the school year. There was some improvement after New Year's but it did not last.
- Education assistants do not receive training for special needs in Yellowknife. There is no transitioning of Independent Education Plans from the school year into summer programming.

[15] The respondent's witnesses were not aware of the details of complainant's childcare situation as outlined by the education workers. They knew only that A.B. had a child with autism.

[16] The respondent's witnesses presented evidence regarding the City's organization and approach in this matter. The relevant facts are uncontested and are summarized as follows:

- The City has approximately 188 full-time employees and around 40 part-time and casual employees with 20 to 25 additional hires during the summer.
- The Human Resources Officer and Human Resources Manager each have several years' experience in human resources, including management of accommodation issues.
- The City does not have a policy specific to accommodation based on family status. It has accommodated employees on this basis, mainly with minor scheduling changes.
- The complainant's situation was unique in that it involved a child with a disability.
- In the summer of 2011, the Programs Manager moved a summer student from a cashier position to the booking clerk position. There were normally four to five casual cashiers working at the fieldhouse, where the booking clerk position is located.
- The summer student made several errors, and the Programs Manager had to spend a weekend correcting errors in the computerized booking system. He had to have another employee make other corrections over the period of about a week.
- The Facilities Manager and Programs Manager did not make plans for 2012 based on the experience with the summer student in 2011. They did not, for example, train a

casual employee or summer student in advance to replace the complainant.

- The Programs Manager attended human rights training in early 2012, where he learned accommodation can take into account the employer's operational needs.
- The Human Resources Officer explained the City approached things differently from 2011 to 2012 because accommodation has to be dynamic and circumstances change.

Complainant's Position:

[17] The complainant's position is that she was the primary caregiver with legal obligations to ensure her child's development. She expected to rely on an agreement with the City. The complainant and her husband arranged their schedules and other arrangements were not available. The complainant tried to explain the circumstances, but the respondent would not listen. Instead, the respondent insisted on a note from her doctor, even though she never sought accommodation for stress and exhaustion. The complainant resigned believing she had no other choice. The complainant seeks everything she believes the City took from her in lost wages and benefits.

Respondent's Position:

[18] The City recognizes that A.B. has a child with significant childcare needs not easily supported in Yellowknife. The respondent, however, does not accept the complainant's legal obligation extends to being free of stress or spending time with her husband. The City maintains it fully accommodated the complainant by proposing schedules on evenings and weekends. The respondent further submits the complainant insisted on one and only one accommodation, and failed to engage in the search for accommodation. The respondent submits the complainant chose to resign and her complaint should be dismissed.

Did the complainant establish a *prima facie* discrimination based on family status?

[19] The test for discrimination on the basis of family status is set out in *Canada (Attorney General)* v. *Johnstone*, 2014 FCA 110 (CanLII) at para. 95:

> …the individual advancing the claim must show (i) that a child 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.

[20] On the first branch of the test, there is consensus that A.B. had a child under her care and supervision. The remaining branches of the test must, however, still be addressed.

[21] The second branch of the test requires a distinction between childcare activities that engage legal responsibilities from those which constitute personal choice. Human rights should not be trivialized by protecting activities such as dance classes, sports events, family trips or extra-curricular activities. *Johnstone, supra* at paras. 68 to 73.

[22] Voluntary activities are distinguishable from fundamental childcare needs or immutable characteristics which the law is designed to protect. The types of childcare activities that will trigger a legal obligation are those which a parent cannot neglect without engaging legal liability. If the obligations were neglected, the parent could, for example, face criminal charges or intervention by child protection authorities. (*Johnstone*, para. 68 to 71)

[23] In *Canadian National Railway Co.* v. *Unifor Council* 4000, [2015] C.L.A.D. No. 213, the employee sought weekday shifts to spend time with her children as a single parent. The parent claimed her child needed special caregivers, but she left them with ordinary caregivers at school and at camp. The decision appeared to be more a personal choice than a legal responsibility.

[24] In *Flatt* v. *Treasury Board (Department of Industry)* 2014 PSLREB 02, the adjudicator accepted there is a legal obligation to provide nourishment for a child, but determined the parent's request for time to breast-feed engaged a personal choice as opposed to a legal obligation.

[25] The City's witnesses took A.B.'s comments about wanting to take vacation and spend time with her husband as indications of personal preference. When A.B. mentioned she would like

vacations and some time with her husband, the Human Resources Officer and the Programs Manager saw this as confirmation that A.B.'s request was really about the desire for vacation and "date nights".

[26] I do not see the complainant's comments as assertions of personal preference. The complainant was trying to express the impact of caring for her child on her personal and family life. The complainant had a child with a disability which was proving difficult to manage in 2011-2012. She was the child's primary caregiver, and the one person who offered the best chance of allowing the child to function socially. In the circumstances, A.B. was engaged in fundamental childcare activities. The complainant would be legally accountable if she failed to fulfill the obligations she had undertaken as the primary caregiver.

