Federal Court of Appeal | Cour d'appel fédérale

Date: 20230613

Docket: A-332-21

Citation: 2023 FCA 135

CORAM: **DE MONTIGNY J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

ANJIE TAREK-KAMINKER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on May 31, 2023.

Judgment delivered at Ottawa, Ontario, on June 13, 2023.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] Anjie Tarek-Kaminker is a lawyer with the Public Prosecution Service of Canada, who works as a Crown Prosecutor in Toronto. She is also an observant Jew, and the mother of five children.

[2] When her telework arrangement allowing her to work from home two days a week was not renewed by her managers, Ms. Tarek-Kaminker filed a grievance seeking to have the

arrangement reinstated. Ms. Tarek-Kaminker argued that in revoking her telework arrangement, her employer had discriminated against her by refusing to accommodate her religious beliefs, her family status, her disability and the combined effects thereof.

[3] Ms. Tarek-Kaminker ultimately referred her grievance to the Federal Public Service Labour Relations and Employment Board for adjudication. Following a lengthy hearing, the Board denied Ms. Tarek-Kaminker's grievance in a decision reported as 2021 FPSLREB 120.

[4] Ms. Tarek-Kaminker now seeks judicial review of the Board's decision, asserting that the Board's decision was unreasonable, and that she had been denied procedural fairness in the Board process.

[5] In particular, Ms. Tarek-Kaminker submits that the Board improperly drew an adverse inference from the fact that she had not called her doctors to testify on her behalf. She further contends that the Board treated her unfairly by failing to advise her that it was not prepared to accept the agreement between the parties to the effect that it was not necessary for her to call the medical professionals as witnesses. Because she was not made aware of the Board's concerns in this regard, Ms. Tarek-Kaminker says that she was unable to properly respond to the case against her.

[6] Ms. Tarek-Kaminker also asserts that the Board failed to give sufficient consideration to the intersecting grounds of discrimination that arose in her case, and to the compounding effect that this had on the discrimination that she experienced.

[7] Finally, Ms. Tarek-Kaminker contends that the Board improperly applied the test for a *prima facie* case of discrimination on the basis of family status. She says that the Board imposed a more onerous obligation on her to establish a *prima facie* case than would be required with respect to other grounds of discrimination. This led the Board to expect her to demonstrate an exceptional level of self-accommodation.

[8] For the reasons that follow, I am not persuaded that the Board erred as alleged. Consequently, I would dismiss Ms. Tarek-Kaminker's application for judicial review.

I. Background

[9] Ms. Tarek-Kaminker was called to the Bar of Ontario in 1996. She began prosecuting tax-related offences in the Toronto area as part of the Revenue Prosecution Team in 2003, initially as a member of the Department of Justice, and later as a member of the Public Prosecution Service of Canada. In 2012, Ms. Tarek-Kaminker joined the Toronto Amalgamated Team (also known as the Old City Hall Team), which is responsible for federal prosecutions, primarily drugs offences, in Toronto, Scarborough, North York and Etobicoke. She primarily worked at the Old City Hall courthouse in downtown Toronto, a place that Ms. Tarek-Kaminker herself described as being the busiest criminal court in the country.

[10] Ms. Tarek-Kaminker is a married woman with five children, all of whom were under the age of 18 at the time of the events in issue in her grievance. One of her children has significant health-related needs, and a second child has learning disabilities and other conditions and

disorders. These required Ms. Tarek-Kaminker's active participation in her children's medical care, as well as her involvement with various therapists, tutors, medical professionals, and education providers.

[11] Ms. Tarek-Kaminker's husband is a surgeon, although little information was provided as to his work arrangements and schedules. She testified that both she and her husband are of the Jewish faith, although she stated that she is more observant than he is. Ms. Tarek-Kaminker described her religious beliefs as falling somewhere between Conservative and Orthodox. She also explained her belief in her religious obligation to participate in the celebration of Shabbat, as well as a number of Jewish holidays beyond the "high holidays". This evidence was not challenged by the employer.

[12] The family's children have predominantly attended Orthodox Jewish schools, a result of Ms. Tarek-Kaminker's belief in her obligation to pass her religion on to her children. None of these schools provide transportation services, requiring her to make carpool arrangements with other parents. She is also required to help the children with their Hebrew homework – something she says that nannies are unable to assist with.

