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Human Rights Update on Family Status

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Human Rights Update on Family Status

For many years, courts and tribunals across Canada have wrestled over the appropriate analysis when faced with a claim of family status discrimination. Just when it seemed that courts and tribunals were in agreement on a favourable test for employers, Ontario's Human Rights Tribunal set out a new, less favourable test.

The *Johnstone* Test

Until late 2016, the leading test for family status discrimination came from the Federal Court of Appeal's decision in *Johnstone v Canada*, 2014 FCA 110 ("*Johnstone*"). In *Johnstone* the Court determined that the complainant must first establish a *prima facie* case of discrimination. If a *prima facie* case was established, the employer was required to rebut the allegations by showing that the policy or practice is a *bona fide* occupational requirement and that the individual in question cannot be accommodated without undue hardship.

In order to establish a *prima facie* case of family status discrimination, in the context of childcare, the *Johnstone* test required the following:

- that a child was under the applicant's care and supervision;
- that the childcare obligation at issue engages the applicant's legal responsibility for that child, as opposed to a personal choice;
- that the applicant has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
- that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

Under this more favourable approach, employers were not required to accommodate employees' preferences with respect to family status related responsibilities – only an employee's legal obligations. It was only when an employer's workplace policy interfered with an employee's ability to fulfill his or her legal obligations that family status discrimination could be found. Employers could also refuse accommodation requests unless the employee had made reasonable efforts to self-accommodate prior to requesting family status accommodation.

Ontario's Superior Court adopted the *Johnstone* test in *Patridge v Botony Dental Corp.* [2015] OJ No 226, and, at the time it was thought that the debate relating to family status, at least in Ontario, was relatively settled.

The *Misetich Test*

However, in late 2016, the Ontario Human Rights Tribunal crafted yet another plot twist in the evolving legal test for family status discrimination when they released their decision in *Misetich v. Value Village*

Stores Inc., 2016 HRTO 1229 ("*Misetich*"). In *Misetich*, the HRTO, critical of the *Johnstone* test, decided that applicants do not need to establish that their family obligation engages a "legal" responsibility, and relaxed the current requirement for applicants to show they have made a reasonable effort to "self-accommodate".

The HRTO advocated for one all-encompassing test for any type of discrimination, where the applicant must establish that he or she (1) is a member of a protected group; (2) has experienced adverse treatment; and, (3) that the discrimination was a factor in the adverse treatment. The HRTO set out the following new test for family status discrimination in employment:

- the employee must establish a negative impact on a family need that resulted in a real disadvantage to the parent/child relationship and the corresponding responsibilities, and/or a negative impact to the employee's work;

- the impact of the impugned rule should be assessed contextually and could consider if there were other supports available to the applicant; and

- once discrimination has been established, the onus shifts to the respondent to establish that the applicant could not be accommodated to the point of undue hardship. At this stage, the applicant's cooperation in the process would be considered, requiring the applicant to provide the respondent with sufficient information relating to their family-related needs, as well as working with the respondent to identify solutions to resolve the conflict.

Under this less favourable approach, employers may be required to accommodate not only the legal responsibilities, but also the family status preferences of employees. Moreover, under this approach employers cannot refuse an accommodation request on the basis that the employee has not taken reasonable steps to self-accommodate.

Current Status of the Law

For Ontario employers, it appears that the more onerous *Misetich* test is the leading approach for the time being. This is evidenced by the fact that the *Johnstone* decision has not been cited with approval at Ontario's Human Rights Tribunal since the release of the *Misetich* decision, while *Misetich* continues to be cited with approval. Employers ought to therefore use the *Misetich* test as guidance on to how to address family status-related issues.

For federally regulated employers, the Federal Court of Appeal's decision in *Johnstone* is still the leading decision.

Cases Since *Misetich*

Thapa v. Suisha Gardens Ltd. Les Jardins Suisha Ltée, [2016] O.H.R.T.D. No. 1328:

Here, the applicant was married with a young son. He was employed by the respondent mainly as a cook for approximately one year. The applicant filed an Application with the HRTO alleging he was

discriminated on the basis on his family status when the respondent refused to allow him to take time off work to take care of his son after his wife had surgery. The evidence showed he provided only a few days' notice to his employer that he needed ten days off work.

In adopting the *Misetich* test, the HRTO held that in the context of employment, an applicant will have to do more than simply establish that the requirement had negative impact on a family status-related need. The negative impact must result in a real disadvantage to the parent-child relationship and the obligations that flow from that relationship. The HRTO confirmed that assessing the impact of the requirement is done contextually and may include consideration of the other supports available to the applicant.

In dismissing his Application, the HRTO considered that the applicant was able to arrange child care support for the time period that he had requested a leave of absence to take care of his son. Specifically, the applicant's evidence was that he had arranged for a friend to take care of his son during the three days that his wife was in hospital, and his wife took care of his son after she returned home from the hospital. The HRTO noted the applicant's wife was recovering from her surgery during this latter period, but relied on the failure by the applicant to provide any evidence that her recovery precluded her from performing basic child care. Given the child care support that the applicant was able to arrange, the HRTO did not accept that the requirement that he work during this time period imposed a disadvantage on him because of his family status.

The Tribunal also considered that the applicant failed to cooperate in the accommodation process while the employer was willing to discuss accommodation, despite the potential undue hardship of losing a cook for ten days on only three days' notice. Failure by an applicant to cooperate in the accommodation process on its own can result in allegations of discrimination being dismissed. However, it is unclear in the decision whether the applicant's failure to cooperate alone would have would have resulted in the dismissal of the Application.

Ananda v. Humber College Institute of Technology, [2017] O.H.R.T.D. No. 612:

In this case, the applicant was a nursing student in a program that required completion within six years. The applicant alleged discrimination based on family status when the respondent refused to grant him an extension of the six year period based on him being his mother's primary caregiver.

The HRTO accepted that the applicant was his mother's primary caregiver and that she had care needs, including those related to cataract surgery. The HRTO accepted that he was required to make tea for his mother, take her to appointments, and get up during the night to assist her. However, the HRTO found that the applicant failed to establish that he was prevented from completing the nursing program within the prescribed time limits as a result of her care needs. Specifically, the applicant's evidence failed to establish that the care needs of the applicant's mother were of a sufficient extent to create any "real disadvantage" to the applicant, as required by the *Misetich* test. As a result, the applicant failed to make out a *prima facie* case of family status discrimination and the Application was dismissed.

Of note, the HRTO made clear that the assessment of whether the duty to accommodate under the *Human Rights Code* is engaged is to be based upon the information provided by the applicant to the

employer at the relevant time, and not on the basis of evidence that emerges later in the context of the hearing but was never provided at the time.

Take-Aways for Employers

Any request for a changed work schedule or time off work because of child care or elder care responsibilities should be taken seriously. Employers need to make reasonable efforts to determine the extent of the family status-related needs of their employees as soon as possible when responding to family status accommodation requests.

However, an employee cannot simply assert they need modified hours because of childcare or elder care responsibilities and provide no information to the employer. The accommodation process is a shared responsibility between employers and employees and both parties must make an effort to find a reasonable accommodation.

When making such accommodation-related decisions, employers need only consider the information provided by the employee.

Despite the *Misetich* test's emergence as the leading test on family status discrimination, Ontario's highest courts have not yet weighed in on this issue and could do so at any moment. Therefore is safe to assume that the law relating to accommodating an employee on the basis of family status is far from settled.