Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society

British Columbia Court of Appeal
Low, Levine and Smith JJ.A.

May 10, 2004

Ritu N. Mahil and M. Jeanne Meyers, for the appellant.
Michael A. Wagner and J.D. Nichols, for the respondent.

LOW J.A. :-

¶ 1 This is an appeal from a decision of an arbitrator appointed under a collective agreement to adjudicate a grievance brought by the appellant union on behalf of one of its members, an employee of the respondent transition society. The parties are agreed that this court has jurisdiction to hear the appeal under s.100 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244. There is a general issue of law involved that is not included in s.99(1).

¶ 2 The legal issue turns on the meaning and scope of the term "family status" found in s.13(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 ("the *Code*"). That provision reads:

> 13(1) A person must not
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> (a) refuse to employ or refuse to continue to employ a person,
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> (b) discriminate against a person regarding employment or any term or condition of employment
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> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

¶ 3 The appellant contends that the employer refused to continue to employ or otherwise discriminated against the employee, Shelley Howard, regarding her employment or a term or condition thereof because of her family status. The appellant says that the respondent, by changing Ms. Howard's hours of work, failed to accommodate her particular family situation.

¶ 4 The arbitrator stated the union's position as follows: the employer was "under a duty to accommodate [Ms. Howard's] hours of work so that she is better able to care for her son who has both medical and behavioural problems".

¶ 5 The respondent's position as stated by the arbitrator was that "it is not under any legal duty to accommodate [Ms. Howard], but nonetheless, it has made attempts to accommodate her".

¶ 6 (The second respondent represents the respondent society and others in collective bargaining and grievance matters. It was not a party before the arbitrator. It is not clear to me why it was added as a respondent in this court and it did not participate in the appeal. In these reasons, I will simply refer to the respondent by which I will always mean the respondent society, the employer.)

¶ 7 The facts are easily stated. Ms. Howard is married with four children, the third of whom, a boy now aged thirteen, has severe behavioural problems requiring specific parental and professional attention. She began working for the respondent in early 1993 as a casual transition house worker and later that year became a part-time child and youth support worker. She worked at Ann Elmore Transition House run by the respondent. It is a safe shelter for women suffering marital abuse, and for their children.

¶ 8 The respondent is a non-profit society incorporated in 1985 to provide to the community of Campbell River services and education directed at ending family violence. In addition to operating the shelter, it offers counselling, assistance to children affected by family violence and public education.

¶ 9 The arbitrator, Stan Lanyon, Q.C., made the following findings of fact with respect to the work schedule of Ms. Howard and the adjustment therein made by the respondent that gave rise to the grievance:

> The Grievor is described as a "very good employee". She is hard working and very helpful to other employees; a person who is always willing to perform duties outside of her job description. She is also described as very flexible and willing to work additional hours on short notice. Her normal part-time hours are 24 hours per week, however, she has agreed on many past occasions to work evenings, weekends and statutory holidays. A normal shift for "front line workers" is 12 hours a day, 4 days on, and 5 days off.
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> On July 12, 2001, Valery Puetz, Coordinator of the Transition Society, notified the Grievor, that as of September 4, 2001, her hours would be changed from her current 8:30 a.m. to 3:00 p.m. shift to 11:30 a.m. to 6:00 p.m., Monday through Thursday. She was informed that she would continue to have "a flexible schedule" and that she could adjust her hours to include school presentations.
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> The Grievor and Puetz had had previous discussions about her reduced workload; the number of children requiring counseling during her shift had gradually declined. The Grievor was doing child-minding in the mornings, which often [proved a] very busy period. These discussions concerning the Grievor's workload first arose in the year 2000.
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> In the Spring of 2001 the Grievor and Puetz once again discussed her declining workload. They did so in preparation for a strategic planning meeting which was to take place in the Summer of 2001. Puetz asked the Grievor to come back with six or seven possible programs for her position. Neither the Grievor nor Puetz

> wanted to lose this part-time position. The Grievor came up with some options and they agreed to take these to the strategic planning committee. One such proposal was to expand the existing healthy relationships program taught in the local schools.
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> When the issue of the Grievor's position was raised at the Board's strategic planning meeting it opened up a wider discussion of her position and her hours of work. In the end, the Board decided to change the hours of work for the Grievor's position so that counselling services could be offered to a greater number of school aged children; thus the change in hours to 11:30 a.m. to 6:00 p.m. (In fact, the position currently has been operating from 2:30 to 9:00 p.m., Tuesdays to Fridays. Puetz stated that with these new hours the workload has been "overwhelming" because there has been a substantial increase in non-resident clients seeking counselling).