[13] Sometime in or around the mid-2000s, Ms. Tarek-Kaminker entered into a telework agreement with her employer, first while she was assigned to the Revenue Prosecution Team, and later as a member of the Toronto Amalgamated Team. This allowed her to work from home two days a week. According to Ms. Tarek-Kaminker, this arrangement allowed her to fulfill her

work responsibilities as well as her religious and parenting duties, and to manage her own health needs.

[14] In particular, Ms. Tarek-Kaminker says that her telework arrangement allowed her to be home by sundown on Friday evenings, almost without exception, in time to light the Shabbat candles – a responsibility that she says fell to her in her role as a Jewish mother.

[15] Ms. Tarek-Kaminker also worked a compressed schedule, working extra time each day. This allowed her to complete the hours ordinarily required to be worked over 20 days in 19 days, providing her with an extra day off every four weeks.

[16] According to the employer's witnesses, the Toronto Amalgamated Team is a busy one: it is litigation-focused, and members are required to be in court between three and five days per week. By 2016, Ms. Tarek-Kaminker's employer concluded that her telework arrangement was no longer feasible, as it unduly restricted what work could be provided to her. For example, it limited her ability to conduct lengthy jury trials before the Superior Court – something that the employer says would be a normal expectation for prosecutors at her level. Consequently, in early 2016, after a lengthy exchange of communications between Ms. Tarek-Kaminker and her superiors, she was advised that her telework arrangement would not be renewed.

[17] Ms. Tarek-Kaminker testified as to the impact that the non-renewal of her telework arrangement had on her religious observation, her family and her health. She stated that she was not always able to attend Shabbat candle lighting as a result of court running late, her being tied

up at the office, or because of transit issues. Moreover, once she lost the option of teleworking, she was required to take leave in order to observe some religious holidays.

[18] Ms. Tarek-Kaminker further contends that the revocation of her telework arrangement caused her to be unable to attend many medical appointments and school meetings, to the detriment of her children's needs.

[19] Insofar as her own health was concerned, Ms. Tarek-Kaminker stated that, as a result of revocation of her telework arrangement, she was unable to cope, and that her health suffered significantly. She testified she became physically exhausted and that she felt like she was "drowning". Ms. Tarek-Kaminker also stated that she lost sleep, that she experienced increased anxiety and often cried, and that she was functioning at significantly reduced capacity. This ultimately required her to take a medical leave due to the stress that she was under.

II. Ms. Tarek-Kaminker's Grievance

[20] As was noted earlier, Ms. Tarek-Kaminker filed a grievance with respect to the non-renewal of her telework arrangement. She alleged that by not renewing her telework arrangement, her employer had discriminated against her by refusing to accommodate her religious beliefs, her family status, her disability and the combined effects thereof. By way of relief, she sought to have the telework arrangement reinstated.

[21] After Ms. Tarek-Kaminker was denied relief at the internal levels, she referred her grievance to the Board for adjudication. Following a *de novo* hearing at which the Board heard from Ms. Tarek-Kaminker, and from a number of witnesses testifying on behalf of the employer, the Board denied Ms. Tarek-Kaminker's grievance. In so doing, the Board found that she had failed to establish that the non-renewal of her telework arrangement amounted to *prima facie* discrimination on the basis of her family status, her religion, her disability or the combined effect thereof.

[22] In determining that Ms. Tarek-Kaminker's grievance should be denied, the Board made negative findings with respect to her credibility. It found that she "was often given to hyperbole as well as being less than frank and omitting important facts", citing specific examples to support this finding. The Board further found that much of Ms. Tarek-Kaminker's evidence with respect to her family responsibilities was "couched in generalities", again citing specific examples to support its findings.

[23] This led the Board to be skeptical as to the truth of much of what Ms. Tarek-Kaminker had stated in her testimony "where it [was] not supported by a source independent from her".

[24] The Board further found that the evidence did not establish that Ms. Tarek-Kaminker had a disability – a finding that has not been directly challenged in this application.

[25] Insofar as her claim of family status discrimination was concerned, the Board found Ms. Tarek-Kaminker had not shown that she had made reasonable efforts to meet her legal childcare

obligations through reasonable alternatives, or that those alternatives were not otherwise reasonably accessible to her. The Board noted that she had not answered the employer's questions in detail during the accommodation process, and that she had likewise failed to provide sufficient details during the hearing to allow the Board to conclude that she had discharged the onus on her to establish a *prima facie* case of discrimination based on family status.

