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Employment Update

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"The Federal Court of Appeal confirmed that certain childcare obligations do fall under the definition of 'family status' and it also clarified the test for establishing a prima facie case of discrimination on the basis of family status ..."

FAMILY STATUS DISCRIMINATION: TEST CLARIFIED BY FEDERAL COURT OF APPEAL

Maria Kotsopoulos

The Federal Court of Appeal released two decisions in early May dealing with the issue of whether a conflict between childcare obligations and an employee's schedule constituted family status discrimination. This article will focus on one of those decisions, *Johnstone v. Attorney General of Canada*.[1] This case had a long and complicated procedural history beginning with Ms Johnstone's complaint to the Canadian Human Rights Commission more than a decade ago, but the main issues before the Federal Court of Appeal in 2014 were:

(1) Was the Canadian Human Rights Tribunal (the "CHRT") wrong to conclude that "family status" includes childcare obligations?

(2) Did the CHRT identify the incorrect legal test for finding a *prima facie* case of discrimination on the basis of family status?; and

(3) Was the CHRT wrong in finding that there was a *prima facie* case of discrimination on the ground of family status?

The Federal Court of Appeal confirmed that certain childcare obligations do fall under the definition of "family status" and it also clarified the test for establishing a prima facie case of discrimination on the basis of family status, bringing some conflicting authorities on this issue to a potential resolution for the time being. While the decision is only directly applicable to federally-regulated employers covered by the *Canadian Human Rights Act*, it will likely be influential when provincial human rights tribunals and arbitrators deal with this issue in the future.

Conflicting Decisions: Is There a Hierarchy of Human Rights?

Prior to *Johnstone* and its companion case, there were effectively two main lines of authority with respect to the test for family status discrimination.

The first, stemming from a British Columbia Court of Appeal decision commonly referred to as *Campbell River*,[2] concluded that to find a *prima facie* case of family status discrimination, there had to be a change in a term or condition of employment imposed by an employer, which resulted in a serious interference with a substantial parental or other significant family duty or obligation. That is, an existing practice or policy of an employer could not lead to a finding of discrimination.

The second line of authority, which has ultimately found greater support amongst human rights tribunals and arbitrators, was stated by the CHRT in *Hoyt v Canadian National Railway*.[3] This

[1] 2014 FCA 110 (CanLII). Also see *Seeley v. Canadian National Railway Company*, 2014 FCA 111 (CanLII).
[2] *Health Sciences Association of British Columbia v. Campbell River and Northern Island Transition Society*, 2004 BCCA 260.
[3] 2006 CHRT 33.

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approach found that the test set out in *Campbell River* was incorrect because it required a higher standard to establish a *prima facie* case of discrimination on the ground of family status – i.e. both a change to an existing term of employment and a "serious or significant" interference - than for other grounds under the *Canadian Human Rights Act*.

The Federal Court of Appeal in *Johnstone* ultimately sided with the principle that there should be no "hierarchy of human rights." The Court concluded that the test to determine whether there was *prima facie* discrimination on the ground of family status should be substantially the same as with other enumerated grounds, and that it should not be confused with the second step of any discrimination analysis which allows an employer to defend its actions on the basis of a *bona fide* occupational requirement and undue hardship.

Facts of the Johnstone Case

Ms Johnstone was an employee of the Canadian Border Services Agency (CBSA). As a full-time employee, she worked rotating shifts pursuant to a Variable Shift Scheduling Agreement. There were six different start times for shifts, with "no predictable pattern" according to the findings of the CHRT. Employees were given 15 days' notice of each new shift schedule. Full-time employees worked 37.5 hours per week, and any employee working fewer hours was deemed part-time. Part-time employees had fewer employment benefits and promotional opportunities.