¶ 10 Ms. Howard was concerned about her new work hours because she attended to the needs of her son after his school hours. However, she worked the new hours from 4 September to 17 September 2001. Later on the 17th, she attended a meeting of the board of the respondent to express her concern. She explained her son's situation and submitted a letter from Dr. Mark Lund, the boy's paediatrician. Six fellow employees provided written support for Ms. Howard resuming her former hours of work. They also attended the meeting but were not permitted to speak. The Board deliberated and decided that the new hours would be maintained. The next day Ms. Howard received a letter from Ms. Puetz so advising her. The letter contained a proviso that there would be a reassessment of the new schedule after six months and that Ms. Howard's input would be welcome.

¶ 11 The arbitrator found that on the day she received the letter Ms. Howard had "a severe anxiety or panic attack". She did not return to work. Her doctor diagnosed post traumatic stress disorder and provided a note stating that she needed to be off work for six weeks. On his advice, Ms. Howard did not return to work after that time and she never did return. The doctor testified before the arbitrator that Ms. Howard's condition was caused by her employment circumstances.

¶ 12 On 26 September 2001, Ms. Puetz sent a letter to Ms. Howard enclosing some forms needed for a claim for sick benefits. She stated in the letter that she hoped Ms. Howard "will be able to return to work soon".

¶ 13 On 1 October 2001, the appellant union informed the respondent by letter that the respondent had to accommodate Ms. Howard's family situation and reinstate her hours of work from 8:30 a.m. to 3:00 p.m. Ms. Howard remained on sick leave for a period of time after which she received employment insurance benefits. Her doctor testified before the arbitrator that she was fit to return to her employment as of April 2002 but that because of the stress she could never again work for the respondent. Before the arbitrator, the appellant sought compensation to Ms. Howard for lost salary as well as punitive damages. It did not seek reinstatement of Ms. Howard.

¶ 14 In his medical report dated 16 August 2001, Dr. Lund stated that Ms. Howard's son "is a very high needs child with a major psychiatric disorder." His need for consistent parenting is best served by his mother, particularly after school. The doctor reported that

she should be available to her son after school, something he considered to be "an extraordinarily important medical adjunct to [the son's] ongoing management and progression in life".

¶ 15 Following the decision of the *Canadian Human Rights Tribunal in Lang v. Employment and Immigration Commission*, [1990] C.H.R.D. No. 8, [1990] 12 C.H.R.R. D/265 and other arbitral authorities, including *Campbell v. Shahrestani*, [2001] B.C.H.R.T.D. No. 36, the arbitrator concluded that the term "family status" in s.13(1) of the *Code* includes the relationship of parent and child. The respondent does not dispute that conclusion.

¶ 16 The arbitrator then noted that the "principal characteristic of the parent-child relationship is the parent's obligation to care for [the] child". He recognized this as a fiduciary obligation, referring to *K.M. v. H.M.*, [1992] 3 S.C.R. 6. He also referred to sections 2 and 4 of the *Child Family and Community Service Act*, R.S.B.C. 1996, c. 46 in which the general nature of parental duties is spelled out.

¶ 17 Then the arbitrator defined what he saw as the central issue before him:

> However, what is clear from these fiduciary and statutory duties is that the fundamental obligation for the care of children rests with the parent, not the employer. If that is the case, can the Legislature have intended that the words "family status" in the *Human Rights Code*, be read to shift some significant part of that fundamental obligation, from parents to employers? Is, for example, an employer legally obligated to accommodate all employees who have children, simply because of their status as a parent?

¶ 18 The core of his analysis commences two paragraphs later:

> In the case before this board, the Grievor has experienced, and continues to experience, both demanding and difficult childcare obligations. Her son requires special care. This is supported by the medical evidence. These difficulties are shared by other parents, especially those who have special needs children. The circumstances of these parents, as well [as] parents of other children, will vary greatly. Some will have excellent childcare arrangements, others will not; some have extended family members, who can assist, others do not; some will be able to afford exceptional care, especially for special needs children, and others will not.
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> Thus, the circumstances of child-care will vary from parent to parent, and indeed may vary for the same parents, over different periods of time. A parent may have what they consider to be exceptional childcare arrangements one year, and yet be searching desperately the following year to find even adequate care. Changes in employment may have an adverse [effect] on these childcare arrangements. In other circumstances, changes in employment may assist a person in their childcare arrangements.
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> Were these different circumstances of employment, and varying degrees of difficulty in child-care arrangements, intended to be captured by the words "family status"?