[26] With respect to her claim of religious discrimination, the Board noted that accommodation need not be perfect, or take the preferred form. The employer had offered Ms. Tarek-Kaminker reasonable accommodation to support her religious practices, allowing her flexibility on Friday afternoons, whenever possible, to allow her to get home in time to light the Shabbat candles. It was Ms. Tarek-Kaminker's own lack of planning, and not the lack of a telework arrangement, that had contributed to any adverse impact upon her religious practices that she may have experienced.

[27] The Board acknowledged that an intersectional analysis could paint a different picture of discrimination in some cases. It further acknowledged that Ms. Tarek-Kaminker's family responsibilities were in many ways inextricably linked to her religious beliefs. The Board also observed, however, that intersectional discrimination must still have "some foundation in the evidence", and that the end of Ms. Tarek-Kaminker's telework arrangement did not establish a *prima facie* case of discrimination on intersecting grounds.

III. The Board's Treatment of the Medical Evidence

[28] The primary focus of the submissions in Ms. Tarek-Kaminker's memorandum of fact and law was on the Board's treatment of the medical evidence before it. She asserted that it was both unreasonable and procedurally unfair for the Board to have drawn an adverse inference against her based on her failure to call medical professionals to testify on her behalf, in light of the agreement between counsel that it was not necessary for her to do so.

[29] This adverse inference amounted to what Ms. Tarek-Kaminker described as being the first in a series of dominoes that fell, culminating in the Board's finding that she was not a credible witness. Given the problems with the Board's treatment of the medical evidence, Ms. Tarek-Kaminker says that the Board's entire credibility assessment is irreparably tainted and that its decision is thus fatally flawed.

[30] Some background is necessary to put Ms. Tarek-Kaminker's submissions into context.

a) The Agreement between Counsel

[31] Ms. Tarek-Kaminker sought to adduce evidence before the Board from a number of medical professionals who had been involved in treating her and members of her family. The parties agreed in advance of the hearing that it would not be necessary for her to call the doctors to testify on her behalf, and that their medical notes and reports would be admitted into evidence

without the need to call the doctors to authenticate the documents. The Board was advised accordingly.

[32] This issue arose again during the parties' closing arguments, when counsel for the employer - having apparently forgotten about the earlier agreement - asked that an adverse inference be drawn against Ms. Tarek-Kaminker because the Board had not heard from the doctors providing the medical notes and letters.

[33] As noted in Ms. Tarek-Kaminker's memorandum of fact and law, this led to a discussion between counsel, following which the Board was advised that "the parties had agreed in advance of the hearing that it was not necessary to call the doctors and that the documents were admissible". The employer does not take issue with this characterization of the terms of the agreement between the parties.

[34] In light of this agreement, Ms. Tarek-Kaminker submits that it was both unreasonable and procedurally unfair for the Board to have drawn an adverse inference against her based on her failure to call the medical professionals to testify on her behalf. In drawing this adverse inference, Ms. Tarek-Kaminker says, the Board failed to consider the explanation for her not calling the doctors, and that it also did not consider what additional value, if any, their testimony would have provided.

b) The Unreasonableness Argument

[35] There are several problems with Ms. Tarek-Kaminker's argument that the Board's treatment of the medical evidence was unreasonable.

[36] The first and most fundamental problem is that at no point in its reasons did the Board draw an adverse inference from the failure of the doctors to testify on Ms. Tarek-Kaminker's behalf. It did note at various points in its reasons that specific doctors had not testified, but these observations were simple statements of fact made in the course of the Board's discussion of the medical evidence before it, and no inference - negative or otherwise - was drawn in this regard.

[37] A couple of the Board's comments were made in the course of its analysis of Ms. Tarek-Kaminker's claim to be disabled. The Board's concern there was not that the doctors had not testified, nor was it concerned about what their letters said: the Board's concern was, rather, was with what the letters did not say. That is, neither of the doctor's letters provided by Ms. Tarek-Kaminker to support her disability claim in fact stated that she was disabled. The letters also did not identify the ability to telework as relating to a medical need rather than a personal preference.