[27] The facts were not hidden from the respondent. The Northwest Territories Disabilities Council, Dr. Affleck and Dr. Radziminski, all wrote letters which connected the complainant's need for time off with C.D.'s disability. There is every indication in the letters that the doctors were available for questions, but the respondent's employees were dismissive. The respondent's employees failed to take any interest in the child's diagnosis, which they needed to do in order to make appropriate inquiries. They chose instead to presume they understood the childcare issue, and to uncharitably misinterpret the complainant's comments.

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

[29] The third branch of the test requires an inquiry into the complainant's efforts to meet her obligations through reasonable alternative solutions, including solutions other than workplace accommodation: *Ontario Public Service Employees Union* v. *Ontario (Liquor Commission) (Thompson Grievance)*, [2012] O.G.S.B.A No. 155 (QL), cited in *Johnstone, supra* at para. 90.

[30] The complainant's efforts to make an arrangement with the City in September 2010 demonstrate an intention to address her childcare issues before she went full time. If there was not an agreement, there was at least an understanding the complaint had childcare needs to be

addressed, which was reinforced when the respondent granted the complainant time off in 2011. The understanding does not establish an entitlement to any particular result. It simply shows the complainant was trying to find a reasonable solution.

[31] The complainant also made efforts to coordinate with her husband's schedule. The City offered A.B. schedules that would work around their understanding of his schedule. From the respondent's perspective, it was a simple matter of one or the other parent being available, and the complainant rejected an obvious reasonable solution.

[32] In my view, the respondent's proposed schedules were not reasonably accessible. The complainant was the child's primary caregiver, as the parent who researched his condition and met with the professionals regularly. She was the one who had the most success socializing her child, and who offered the best chance of allowing him to function. She was better equipped than her husband to take on these full-time responsibilities.

[33] The obligation the complainant faced was providing full-time specialized childcare, without the supports available during the school year through the Child Development Team and two education assistants. The complainant did not have the option of placing her child in summer camps in 2012. This was clearly not accessible for the reasons outlined in the letter from the Northwest Territories Disabilities Council.

[34] The City's managers failed to appreciate the legitimate reasons for the complaint's rejection of its proposed schedules, because again they failed to move past assumptions and appreciate the actual circumstances.

[35] The third branch of the *Johnstone* test has been met. The complainant has established she found herself in situation where there really were no other reasonable alternatives to caring for her child in the summer of 2012.

[36] On the fourth branch of the test, "The underlying context of each case in which the childcare need comes into conflict with the work schedule must be examined so as to ascertain whether the interference is more than trivial or insubstantial." *Johnstone, supra* at para. 97.

[37] The complainant gave ample evidence to show how working part-time would interfere with her childcare responsibilities. The evidence was available to the respondent through the many supporting documents she provided.

[38] There is the letter from Dr. Affleck pointing out that requiring A.B. to work evenings and weekends could have a "deleterious impact" on the C.D. There is also the letter from the Northwest Territories Disabilities Council, which explains the need for the child to receive support from a "small circle" with the parents being the main focus. In light of A.B.'s evidence of being the primary caregiver for C.D., one can reasonably place her at the center of the small circle. If the respondent had any concerns about the information outlined in the letters, they had every opportunity to make follow-up inquiries.

[39] The evidence highlights the need to A.B. to be attentive and present when caring for her child. The need to fulfill this role without undue stress was not a separate condition, or a choice or preference. Dr. Affleck and Dr. Radziminski appeared to have recognized this when they supported A.B.'s request for the summer off, citing the possible effects on both parent and child.

[40] The City failed to consider the effect of its proposed schedules in relation to A.B.'s childcare obligations. The Human Resources Officer, Facilities Manager and Programs Manager treated A.B.'s comments about stress and fatigue as a separate request which it was not.

[41] The fourth branch of the *Johnstone* test has been met for all these reasons. The complainant was facing work schedules that would interfere with her obligations in a way that was more than trivial or insubstantial.

Did the respondent establish a *bona fide* occupational requirement for the complainant to work evenings and weekends?

[42] The onus now shifts to the respondent. The City must establish that it needed A.B. to work the summer of 2012 for a purpose rationally connected to a legitimate purpose. *British Columbia (Public Service Relations Committee)* v. *British Columbia Government and Service*

Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance) [1999] 3 S.C.R. 3 *(Meiorin)* at para. 58.

[43] There is no dispute about the complainant's ability to fulfill the duties of the booking clerk position. The Programs Manager testified that the student hired to do the work of A.B. in 2011 made a number of errors which had to be corrected. There is a rational connection in this case.

[44] The City must next establish it decided A.B. needed to work the summer of 2012 based on honest and good faith belief this was necessary. *Meiorin*, *supra* at para. 60.

[45] The Programs Manager attended a course in human rights in early 2012. He took away from the course an understanding that accommodation need not be automatic but could take into account the employer's operational needs. The Human Resources Officer and Facilities Manager embarked upon their discussions with the complainant with a view to applying a more principled approach to the complainant's request for accommodation. The Human Resources Officer explained that accommodation must be dynamic and adapt to changing circumstances.

