FTR Now

Federal Court of Appeal Upholds *Johnstone*, Clarifies Nature and Scope of Family Status Protections

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On May 2, 2014, the Federal Court of Appeal unanimously upheld the findings of the Federal Court concerning an employer's obligation to provide workplace accommodation for an employee's childcare needs in *Canada (Attorney General) v. Johnstone* ("*Johnstone*"), a case that has garnered significant media attention. As the first decision from an appellate-level court on this issue in more than a decade, this ruling serves as the most authoritative statement to date on a difficult issue that has generated a lot of uncertainty for workplace participants.

In applying a correctness standard to the issues before it, the Court of Appeal took significant steps to clarify both the meaning and content of the "family status" protections which exist in federal and provincial human rights legislation, and the test that should be applied for determining whether a *prima facie* case of discrimination on the basis of "family status" has been established by a claimant.

This *FTR Now* discusses this important Federal Court of Appeal decision and what it will mean for employers as family status accommodation issues become more prevalent.

BACKGROUND FACTS

As reported in our February 7, 2013 FTR Now, the *Johnstone* case involved an employee who worked rotating shifts for the Canada Border Services Agency ("CBSA") at Pearson International Airport in Toronto. Both the employee and her husband worked for CBSA on unpredictable, variable, rotating shifts with six potential start and end times. Following the birth of her second child, Ms Johnstone requested that CBSA provide her with a scheduling accommodation in the form of three fixed daytime shifts of 13 hours each. This schedule would have enabled Ms Johnstone to secure childcare for her two children while allowing her to maintain full time employment status and pension and benefits entitlements.

CBSA denied Ms Johnstone's request in accordance with an unwritten policy which required employees seeking childcare accommodation to transfer to part-time status. In doing so, employees would relinquish some benefits and pension entitlements and would be entitled to fewer work hours per week. Ms Johnstone complained to the Canadian Human Rights Commission ("CHRC") and her complaint was ultimately heard by the Canadian Human Rights Tribunal ("Tribunal").

Consistent with its earlier decisions on the issue, the Tribunal found that the "family status" protections of the *Canadian Human Rights Act* ("the *Act*") included parental obligations like childcare. The Tribunal concluded that Ms Johnstone had established a *prima facie* case of discrimination, and that CBSA had failed to consider accommodation of Ms Johnstone's childcare needs. Further, the Tribunal found that accommodation of Ms Johnstone's needs would not have caused the CBSA undue hardship.

The Tribunal ordered the CBSA to pay Ms Johnstone lost wages and special compensation, and to establish policies to address family status accommodation requests.

THE FEDERAL COURT DECISION

The Federal Court upheld the Tribunal's decision, finding that it was reasonable. The Court made three noteworthy determinations which were ultimately reviewed by the Federal Court of Appeal.

First, the Federal Court found it was reasonable to conclude that "family status" includes a parent's obligation to care for a child.

Second, the Federal Court found that a *prima facie* case of discrimination was established. Ms Johnstone was unable to find childcare that would allow her to continue working rotating shifts, the CBSA failed to inquire into her individual circumstances, the move to part-time affected her pension and benefits entitlements and the CBSA had accommodated other employees on religious and medical grounds. The Court stated that the CBSA's unwritten policy that employees seeking accommodation for childcare needs had to transition to part-time status was arbitrary, applied inconsistently and failed to consider employees' legitimate childcare needs.

Third, the Federal Court found that the CBSA could have accommodated Ms Johnstone without any undue hardship. Importantly, at this point in its analysis, the Federal Court affirmed the Tribunal's rejection of the test for *prima facie* discrimination articulated in the British Columbia Court of Appeal's 2004 decision in *Health Sciences Assoc. of B.C. v. Campbell River North Island Transition Society* ("*Campbell River*"), which held that a prima facie case of discrimination on the basis of family status could only be established where there was a "serious interference" with a substantial parental or other family obligation. The Federal Court found instead that "the childcare obligation arising in discrimination claim[s] based on family status must be one of substance and the complainant must have tried to reconcile family obligations with work obligations." The Federal Court expressly rejected the notion that there has to be a "serious interference" with the family obligation in order to trigger the protections of the *Act*.

THE FEDERAL COURT OF APPEAL DECISION

The CBSA appealed the Federal Court's decision, challenging the Court's findings concerning the content of the "family status" protections under the *Act*, as well as the legal test for establishing a

prima facie case of discrimination. The CBSA also challenged the amount of the financial award granted to Ms Johnstone by the Tribunal.

Notably, in rendering its decision, the Court of Appeal held that the presumption of deference that is often granted to the decisions of administrative tribunals was rebutted, and that the two legal issues before it ought to be reviewed on a correctness standard. The Court of Appeal stressed that there were several factors that weighed in favour of applying the correctness standard, including the fact that human rights legislation is "quasi-constitutional" in nature. The Court of Appeal also noted that human rights legislation is the sort that is applied and interpreted both by the courts and by administrative tribunals, and that this concurrent jurisdiction militates against applying a reasonableness standard.