[38] The Board observed that the doctors' clinical notes had not been introduced into evidence, and that neither of the doctors had testified, with the result that the shortcomings in the medical evidence could not be explored with the doctors in question. Consequently, the Board found that the evidence before it was insufficient to establish that Ms. Tarek-Kaminker suffered from a disability. The Board's finding in this regard was not grounded in an adverse inference

based on the failure of the doctors to testify, but was, rather, a comment as to the sufficiency of the evidence before it.

[39] As noted earlier, Ms. Tarek-Kaminker does not now take issue with the substance of the Board's finding that she had not established that she was disabled. In any event, the Board's comments with respect to the failure of the doctors to testify were offered merely to explain that there was no medical evidence beyond the letters themselves to support Ms. Tarek-Kaminker's disability claim.

[40] The second problem with Ms. Tarek-Kaminker's argument relates to the nature and scope of the agreement between counsel with respect to the medical evidence. Her argument appears to be premised on the notion that the Board was required to accept what the doctors had said in their letters and notes, subject only to the respondent's argument that what they were offering was personal opinion, rather than medical expertise. However, it is clear from the agreed-upon "stipulation" with respect to the medical evidence that the agreement between the parties related only to the admissibility of the medical documents, and not to their probative value.

[41] There was nothing in the parties' agreement that would suggest that the Board was required to accept the truth of the contents of the medical evidence or its probative value – something that would always be for the Board to determine. Indeed, counsel for Ms. Tarek-Kaminker conceded before us that it remained open to the employer under the terms of the agreement to argue the weight that should be attributed to the medical evidence.

[42] The Board identified what it saw as being the shortcomings in the medical evidence provided by Ms. Tarek-Kaminker, and it provided transparent, intelligible and internally coherent reasoning justifying its findings in this regard.

[43] The third problem with Ms. Tarek-Kaminker's argument is that her failure to call the doctors to testify did not factor into the Board's credibility assessment. The Board's reasons are some 272 paragraphs long, and an entire section of the decision is devoted to the Board's credibility analysis.

[44] There, the Board noted that Ms. Tarek-Kaminker had testified over a four-day period, and that it became clear over the course of her testimony that she was often given to hyperbole, that she had omitted important facts and that she was less than frank in her testimony. The Board cited several examples in support of this conclusion.

[45] One such example related to Ms. Tarek-Kaminker's claim that the non-renewal of her telework arrangement caused her to miss lighting the Shabbat candles.

[46] During her testimony, Ms. Tarek-Kaminker had explained how convenient teleworking had been for her, and that one thing that it had accomplished was to alleviate the need for her to commute from downtown Toronto on Friday afternoons to get home before sundown, in time to light the Shabbat candles.

[47] Ms. Tarek-Kaminker described a specific incident that had occurred shortly before she testified, where she said that she had been in court and the hearing had run late, causing her to be unable to discharge her religious obligations with respect to candle lighting. As the Board observed, the purpose of this example was to demonstrate that her employer had prevented her from discharging her religious obligations.

[48] What Ms. Tarek-Kaminker did not disclose, either in her evidence in chief or in cross-examination, was that she herself had scheduled the hearing for the Friday afternoon in question, and that her employer had had nothing to do with the timing of the court appearance. This information only surfaced at the end of her testimony, when Ms. Tarek-Kaminker was responding to questions from the Board. At that point, she also confirmed that she had not raised a concern with the Court or her opposing counsel about the timing of the hearing or her need to be home in time to light the Shabbat candles, nor would her superiors even have been aware of the scheduling issue.

[49] Insofar as Ms. Tarek-Kaminker's propensity to exaggerate was concerned, the Board cited a couple of examples, one relating to her claim that she had been required to attend over 50 dental appointments in a given year, including appointments related to her children's orthodontic needs. However, a review of her Great West Life dental claims revealed that the number of dental appointments for the year in question was actually 20, four of which were for Ms. Tarek-Kaminker or her husband, meaning that only 16 of the appointments related to her children. The Board further noted that 11 of the 20 appointments took place on days other than Thursdays or

Fridays, which were the days that Ms. Tarek-Kaminker had previously been permitted to work from home under the telework arrangement.

[50] While any working parent would appreciate the challenges that would arise in getting children to 16 dental appointments over the course of a year, that is not the point. The point is that what started as a claim that Ms. Tarek-Kaminker's family responsibilities caused her to have to attend some 50 dental appointments in one year ended up being 16 appointments, most of which would not have been accommodated by her telework arrangement.