> I conclude that these differing circumstances, many of which may result in individuals trying to balance work and child-care arrangements, are not the kind of circumstances that raise an issue of discrimination based on the prohibited ground of "family status". Rather, the Legislature by deliberately employing the words "family status", was concerned with discrimination based upon the very status of being a parent, or other family member. For example, had the Employer refused to employ the Grievor, because she was the parent of a special needs child, that would, in my view, violate section 13 of the *Human Rights Code*. It would not make sense, that one could not discriminate, based on the prohibited grounds set out in section 13, against an employee, but could do so against one of their family members. This would defeat the very purpose of the *Human Rights Code*.
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> Thus family status in these circumstances deals with the status of parent and child, and not with the individual circumstances of a family's needs, such as those concerning childcare arrangements. I therefore conclude that all parents that experience difficult childcare arrangements, as a result of their employment, are not a class or category that section 13 of the *Human Rights Code* seeks to protect.
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> I find that the Employer had the right to change the shift, and that its purpose in wanting to extend counselling services to school aged children was a reasonable one. It would be ironic indeed, if the Employer was not at liberty to change the hours of work of the Grievor's position, in order to make counselling service available to students, who may well have needs as serious as those of [the Grievor's son].

¶ 19 After considering the decision of the Canadian Human Rights Tribunal in *Brown v. Department of National Revenue (Customs and Excise)*, [1993] C.H.R.D. No. 7, [1993] 19 C.H.R.R. D/39, the arbitrator said (p.17): "I have found that the words 'family status' refers to the status of being a parent per se, and not to the innumerable (and yet important) circumstances that arise for all families in regard to their daycare needs. I therefore decline to follow *Brown*, *supra*."

¶ 20 The reasons of the arbitrator continue:

> Does this mean that the Grievor is faced with either working the new shift or losing her job? Without a finding of discrimination, and no duty to accommodate, what is the Employer's obligation to the Grievor? There may well be situations where a Grievor is faced with the Hobson's choice of either working the new shift, or losing their employment. However, most employers, as a matter of good labour relations, permit employees to deal with a wide variety of family matters: medical emergencies, domestic problems, and childrens' school activities. Many collective agreements provide special leave to deal with such issues (Article 20 of this Collective Agreement).
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> . . .
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> What were some of the options which the Grievor had in regard to this workplace under this Collective Agreement? First, five of the six employees who signed the petition testified that they were willing to participate in an "accommodation" of

> the Grievor. This was never explored. Second, the Collective Agreement provided some contractual options: for instance, two Memoranda of Agreement, attached to the Collective Agreement, provide for job sharing and flexible work hours. Third, if extra time was required to obtain a resolution to the dispute there are both paid and unpaid leaves. Fourth, the Grievor could have assumed casual status and worked relief. Fifth, there were lay-off and bumping rights. It must be remembered that the position held by the Grievor included not only that of Child Counsellor, but also of Transition House Counselor; other employees were capable of performing the Child Counselling position and the Grievor was capable of performing the Transition House Counselling position. Thus, the Collective Agreement offered both the potential of different hours of work, and different classifications.
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> However, what is clear is that the Grievor was not entitled to keep either her same hours of work or her same position. The Employer had the right to change the hours of work of that position in order to extend a much needed service to the community.

¶ 21 The appellant union does not challenge the conclusions of the arbitrator that there was no tort and no breach of the collective agreement committed by the respondent society. Nor does it dispute the conclusion of the arbitrator that the changes in the working hours of Ms. Howard were a work-related requirement of the respondent society made in good faith. The arbitrator said that the respondent's "purpose was simply to offer counselling services to children who would otherwise not be able to access them."

¶ 22 The appellant union says that the arbitrator erred in not finding that the respondent breached s.13(1) of the *Code* by discriminating against Ms. Howard on the basis of family status. It also says that the arbitrator erred in declining jurisdiction under s.37(2)(d)(iii) of the *Code* to award damages.

¶ 23 The appellant asks this court to set aside the award of the arbitrator and to remit the matter back to him with the following directions:

(a) that "family status" under s. 13 of the *Code* includes the fiduciary obligation of parents to care for their children;

(b) that the respondent discriminated against Ms. Howard contrary to s. 13 by not reasonably accommodating her particular family status; and

(c) that the arbitrator must fashion an appropriate remedy in damages under s. 37 of the *Code*.

