CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

# CASHRA
# Legal Update 2007

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Canada

# Topics

I. Family status

II. Drug & Alcohol Testing

III. Other cases of note

# Case List

**I. Family status:**

- *H.S.A.B.C. v. Campbell River & North Island Transition Society*
  - Arbitration decisions
- *Hoyt v. Canadian National Railway*
- *Johnstone v. Canada (Attorney General)*

**II. Drug & Alcohol Testing**

- *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root*
  - The hybrid arbitration cases

**III. Other cases of note:**

- *Brown v. National Capital Commission*
- *Sangha v. Mackenzie Valley Land And Water Board*
- *Ontario Human Rights Commission v. Regional Municipality of Peel Services Board*

# Family Status

- *H.S.A.B.C. v. Campbell River & North Island Transition Society*, 2004 BCCA 260, 240 D.L.R. (4th) 479

- Arbitration decisions:

  - *United Transportation Union v. Canadian National Railway Co.* [2006] C.L.A.D. No. 319 (April 20, 2006)
  - British *Columbia Teachers' Federation v. Coast Mountains School District No. 82* [2006] B.C.C.A.A.A. No. 184 (October 10, 2006)
  - *Canadian Staff Union v. Canadian Union Of Public Employees* [2006] N.S.L.A.A. No. 15 (December 4, 2006)

- *Hoyt v. Canadian National Railway*, 2006 CHRT 33

- *Johnstone v. Canada (Attorney General)*, 2007 FC 36

# ***H.S.A.B.C. v. Campbell River & North Island Transition Society***, 2004 BCCA 260

The Facts:

- Employee had a child with severe behavioural problems who required specific parental attention
- Employer changed employee's hours. Change in schedule meant that she was no longer available to her child after school
- Request to have former work hours restored was denied
- After union filed grievance, arbitrator found that there was no discrimination based on family status in violation of B.C. *Human Rights Code*
- Arbitrator stated that 'family status' discrimination meant discrimination based on "the very status of being a parent, or other family member"

# ***H.S.A.B.C. v. Campbell River & North Island Transition Society***, 2004 BCCA 260

The Decision

- B.C. Court of Appeal allowed appeal, sent grievance back to arbitrator:
  - Arbitrator's definition of 'family status' discrimination too narrow
  - However, family status "cannot be an open-ended concept... for that would have the potential to cause disruption and great mischief in the workplace"
  - "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**"
  - "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"

# ***H.S.A.B.C. v. Campbell River & North Island Transition Society***, 2004 BCCA 260

Impact

- *Campbell River* test applied in a number of arbitration decisions involving claims of discrimination based on family status:
  - *Canadian Staff Union v. Canadian Union of Public Employees*, [2006] N.S.L.A.A. No. 15 (QL)
  - *British Columbia Teachers' Federation v. Coast Mountain School District No. 82*, [2006] B.C.C.A.A.A. No. 184 (QL)
  - *Canadian Union of Postal Workers v. Canada Post Corporation*, [2006] C.L.A.D. No. 371 (QL)
- Arbitrators' interpretations of 'serious interference' and 'substantial parental or other family duty or obligation' vary

# ***Hoyt v. Canadian National Railway***, 2006 CHRT 33

The Facts:

- Complainant became pregnant with her second child and requested modified duties
- When appropriate accommodation found, it required complainant to work on Saturdays. This meant that she had to find childcare for her first child
- Complainant able to find childcare except for a 3-week period She asked that her schedule be altered so that she would not have to work on Saturdays for those three weeks
- Employer denied request to alter schedule, told complainant that she could take unpaid leave for those days

# ***Hoyt v. Canadian National Railway***, 2006 CHRT 33

The Decision

- Tribunal found employer's actions to be discriminatory based on sex and family status
- Disagreed with *Campbell River* test for establishing *prima facie* discrimination based on family status:
  - Human rights legislation is to be interpreted liberally; inappropriate to single out ground of family status for a more restrictive definition of discrimination
  - Concerns about 'workplace disruption and great mischief' might be proper matters for consideration under analysis of the duty to accommodate, especially in assessing undue harship
  - Undue hardship is to be proven by employer on a case-by-case basis. A mere apprehension of undue harship will not suffice
- Employer has filed for judicial review by Federal Court

# ***Johnstone v. Canada (Attorney General)***, 2007 FC 36

The Facts:

- Complainant and husband worked different rotating shifts for the same employer. Impossible to find childcare
- Complainant requested accommodation in the form of a fixed shift schedule
- Request for fixed shift schedule granted, but with part-time status only
- Employer policy indicated that only employees requiring accommodation for medical reasons could retain full-time status on a fixed shift schedule

# ***Johnstone v. Canada (Attorney General)***, 2007 FC 36

The Facts (cont'd):

- Commission dismissed complaint. Commission stated that:
  - Employer accommodated the complainant's request for a fixed shift to meet her childcare obligations
  - Commission was not convinced that the effect of the respondent's policy constituted "a serious interference with the complainant's duty as a parent" or that it had a discriminatory impact based on family status

# ***Johnstone v. Canada (Attorney General)***, 2007 FC 36

The Decision

- Federal Court overturned Commission decision, returned complaint to Commission
- Disagreed with *Campbell River* test:
  - Conflates threshold issue of *prima facie* discrimination with analysis of *bona fide* occupational requirement
  - To establish *prima facie* discrimination, do not have to show a 'serious interference' with one's protected interests. Complainant does not have to suffer a particular degree or level of discrimination to gain protection of *CHRA*
  - Limiting 'family status' discrimination situations where the employer has changed a term or condition of employment is unduly restrictive, since the relevant change typically arises within the family and not in the workplace (*e.g.*, the birth of a child, a family illness)
- Decision is being appealed to Federal Court of Appeal