[51] One example cited by the Board to support its negative credibility finding did relate to the medical evidence adduced by Ms. Tarek-Kaminker, but not to the fact that the doctor in question had not testified.

[52] Ms. Tarek-Kaminker produced two letters from a Doctor Wise, who was evidently the children's pediatrician. These letters, which had been provided to the employer in 2012 and 2015 during the accommodation process, are lengthy and somewhat unusual in that they contained detailed narratives of the family's dynamics, schedules and needs, as opposed to medical information.

[53] What Ms. Tarek-Kaminker did not initially tell the Board was that Dr. Wise was not actually the author of these letters, although he did sign them. The fact that the letters had actually been written by Ms. Tarek-Kaminker and her husband was only elicited from her in the course of her cross-examination by counsel for the employer.

[54] Ms. Tarek-Kaminker argues now that there would have been no reason for her to have volunteered this information earlier, given the agreement between the parties with respect to the medical evidence. As noted earlier, this agreement related only to the admissibility of the medical evidence, and its terms would not have affected the Board's understandable concern in this regard.

c) The Procedural Fairness Argument

[55] Ms. Tarek-Kaminker also submits that the adverse inference drawn by the Board as a result of her failure to call the doctors was improperly drawn in violation of the principles of procedural fairness. According to Ms. Tarek-Kaminker, this breach permeated the Board's credibility assessment and tainted its decision.

[56] Ms. Tarek-Kaminker contends that if the Board was not going to accept the agreement reached between counsel with respect to the medical evidence, it was incumbent on it to advise the parties accordingly, so that the Board's concerns could be addressed. As a result of the Board's failure to do so, Ms. Tarek-Kaminker says, she was unable to properly respond to the case against her.

[57] It is for this Court to determine whether the principles of procedural fairness have been complied with, and no deference is owed to the Board in this regard: *Mission Institution v. Khela*, 2014 SCC 24 at para. 79.

[58] The premises underlying Ms. Tarek-Kaminker's procedural fairness argument are flawed. First of all, as was explained earlier, the Board did not draw an adverse inference from the failure of the doctors to testify. Secondly, the Board did not reject the agreement reached by counsel with respect to the medical evidence. It accepted the letters and notes into evidence, notwithstanding that the doctors had not testified to authenticate the documents. That is all that it was required to do under the terms of the agreement.

[59] It is, moreover, clear from a review of the record that while the employer was not going to insist on the presence of the doctors at the hearing, it nevertheless contested the weight to be attributed to the medical evidence throughout the hearing, including whether it was sufficient to discharge Ms. Tarek-Kaminker's burden of proof and whether it was sufficient to trigger the employer's duty to accommodate.

[60] Amongst other things, counsel for the employer argued before the Board that the role of a doctor in the accommodation process is to provide their professional opinion as to the medical needs and limitations of their patients, and not to advocate on their behalf. The Board itself found that much of the medical evidence adduced by Ms. Tarek-Kaminker indeed amounted to advocacy on her behalf.

[61] This is entirely consistent with Ms. Tarek-Kaminker's somewhat expanded description of the terms of the agreement between the parties that appears at paragraph 21 of the Reply submissions that she provided to the Board. There she stated that the employer's submissions had to be read in the context of the parties' agreement that the medical doctors need not testify

"as there was to be no challenge to admissibility or medical opinion, though it was open to the Employer to argue that the letters were opinion and not medical expertise".

[62] Counsel for the employer further argued before the Board that the medical evidence adduced by Ms. Tarek-Kaminker was incomplete, and that it failed to indicate her medical limitations as opposed to her preferred method of accommodation. Counsel also submitted that the medical documents did not demonstrate a strict medical need for telework as the sole means of accommodating Ms. Tarek-Kaminker's needs, and that the documents did not all originate from her treating physicians.

[63] In light of the employer's submissions before the Board, Ms. Tarek-Kaminker could have been under no illusion that the sufficiency or the truth of the contents of the medical evidence that she adduced had been accepted by the employer, or that it would be accepted by the Board without question. As she was, or should have been, aware of this, and as she had the opportunity to disabuse the Board of any concerns that it might have had in this regard, there was no breach of procedural fairness with respect to the Board's treatment of the medical evidence.

d) Conclusion with respect to the Board's Treatment of the Medical Evidence

[64] As the Supreme Court of Canada explained in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, for an administrative decision to be reasonable, it must be justified, transparent and intelligible.