¶ 24 The appellant begins its argument by referring to the ruling of the Supreme Court of Canada that human rights legislation is "quasi-constitutional" and must be interpreted "in a liberal and purposive manner in order to advance the broad policy considerations underlying it ...": *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403, at para. 44, and other cases cited therein.

¶ 25 The appellant contends that the arbitrator held that there had to be an intention on the part of the employer to discriminate against the employee when he gave an example

in his reasons (quoted at para. 18 above) of a circumstance in which the employer would have discriminated "based upon the very status of being a parent". The appellant says that this is contrary to s.2 of the *Code* that states that no intention to contravene the *Code* is required.

¶ 26 I do not accept this argument. The arbitrator gave an example in which intention to discriminate might be inferred. But it was an example only and he did not discuss intention. It cannot be said that he required proof of intention. Read as a whole, his reasons do not identify the error alleged. The arbitrator did not dismiss the grievance on the basis of absence of intention to discriminate on the part of the respondent employer.

¶ 27 The appellant's argument continues with the assertion that the arbitrator failed to apply the law by rejecting as part of "family status" the parental obligations that flow from that status. In *Brown*, *supra*, the tribunal considered s.3 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 that contains wording very similar to the wording of s.13(1) of the *Code* in this province. One of the issues in the case arose out of denial by the employer of the employee's request for only day-shift work due to difficulties she had encountered in arranging daycare for her child after expiration of her maternity leave.

¶ 28 The tribunal in *Brown* said this:

> We can therefore understand the obvious dilemma facing the modern family wherein the present socio-economic trends find both parents in the work environment, often with different rules and requirements. More often than not, we find the natural nurturing demands upon the female parent place her invariably in the position where she is required to strike this fine balance between family needs and employment requirements.
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> It is this Tribunal's conclusion that the purposive interpretation to be affixed to s.2 of the *C.H.R.A.* is a clear recognition within the context of "family status" of a parent's right and duty to strike that balance coupled with a clear duty on the part of an employer to facilitate and accommodate that balance within the criteria set out in the *Alberta Dairy Pool case* [[1990] 2 S.C.R. 489]. To consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of "family status" as a ground of discrimination.

¶ 29 The arbitrator declined to follow *Brown*. He agreed that it is desirable to expand employer obligations "that better [enable] families to balance the care of their children with their work". But he said that the Legislature has occupied this area by enactment of ss. 50 to 54 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113. He held that it was not correct to do indirectly through the *Code* what the Legislature declined to do directly through specific legislation. Therefore he restricted "family status" under the *Code* "to the status of being a parent per se" without regard to the "innumerable (and yet important) circumstances that arise for all families in regard to their daycare needs."

¶ 30 Sections 50 to 54 of the *Employment Standards Act* deal with four specific matters - pregnancy leave, parental leave, family responsibility leave and bereavement leave. It cannot be said that the scope of family status in s.13(1) of the *Code* is

determined by the more specific statute. I cannot find any wording in either statute that would lead to that conclusion. Section 13(1) of the *Code* legislates against discrimination "regarding ... any term or condition of employment". On the reasoning of the arbitrator those words would be superfluous. In my opinion, the arbitrator erred in considering the provisions of the *Employment Standards Act* when attempting to determine the scope of the term "family status" in s.13(1) of the *Code*.

¶ 31 Although it was not so stated by the arbitrator, it seems to be clear from the authorities that the first issue is whether the appellant has made out a *prima facie* case of discrimination that requires consideration of the issue of accommodation: see *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at para. 20.

¶ 32 The appellant argues that the circumstances of this case give rise to a *prima facie* case on the basis that family status should be given a very broad scope as the board did in the passage quoted above from the decision in *Brown*. The appellant also relies on *Woiden v. Lynn*, [2002] C.H.R.D. No. 18, also a decision of the Canadian Human Rights Tribunal.

¶ 33 In *Woiden*, the tribunal considered complaints by four female employees that the respondent, the senior manager at their place of employment, discriminated against them by sexual harassment and on the basis of sex. One of the four complainants also alleged that the respondent discriminated against her "on the ground of family status by requiring that she change her work hours in a manner that was incompatible with her obligations as a single mother of three children". The respondent required that employee to work extended hours upon pain of dismissal. In the decision, there was no exploration of the evidence on this issue and no elaboration of the facts. There was a finding that "the extended hours limited [the complainant's] ability to work because of the basic needs related to her particular family situation". The respondent, who was a manager and not the corporate employer of the complainant, did not appear at the hearing or present evidence in any other manner. The tribunal apparently assumed discrimination and had before it no evidence or submission that imposition of the extended hours was a *bona fide* occupational requirement and that the respondent could not accommodate the complainant without incurring undue hardship to the employer. The tribunal found discrimination based on family status. It defined family status discrimination as "practices or attitudes that have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic relating to their family".

