

PUBLIC SERVICE

Judicial review of Public Service Labour Relations and Employment Board (Board) decision (2016 PSLREB 71) allowing respondents' grievances, finding that employer had discriminated against them in application of its National Attendance Management Policy (NAMP) by including in calculations required under NAMP absences due to disability or for which family-related leave had been granted under applicable collective agreement — Respondents were employees of Correctional Service Canada (CSC) that held various positions in Program and Administrative Services bargaining unit represented by Public Service Alliance of Canada — Applicable collective agreement providing sick leave, leave with pay for family-related responsibilities, containing anti-discrimination provision — CSC launching NAMP due to concerns about excessive employee absenteeism — NAMP intended to be non-disciplinary, to assist employees in maintaining adequate attendance levels, help identify situations where employees might require accommodation — Respondents having absenteeism records exceeding applicable group average — Respondents filing grievances, alleging that NAMP violating Articles 19 (anti-discrimination provision), 35 (sick leave) and 43 (entitlement to 37.5 hours of paid leave per year for leave for family-related reasons) of applicable collective agreement — Board holding that to include absences for family-related leave in NAMP calculation discriminatory; concluding that inclusion, calculation of absences caused by disability in employee's absenteeism level to determine if NAMP threshold exceeded establishing *prima facie* case of discrimination; holding that employer not discharging its burden of justifying situation, calling no evidence to establish *bona fide* occupational requirement defence — Main issue whether Board committing reviewable error in finding *prima facie* case of discrimination arising merely from inclusion of certain types of absences in calculations under NAMP, in conflating family-related leave under collective agreement with sorts of leave that employee entitled to under Canadian Human Rights Act, R.S.C., 1985, c. H-6 (Act) by reason of family status responsibilities — Board's decision having to be set aside — Board ignoring essential pre-requisite for *prima facie* case of discrimination, i.e. proof of adverse impact by a claimant — Unreasonably finding that respondents made out case of *prima facie* discrimination in absence of any proof of adversity — Nothing adverse flowing from inclusion of absences due to disability or for family-related leave in group average threshold under NAMP — This sort of calculation sanctioned in other cases where plan making it clear that employer would accommodate to point of undue hardship absences occasioned by disability — Difficult to conceive how line could be drawn in timely way between absences due to disability, those due to other reasons for purposes of calculating rolling twelve month group average absence rate — Presence of adversity essential component of *prima facie* case of discrimination — On issue of family status discrimination, distinction to be made between family-related leave under collective agreement, leave based on family status for which employee entitled to receive accommodations under Act — In ascertaining whether discrimination has occurred, Board should have regard to only those situations where employee entitled to claim right to the leave under Act based on family status responsibilities — Respondents' grievances remitted to newly constituted panel of Board for redetermination — Application allowed.

CANADA (ATTORNEY GENERAL) V. BODNAR (A-298-16, 2017 FCA 171, Gleason J.A., judgment dated August 22, 2017, 18 pp.)