[65] In this case, the Board identified its concerns with respect to the sufficiency of the medical evidence adduced by Ms. Tarek-Kaminker in its reasons, and it clearly explained why it had those concerns in a manner that was justified, transparent and intelligible. The Board's concerns were not based on the fact that the doctors had not testified, nor was an adverse inference drawn in this regard. This fundamentally undermines Ms. Tarek-Kaminker's arguments with respect to this issue.

[66] The Board further explained why it found the medical evidence adduced by Ms. Tarek-Kaminker to be insufficient to establish that she suffered from a disability. This finding was also entirely reasonable, and indeed, it has not been directly challenged by Ms. Tarek-Kaminker.

[67] Finally, Ms. Tarek-Kaminker has not demonstrated that the Board acted in a manner that was procedurally unfair in relation to the agreement between the parties with respect to the medical evidence, and no basis for interfering with the Board's findings in this regard has been established.

IV. The Board's Treatment of the Intersecting Grounds of Discrimination

[68] Ms. Tarek-Kaminker also contends that the Board failed to give due consideration to the intersecting grounds of discrimination that arise in her case, and the compounding effect that they had on the discrimination that she experienced in the course of her employment. Given that she has not directly challenged the Board's finding that she had not established that she was

disabled, the prohibited grounds of discrimination at issue at this point in the analysis are Ms. Tarek-Kaminker's religion and her family status.

[69] Section 3 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 identifies the grounds of discrimination prohibited by the Act. These include, amongst others, religion and family status. The term "family status" has been interpreted as including an individual's parental obligations, such as childcare obligations: *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 at para. 66.

[70] For greater certainty, section 3.1 of the Act provides that a discriminatory practice "includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds".

[71] Human rights jurisprudence recognizes that categories of discrimination may overlap, and individuals may suffer historical exclusion on the basis of, for example, both race and gender, age and disability, or some other combination thereof. Categorizing such discrimination as being primarily based on one ground or another "misconceives the reality of discrimination as it is experienced by individuals": *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at paras. 152-153, per L'Heureux-Dubé, dissenting, but not on this point.

[72] Indeed, as this Court observed at paragraph 48 of *Turner v. Canada (Attorney General)*, 2012 FCA 159, where multiple grounds of discrimination are present, a single axis analysis may minimize what is in fact, compound discrimination. That is, each proscribed ground, when

viewed singly, may not justify a finding of discrimination, but a different picture may emerge when the grounds are considered together.

[73] In other words, in cases where multiple prohibited grounds of discrimination are at play, the whole may be greater than the sum of its parts. Discrimination on the basis of more than one prohibited ground may result from the compounding effect that can occur where multiple, intersecting grounds of discrimination are present, affecting the rights of the individual to substantive equality.

[74] As the Supreme Court observed in *Ontario (Attorney General) v. G.*, 2020 SCC 38: "[s]ubstantive equality demands an approach 'that looks at the full context, including the situation of the claimant group'". Regard must also be had to the impact of the actions in issue on the claimant and the groups to which they belong, "recognizing that intersecting group membership tends to amplify discriminatory effects": at para. 47, citing *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, at para. 27; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 40.

[75] Intersecting group membership can, moreover, create unique discriminatory effects not visited upon any single group of which the claimant is a member, when viewed in isolation: *Ontario (Attorney General) v. G.*, above at para. 47.

[76] Ms. Tarek-Kaminker asserts that while the Board considered whether or not she had established a *prima facie* case of discrimination based on her religion and on her family status, it

failed to give adequate consideration to the intersecting grounds of discrimination at play in her case, namely, that she was both Jewish and a mother.

[77] I cannot agree.

[78] The Supreme Court's decision in *Vavilov*, above, teaches that one of the factors to be considered in assessing whether an administrative decision is reasonable is the extent to which the decision maker grappled with key issues or central arguments raised by the parties. Also relevant is whether their reasons "meaningfully account" for the central issues and concerns raised by the parties: *Vavilov*, above at paras. 127-128.