[46] There is nothing objectionable about applying a more principled approach, especially if the facts have changed. The evidence, however, shows the circumstances had not materially changed.

[47] The complainant's childcare needs were no less in 2012 than they were in 2011. The respondent's circumstances had not changed in terms of the number of employees on staff, hiring practices or operational needs. The City had an employee who was granted full accommodation in 2011 and expected the same in 2012, notwithstanding differing views as to whether there was an agreement.

[48] The City nonetheless waited for the complainant to raise the issue before beginning to discuss alternatives to full accommodation. In the meantime, the respondent did nothing to address problems with the student by considering another substitute or training a replacement. The only party that could have done anything about the operational need for effective bookings was the respondent. The circumstances were not new, and should not have come as a surprise.

[49] If the respondent wanted to apply a more principled approach in assessing the

accommodation based on family status, it accomplished the reverse. The respondent withdrew an accommodation granted in essentially the same circumstances in 2011, and placed the onus the complainant to establish a disability she did not have. The respondent did not make new or meaningful inquiries into the childcare situation, and discounted medical documents on the technicality they were not from the complainant's doctor.

[50] The City has not established that its treatment of A.B. was made in an honest and good faith effort to fulfill a work-related purpose. On the contrary, if the intention was to apply a more principled approach, the execution was so flawed as to amount to bad faith.

[51] The respondent's managers chose a cold and formalistic strategy when they had the training and experience to know better. The respondent acted upon suspicions about the complainant wanting vacation and "date nights" while ignoring or dismissing more pertinent facts about the actual childcare situation. The Human Resources Manager and the Programs Manager were not in any position to unilaterally decide the childcare issue was accommodated, which they did, while treating the complainant's stress and fatigue as an isolated accommodation issue.

Did the respondent accommodate to the point of undue hardship?

[52] The ultimate question is whether or not the City off Yellowknife accommodated to the point of undue hardship, since the reality is the respondent always accepted there was some degree of accommodation required.

[53] The point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation are left. *Council of Canadians with Disabilities* v. *VIA Rail Canada Inc.*, [2007] 1 SCR 650, 2007 SCC 15 (CanLII), at para. 130.

[54] The Programs Manager spent two weekend days making corrections, and that he had to get another employee to make other corrections over the course of a week. He estimated it would take about 29 hours to train a casual to the level where he or she could enter the bookings effectively. I do not consider the amount of time required to make these corrections, or to train

a replacement, excessive.

[55] The complainant was only requesting leave without pay from mid-July to the end of August. She was prepared to take annual leave in early July, so the total period of her request was only 8 to 9 weeks. The summer is a slow period at the fieldhouse, and there were several casual cashiers who could have been trained to fulfill the responsibilities of the bookings clerk. The City hires summer students and could easily have assigned extra staff to enter bookings. The functions of the booking clerk are not so specialized they cannot, for the most part, be transferred to casual cashiers.

[56] The complainant's request for the summer of 2012 off work would not have imposed an undue hardship on an organization with the size and capacity of the City. The proposal was entirely within the range of reasonable or practicable options.

[57] The last point to be addressed is whether the complainant did her part in the search for suitable accommodation. In *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R., at p. 995, the Supreme Court of Canada outlines the duty of employees to facilitate the search for accommodation. If the complainant fails to facilitate, the complaint will be dismissed.

[58] In this case, there were valid reasons the complainant did not provide feedback to the respondent's proposed schedules, except when she mentioned the possibility of working something like 20 hours, which she immediately withdrew. The evidence of everyone who dealt with the child is that the complainant faced a demanding full-time role which she was uniquely qualified to perform.

[59] The impasse between the parties cannot be attributed solely to the complainant. There is a procedural component to the search for accommodation which falls largely to the respondent as the party having management of the situation.

[60] The employer must take adequate steps to explore and assess accommodation options, and

this includes obtaining information relevant to the inquiry. *McDonald* v. *Mid-Huron Roofing*, 2009 HRTO 1306 (CanLII), at para.30. The employer must also be innovative, flexible and creative in the search for accommodation. *Hoyt* v. *Canadian National Railway*, 2006 CHRT 33 (CanLII), at para. 102.

[61] In this case, the complainant may not have had the right to expect a perfect solution, but her employer expected her to accept an inadequate solution. The respondent persisted with proposed schedules, notwithstanding the complainant's explanations and supporting documentation. The schedules were essentially full-time, until two part-time options were added at the last moment. In addition, the respondent's inflexibility prevented it from considering other options such as allowing the complainant to work from home or using flexible hours.

[62] The search for accommodation did not fail because the complainant would accept one and only one accommodation. It failed because the respondent neglected to take a remedial approach and became entrenched in its refusal to accommodate.

Remedy:

[63] The parties will have 30 days from the date of this decision to indicate their availability to make submissions on the appropriate remedy.

DATED at Yellowknife, Northwest Territories, this 13th day of April 2016.

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Sheldon Toner
Adjudicator
Human Rights Adjudication Panel