After determining the applicable standard of review of the Tribunal's decision, the Court of Appeal considered the nature and content of the protection of "family status," and whether the Federal Court was correct in finding that this protection includes childcare obligations. The Court of Appeal rejected the CBSA's argument that family status is to be given a literal interpretation and only concerns the immutable characteristic of being in a parent-child relationship. The Court of Appeal stressed that such an interpretation was contrary to the findings of most courts and tribunals which have considered this issue. Given the broad and purposive interpretation that decision-makers are supposed to give to human rights legislation, the Court of Appeal found that so literal an interpretation would defeat the purposes of the *Act*.

In finding that family status includes an individual's childcare obligations, the Court of Appeal made certain to address one of the more pressing concerns raised by the Federal Court's decision: that all forms of childcare obligations, even if trivial, would be subsumed by the protection against family status discrimination. The Court of Appeal stressed that prohibited grounds of discrimination generally address "immutable characteristics," and thus the sorts of childcare obligations considered under family status must likewise be immutable. The Court of Appeal stated that the childcare obligations that will be considered are "those that form an integral component of the legal relationship between a parent and child…[T]he childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability." The Court of Appeal stressed that the protection against family status discrimination would not be extended to personal family choices, such as participation in extra-curricular activities or family trips.

In considering the proper test to be applied in order to determine whether discrimination has occurred, the Court of Appeal agreed with the Federal Court's rejection of the approach from *Campbell River*, stating that there should be no hierarchies of human rights, and that the test applied to family status should be substantially the same as that applied to all other protected grounds. However, the Court of Appeal clarified that a *prima facie* case "must be determined in a flexible and contextual way." With respect to the ground of family status, this would include a consideration of the steps taken by the employee to self-accommodate. The Court of Appeal noted that "[i]t is only if 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 will be made out."

Having concluded that an employee's own efforts to self-accommodate must be considered as part of the *prima facie* case test for family status discrimination, the Court of Appeal then set out the following four elements that a claimant must demonstrate in order to establish a *prima facie* case of discrimination on the basis of family status, where the issue is of accommodation of childcare needs:

(i) that a child is under his or her care and supervision;

(ii) that the childcare obligation at issue engaged the claimant'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 fulfilment of the childcare obligation.

Based on the application of this test, the Court of Appeal found no reviewable error had occurred in the Federal Court's determination of Ms Johnstone's case. The Court of Appeal found that Ms Johnstone clearly had a legal obligation to care for her two children, and that she had made significant efforts to find childcare providers who would be able to provide services that would fit her unpredictable rotating shift schedule, without success. The Court of Appeal further found that this shift schedule interfered with Ms Johnstone's fulfillment of her childcare obligations in more than a trivial or insubstantial way. Thus, a *prima facie* violation of the *Act* was established.

IMPLICATIONS OF THE FEDERAL COURT OF APPEAL'S DECISION

While the Court of Appeal's *Johnstone* decision has reaffirmed what most employers have now accepted – that employee childcare obligations may trigger a duty to accommodate – the decision should provide some solace to employers who feared that the Federal Court decision would trigger a flood of employee requests for changes to work schedules and other terms and conditions of employment.

In rendering its decision, the Court of Appeal took great pains to stress that family status protections extend only to parental *obligations*, not to personal choices, and that family status accommodation obligations will only arise after the employee has made efforts to self-accommodate. These two aspects of the decision are quite important, as they refocus the discussion on the employee's actual accommodation *needs*, as opposed to employee preferences.

In making this distinction, the Court of Appeal also clarified that accommodation will only be required where the workplace requirements interfere with the employee's childcare obligations in more than a trivial or insubstantial manner. While the Court of Appeal's decision may signal the end of the *Campbell River* approach (which has been ignored or distinguished by most recent court and tribunal decisions), this aspect of the Court of Appeal's test and the Court's narrow definition of what will fall under the family status protection preserve some of the limitations on the scope of the protections against family status discrimination that were adopted by the British Columbia Court of Appeal in 2004.

While the debate over the accommodation of employee childcare obligations may not yet be over (this decision may still be appealed to the Supreme Court of Canada), it is difficult for employers to disagree with the restrained and thoughtful approach that the Court of Appeal has taken in providing a clear and reasonably straightforward test for determining when accommodation of childcare obligations is legally required. The decision clearly recognizes that employers need not accommodate every instance where work interferes with family life.

Notwithstanding the assistance that this decision will likely provide to both employers and employees when it comes to understanding these issues, it remains incumbent on employers to continue to take an open-minded and reasonable approach to requests for workplace accommodation when they arise. Employers cannot assume that an employee's stated childcare obligations will not fall under the protections of human rights legislation. They will still be required to establish that they have implemented a reasonable accommodation process to understand their employees' childcare needs and how those needs can be accommodated short of undue hardship.

If you require any information about the Federal Court of Appeal's *Johnstone* decision or how the issue of "family status" and parental obligations to provide childcare may have an impact on your organization, please contact Andrew N. Zabrovsky at 416.864.7536 or your regular Hicks Morley lawyer.