Ms Johnstone's husband was also employed by the CBSA as a supervisor. Like Ms Johnstone, he worked a variable shift schedule. The Johnstones' work schedules overlapped 60% of the time but were not coordinated. At first instance, the CHRT concluded that the Johnstones had the same work scheduling problems and that neither could provide necessary childcare on a reliable basis.

The CBSA accommodated employees with medical issues by providing them with a fixed work schedule on a full time basis, and it also accommodated employees who required fixed work schedules due to their religious beliefs. However, it did not provide accommodation to employees with childcare obligations because of its view that it had no legal duty to do so. Rather, the CBSA had an unwritten policy which allowed an employee with childcare obligations to work a fixed schedule only insofar as the employee agreed to be treated as a part-time employee with a maximum work schedule of 34 hours per week.

The Johnstones had two children. Prior to Ms Johnstone's return to work from her first maternity leave, she asked her employer for static shifts on a full-time basis (13 hour shifts, three days per week). This schedule afforded her family with childcare through other family members. The CBSA denied her request, and instead followed its unwritten policy. Ms Johnstone was offered static shifts, but for 34 hours per week, resulting in her being treated as a part-time employee.

The CBSA did not take the position that static shifts on a full-time basis would cause it undue hardship. Its refusal was premised, as outlined above, entirely on its view that there was no legal obligation to accommodate Ms Johnstone's childcare responsibilities.

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Does the Ground of Family Status Include Childcare Obligations?

The Federal Court of Appeal confirmed that family status encapsulates childcare obligations, so long as the childcare obligations are ones that engage legal obligations of a parent to a child, and not merely personal choices. The Court stated the following:

> In conclusion, the ground of family status in the *Canadian Human Rights Act* includes parental obligations which engage the parent's legal responsibility for the child, such as childcare obligations as opposed to personal choices. Defining the scope of the prohibited ground in terms of the parent's legal responsibility (i) ensures that the protection offered by the legislation addresses immutable (or constructively immutable) characteristics of the family relationship captured under the concept of family status, (ii) allows the right to be defined in terms of clearly understandable legal concepts, and (iii) places the ground of family status in the same category as other enumerated prohibited grounds of discrimination such as sex, colour, disability, etc.[4]

A New Four-Step Test for a Prima Facie Case of Discrimination on the Basis of Family Status

The Federal Court of Appeal also set out a four step test to prove a *prima facie* case of workplace discrimination on the ground of family status resulting from childcare obligations, which requires evidence of the following:

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

In Ms Johnstone's case, it was not disputed that her children were under her care and supervision. The issues in her complaint related to obligations to her children which were more than personal choices. The Court was satisfied with the CHRT's finding of fact that Ms Johnstone had made serious efforts to secure reasonable alternative childcare arrangements, albeit unsuccessfully. Specifically, the Court referred to the CHRT's findings that Ms Johnstone had made attempts to investigate numerous childcare providers, including "unregulated" childcare providers (i.e. family members), and its finding that the work schedules of the Johnstones were such that neither could provide the childcare needed on a reliable basis. Finally, the Court was satisfied with the CHRT's finding that Ms Johnstone's regular work schedule, which was based on the variable shift schedule agreement, interfered in a manner that was more than trivial or insubstantial with the fulfilment of her childcare obligations.

Because the CBSA did not assert any *bona fide* occupational work requirement or undue hard-

[4] 2014 FCA 110, para. 74.

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ship defence, the Federal Court of Appeal upheld the CHRT's ruling that Ms Johnstone's complaint was substantiated and upheld the decision.

Conclusion

The decision of the Federal Court of Appeal provides some additional clarity with respect to the types of employee childcare obligations that must be accommodated under the *Canadian Human Rights Act*. However, the application of the test to determine when accommodation must be provided and in what measure will depend on the particulars of each case, and will likely lead to many more cases in this area in future in both the federal and provincial human rights tribunals.

Employers facing possible accommodation requests from employees about conflict between work duties and childcare obligations should be mindful of this case and the potential new test. ■

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