# Drug & Alcohol Testing

- *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.*, 2006 ABQB 302

- Other decisions

  *The hybrid arbitration cases*

  - *Health Employers' Association of British Columbia v. British Columbia Nurses' Union,* 2006 BCCA 57
  - *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58
  - *Bakery, Confectionary, Tobacco Workers & Grain Millers, Local 154-G v. Kellogg Canada Inc*. (2006) O.L.A.A. No 375 (QL)

# ***Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.***, 2006 ABQB 302

The Facts:

- Mr. Chiasson underwent pre-employment urine test and began work at KBR in June of 2002
- Nine days later, test results came back positive for cannabis
- Mr. Chiasson fired as a result
- He then challenged the pre-employment test as discriminatory
- At Panel, Mr. Chiasson claimed he was not drug-dependent, but only a recreational user
- Expert witness noted the test was unreliable as indicator of impairment
- Panel decided that the company had no obligation to accommodate Mr. Chiasson, due to the absence of addiction as a disability
- Mr. Chaisson and the Human Rights Commission appealed the Panel decision

# ***Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.***, 2006 ABQB 302

The Decision:

- At Court of Queen's Bench, the appeal was allowed
- Court found policy was discriminatory because it treated all employees affected by the policy as though they were addicted
- Recreational drug users protected
- Court found automatic termination upon failing test was discriminatory because of a lack of accommodation
- KBR ordered to cease discriminatory practices and prevent similar contraventions in the future

# *The hybrid arbitration cases*

- BCCA approach in two cases last year
- Both appealed to Supreme Court of Canada
- Both applications to SCC dismissed – BCCA decisions stand
- Hybrid approach states that in assessing discipline in cases where employee's behaviour is partly culpable and partly non-culpable, two analyses must be separately undertaken
  - First, just cause analysis on culpable behaviour
  - Second, full human rights analysis (in accordance with Meiorin) for non-culpable behaviour

# *Health Employers' Association of British Columbia v. British Columbia Nurses' Union*
2006 BCCA No. 57

The Facts:

- Employee former head nurse at hospital
- Fired three times
- Last time for stealing drugs from work

- At arbitration, termination grievance was successful
- Arbitrator ruled that the theft was a reassertion of the chronic disease of dependence
- Arbitratror concluded that employer failed to consider options other than termination

# *Health Employers' Association of British Columbia v. British Columbia Nurses' Union*
2006 BCCA No. 57

The Decision

- BC Court of Appeal favoured the employer's position and restored the dismissal decision
- Stated that the disease of addiction requires an employee to take responsibility for his rehabilitation
- If an employee fails in this duty, the employer's duty to accommodate is exhausted

# *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*
[2006] BCCA No. 58

The Facts:

- Employee at fly-in mine site dismissed when caught smoking marijuana in camp lodging
- At arbitration, grievance partly allowed – dismissal replaced with 10-month suspension
- Arbitrator found employee sufferred from cannabis dependence
- Ruled that employers ligitimate interests could be met without termination

# *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*
[2006] BCCA No. 58

The Decision:

- BCCA affirmed the arbitration decision
- Noted that in this case, employee had not sought treatment because in denial – had not reached point of exhausting employer's duty
- When applying hybrid analysis, needs to be separate consideration of each type of behaviour
- The remedy, however, may blend culpable and non-culpable elements

# ***Bakery, Confectionary, Tobacco Workers & Grain Millers, Local 154-G v. Kellogg Canada Inc.*** (2006) O.L.A.A. No 375 (QL)

- Arbitrator reviewed history of D&A cases and listed 7 factors to consider in assessing whether dismissal justified:

1. The nature of the job and impact of addiction in the workplace
2. Past efforts to accommodate
3. Degree of employee cooperation in recovery efforts
4. Existence of last chance agreement
5. Prognosis for successful employment at time of termination
6. Post-dismissal evidence re: prognosis
7. Mitigating factors (service record, personal circumstances, etc)

# Other Cases of Note

***Brown v. National Capital Commission***, 2006 CHRT 26

- Complainant paraplegic resident of downtown Ottawa who uses wheelchair
- Challenged  public accessibility of the York Street Steps,
- Case involved examination of obligations of public planning process
- Tribunal concluded the steps were not accessible and it would not be undue hardship to make them accessible
- Tribunal also found there was a duty to consult when planning public services and spaces
- Decision commented on parallel meanings of reasonable accommodation and undue hardship

# Other Cases of Note

***Sangha v. Mackenzie Valley Land and Water Board*** 2006 CHRT 9

- Decision not to hire a qualified immigrant candidate because he was ‘overqualified’ amounted to discrimination based on race and national or ethnic origin.
- Tribunal found that screening out ‘overqualified’ job candidates has an adverse impact on immigrant candidates, who apply in disproportionate numbers for jobs below their qualifications.

# Other Cases of Note

***Ontario Human Rights Commission v. Regional Municipality of Peel Services Board*, 2007 HRTO 14 (May 11, 2007)**

- Tribunal found that police discriminated against and racially profiled a black woman in the way it detained and investigated her
- Tribunal concluded that a police officer assumed she did not speak English, treated her in a derogatory and hostile manner, and treated her case with an undue amount of suspicion with no evidentiary support
- Behaviour partly based on stereotypical assumptions about her race and colour
- Tribunal also found that internal policies and training in police force did not adequately address racial profiling concerns
- Ordered $20 000 in damages plus further development of policy and training for the police force
- Case provides guide on when to apply social science research in racial profiling cases