¶ 34 The appellant argues that, as the mother of a special needs child who required her attention as the person most effective in attending to his needs at a critical time of the day, Ms. Howard was discriminated against on the basis of family status to a greater extent than the employees in the *Brown* and *Woiden* cases.

¶ 35 In my opinion, the tribunals in both *Brown* and *Woiden* conflated the issues of *prima facie* discrimination and accommodation. They seem to hold that there is *prima*

facie discrimination whenever there is a conflict between a job requirement and a family obligation. In each decision there is an overly broad definition of the scope of family status that I consider to be unworkable. I find both decisions unhelpful in defining family status under s.13(1) of the *Code* for the purpose of determining whether *prima facie* discrimination is proven.

¶ 36 What then needs to be established in order to prove *prima facie* discrimination based on family status? The respondent relies on *Wight v. Ontario (Office of the Legislative Assembly)*, [1998] O.H.R.B.I.D. No. 13, a decision of the Ontario Board of Inquiry (*Human Rights Code*). In that case, the employee was on pregnancy leave during a high-risk pregnancy and delivery. The employer ordered her to return to work but she refused to do so until she had secured adequate daycare for her children. She was dismissed from her employment. One of her complaints under the applicable human rights code was that her dismissal amounted to discrimination on the basis of family status. In an extremely lengthy decision, the board found that the employer had breached other provisions of the code but had not discriminated on the basis of family status. That issue turned on the facts of the case and I am unable to find in it any useful definition of the scope of family status in human rights legislation.

¶ 37 The Supreme Court of Canada did deal with the concept of family status in human rights legislation in *B.*, *supra*, and in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. In *B.* the majority of the court upheld the decision of the Ontario Court of Appeal, 50 O.R. (3d) 737, that family status did encompass discrimination claims based on the particular identity of the complainant's child. *Mossop* was a bereavement leave claim and turned on whether family status included a homosexual relationship. The majority determined that it did not. Neither case addressed the question of whether family status includes parental or other family obligations.

¶ 38 The parties have cited no other cases that assist in providing a working definition of the parameters of the concept of family status as the term is used in the *Code*. In my opinion, it cannot be an open-ended concept as urged by the appellant for that would have the potential to cause disruption and great mischief in the workplace; nor, in the context of the present case, can it be limited to "the status of being a parent per se" as found by the arbitrator (and as argued by the respondent on this appeal) for that would not address serious negative impacts that some decisions of employers might have on the parental and other family obligations of all, some or one of the employees affected by such decisions.

¶ 39 If the term "family status" is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to *prima facie* discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which

there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.

¶ 40 In the present case, the arbitrator accepted the evidence of Dr. Lund that Ms. Howard's son has a major psychiatric disorder and that her attendance to his needs during after-school hours was "an extraordinarily important medical adjunct" to the son's wellbeing. In my opinion, this was a substantial parental obligation of Ms. Howard to her son. The decision by the respondent to change Ms. Howard's hours of work was a serious interference with her discharge of that obligation. Accordingly, the arbitrator erred in not finding a *prima facie* case of discrimination on the basis of family status.

¶ 41 The appellant contends that we should advise the arbitrator that the respondent breached s.13 of the *Code* by not accommodating Ms. Howard's parental obligation. The arbitrator did not address that issue and, in my opinion, this court should not do so in the first instance.

¶ 42 The issue of accommodation arises out of s. 13(4) of the *Code* that reads:

> 13(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement. (emphasis added)

¶ 43 In the application of this sub-section and others like it in human rights legislation, McLachlin, J. (as she then was) in the *B.C.G.S.E.U.* case (cited in para. 31 above) enunciated the analysis to be employed:

> 54 Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR [*bona fide* occupational requirement]. An employer may justify the impugned standard by establishing on the balance of probabilities:
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> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
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> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

¶ 44 The appellant concedes the first two stages of the analysis.

¶ 45 The authorities make it clear that reasonable accommodation is the responsibility of both sides - the employee and the union on the one hand and the employer on the other. The present case has the added factor of the effect of Ms. Howard's illness on the issue of accommodation. It is for the arbitrator to resolve this issue.

¶ 46 It is not appropriate for us to discuss the issue of damages. That is a matter for the arbitrator to address if he finds against the respondent on the accommodation issue.

¶ 47 I would allow the appeal and remit the grievance back to the arbitrator.