[79] In assessing the reasonableness of the Board's approach to the issue of intersectionality in this case, it is instructive to start by examining the written submissions that Ms. Tarek-Kaminker provided to the Board to see how she approached this question. In those submissions, she first reviewed the evidence as it related to her allegations of discrimination on the basis of religion. She then reviewed the evidence relating to her allegation of family status discrimination, and lastly, she reviewed the evidence adduced with respect to the issue of her disability.

[80] Ms. Tarek-Kaminker's written submissions then provided five paragraphs dealing with the intersectionality issue. Two paragraphs summarized the applicable legal principles discussed earlier, and one paragraph dealt with the disability issue.

[81] In the two remaining paragraphs, Ms. Tarek-Kaminker stated that if the Board were to ignore the intersection of religion and family obligations in her case, it would disregard the fact that she "is not simply a mother, or Jewish, but is a Jewish mother". She further submitted that even if she had failed to establish a *prima facie* case of discrimination on the basis of one, two or even all three of the asserted grounds of discrimination, her role as a Jewish Mother with a disability with children who also have disabilities results in the intersectionality of the three grounds sufficient to establish a *prima facie* case of discrimination.

[82] The Board's reasons were responsive to the structure of Ms. Tarek-Kaminker's own submissions, as it first considered the evidence with respect to each of the asserted grounds of discrimination, and then considered whether an intersectional analysis would change the result. This is precisely the approach that Ms. Tarek-Kaminker had taken to the intersectionality analysis in her submissions to the Board.

[83] It is, moreover, clear from the Board's reasons that it was alive and sensitive to the intersectionality issue, as it specifically addressed the need for an intersectional analysis in its reasons. The Board examined the intersecting identities advanced by Ms. Tarek-Kaminker against the applicable legal tests. While the Board was not persuaded that she was disabled, it accepted that Ms. Tarek-Kaminker was a Jewish woman with family responsibilities, acknowledging this reality throughout its reasons.

[84] With respect to her identity as a Jewish woman, for example, the Board explicitly acknowledged the gendered aspect of her responsibility for lighting candles on Shabbat, and the

importance of this activity to her. The Board found, however, that Ms. Tarek-Kaminker had not established *prima facie* discrimination in this regard, as her employer had granted her sufficient flexibility to allow her to return home and light the candles on Friday evenings.

[85] Similarly, the Board recognized Ms. Tarek-Kaminker's identity as a Jewish mother who believed that she had an obligation to ensure her children received the appropriate spiritual education. Here again, the Board found that it had insufficient evidence to conclude that Ms. Tarek-Kaminker had shown *prima facie* discrimination on this ground, as she failed to demonstrate that she had made reasonable efforts to identify reasonable alternatives to enable her children to continue to attend Hebrew school, other than her teleworking and driving them herself.

[86] It is true that the Board's treatment of the intersectionality issue was relatively cursory, but so too were Ms. Tarek-Kaminker's submissions to the Board with respect to this issue. The Board's decision was, however, responsive to Ms. Tarek-Kaminker's submissions. It addressed each ground of alleged discrimination separately, and it then considered whether the interaction and cumulative effect of these grounds led to a different result. This is what it was required to do, and Ms. Tarek-Kaminker has not established that the Board erred in this regard.

V. The Board's Treatment of the Allegation of Discrimination on the Basis of Family Status

[87] Finally, Ms. Tarek-Kaminker contends that the Board improperly applied the test for *prima facie* family status discrimination, imposing a more onerous test on her than that which

applies with respect to other grounds of discrimination. The effect of this was to require her to expose herself to a highly intrusive inquiry into all aspects of her life, demanding that she demonstrate an exceptionally high level of self-accommodation.

[88] One such area where this occurred, Ms. Tarek-Kaminker says, related to her obligations *vis-à-vis* her children with significant health or educational needs. She asserts that it was not enough for her to describe the numerous medical appointments and meetings that she was required to attend on behalf of her children: the Board required that she provide evidence as to how many meetings occurred, who she had met with, the dates of the meetings and how long they had lasted, and which of them occurred on her telework days.

[89] Similarly, with respect to the appointments that she described with teachers, tutors, dentists and other professionals, Ms. Tarek-Kaminker says that the Board expected her to have produced evidence as to how many meetings there had been, with whom she had met, when the meetings were held, how long they lasted and how many occurred on her telework days or her compressed days off.

[90] The Board also identified other information in its reasons that it believed was missing from the evidentiary record, including information with respect to the children's Hebrew school, the family's nanny situation, Ms. Tarek-Kaminker's husband's role in managing the family's activities, and the availability of extended family to assist in caring for the children.

[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] 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.

[99] In this case, neither the employer nor the Board disputed that Ms. Tarek-Kaminker met the first two parts of the *Johnstone* test. The issue that divided the parties was whether she satisfied the third component of the test. That is, the employer argued that Ms. Tarek-Kaminker had not demonstrated that she had made reasonable efforts to meet her childcare obligations through reasonable alternative solutions, or to show that no such alternative solution was reasonably available.

[100] The Board agreed with the employer, finding that the evidence adduced by Ms. Tarek-Kaminker was insufficient to demonstrate that she had made reasonable efforts to meet her

childcare obligations through reasonable alternative solutions. The Board then went on to list the numerous areas in which Ms. Tarek-Kaminker's evidence with respect to this issue was found wanting.

[101] Read in a vacuum, the Board's comments at paragraph 214 of its decision are concerning. There is no general requirement that an individual claiming discrimination on the basis of family status provide the level of detailed information described in that paragraph with respect to their children's needs or their efforts to explore alternative arrangements for the care of their children.

[102] But the Board's comments were not made in a vacuum. We know from *Vavilov* that the reasons of administrative decision makers are to be read holistically and contextually by reviewing courts, for the purpose of understanding the basis on which decisions were made: above, at para. 97.

[103] As was noted earlier, the Board had serious concerns with respect to Ms. Tarek-Kaminker's general credibility. It was, moreover, concerned that while some of her evidence was quite detailed and specific in nature, much of that detailed evidence was either "quite tangential, or, at times, irrelevant to the issues". When it came to facts that were critical to the family status analysis, however, the Board stated that she often spoke in generalities, thus failing to provide the evidence necessary to establish a *prima facie* case of discrimination on the basis of family status.

[104] The list that appears at paragraph 214 of the Board's reasons comes immediately after these observations. Read in context, I do not understand the Board to be saying at this point that a person claiming discrimination on the basis of family status necessarily has to provide this level of detailed information in every case. That is clearly not the law.

[105] However, after observing the very general nature of the evidence provided by Ms. Tarek-Kaminker with respect to the material issues, what the Board does at paragraph 214 is identify the types of information that had not been provided by her with respect to various matters, confirming the generality of the information that she had provided in this regard.

[106] For example, the Board observed that no specific evidence had been adduced with respect to the role played by Ms. Tarek-Kaminker's husband, beyond the fact that he was a surgeon working at two different hospitals who was very busy. No information was provided to the Board as to the hours that he worked, or what role he played in the operation of the family unit. This was clearly information relevant to the family status discrimination analysis: *Johnstone*, above at para. 96.

[107] It is true that some of the activities carried out by Ms. Tarek-Kaminker were her sole responsibility, such as the lighting of the Shabbat candles. However, most of the family obligations at issue (such as attendance at medical appointments, meetings with teachers and tutors, getting children to school and helping with homework) were the joint responsibility of Ms. Tarek-Kaminker and her husband. The Board was clearly not satisfied with the level of information that had been provided as to why the other adult member of the family could not have lightened the load on Ms. Tarek-Kaminker.

[108] The Board's comments with respect to the lack of detail regarding various appointments and meetings also have to be read in context. I have already reviewed the issues that arose with respect to Ms. Tarek-Kaminker's claim to have attended some 50 dental appointments over the course of one year. As a result of her apparent exaggeration as to the extent of her obligations in this regard, the Board quite understandably and reasonably would have liked to have seen some independent confirmation of her claims regarding the frequency of her attendance at other types of appointments.

[109] In light of this, Ms. Tarek-Kaminker has not persuaded me that the Board erred in its family status analysis, or that its finding that she had not established a *prima facie* case of discrimination on this ground was unreasonable.

VI. Proposed Disposition

[110] For these reasons, I would dismiss Ms. Tarek-Kaminker's application for judicial review, with costs.

"Anne L. Mactavish"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Sean McGee Alison McEwen	FOR THE APPLICANT
Joel Stelpstra Amanda Bergmann	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ravenlaw LLP/s.r.l. Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT