FTR Now

Tribunal Rejects the *Johnstone* Test for Establishing Family Status Discrimination in New Eldercare Case

Date: October 4, 2016

Ruling casts doubt on the applicable test for establishing discrimination in applications relating to childcare and eldercare accommodation in Ontario.

In a significant recent decision relating to eldercare accommodation, the Human Rights Tribunal of Ontario (Tribunal) indicated its intention to depart from the test for family status discrimination outlined by the Federal Court of Appeal in *Canada (Attorney General) v. Johnstone* and *Canadian National Railway v. Seeley*.

In this *FTR Now*, we discuss the Tribunal's ruling and its implications for employers and human resources professionals.

Johnstone and the "Test" for Establishing Family Status Discrimination

As we previously reported, the Federal Court of Appeal developed a "test" in order to establish family status discrimination with respect to childcare obligations in the 2014 *Johnstone* and *Seeley* decisions. Pursuant to the so-called "*Johnstone* test," a claimant is required to prove:

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

The Tribunal's Decision in *Misetich v. Value Village Stores Inc*.

In *Misetich v. Value Village Stores Inc.* – one of few Tribunal family status discrimination decisions dealing with eldercare – the Applicant alleged that a proposed change to her work schedule in order to accommodate her physical restrictions discriminated against her on the basis of her eldercare responsibilities (specifically, that she needed to be home in order to prepare dinner for her elderly mother).

Following a review of the relevant family status discrimination case law, including *Johnstone*, the Tribunal ruled that the analysis for establishing discrimination on the basis of family status is no different than the analysis to be used when evaluating discrimination claims based on other protected grounds under the *Human Rights Code*. The Tribunal expressly rejected prior rulings that had applied different "tests" for establishing family status discrimination, and made the following noteworthy statements:

1. The test for discrimination is the same in all cases: the applicant must establish that they are a member of a protected group, have experienced adverse treatment and the ground of discrimination alleged was a factor in the adverse treatment.
2. Different tests for family status discrimination result in inconsistency and uncertainty in the law.
3. The test for family status discrimination has been higher than for other kinds of discrimination (for example,

Johnstone determined that the childcare obligation at issue must engage the individual's *legal* responsibility for the child).
4. The test of *legal* responsibility is difficult to apply in the context of eldercare and may result in a higher test than that applied for childcare.
5. Some cases conflate the test for discrimination and accommodation. In the Tribunal's view, an applicant need not establish that they could not self-accommodate in order to prove discrimination.

The Tribunal proceeded to outline the following analysis for establishing family status discrimination in employment:

- The employee must establish more than a negative impact on a family need: "the negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work."
- Assessing the impact of the impugned rule is done contextually and may include consideration of the other supports available to the applicant. However, this is fundamentally different from considering whether an applicant can "self-accommodate," since the self-accommodation approach imposes an onus on the applicant to find a solution to the family/work conflict.
- Once the applicant proves discrimination, the onus shifts to the employer to establish that the applicant cannot be accommodated to the point of undue hardship. At this stage, the employee's co-operation – including providing the employer with supporting information regarding the family-related needs and collaborating on solutions to resolve the family/work conflict – is considered.

The Tribunal dismissed the application as a result of the Applicant's failure to provide appropriate documentation to establish her eldercare responsibilities. .

Takeaways for Employers

While this decision purports to "clarify" the appropriate test for family status discrimination, it raises significant concerns regarding the inconsistency with which various courts and jurisdictions across Canada have considered childcare and eldercare accommodation issues. With diverging tests arising from the Federal and Ontario Courts of Appeal, the Tribunal and other decision-makers, the law applicable to family status-based allegations of discrimination is far from settled.

In light of this uncertainty, prudent employers should continue to adopt best practices when considering individual employee requests for family status accommodation. These include:

- Communicating to ensure you have a clear understanding of the employee's childcare or eldercare needs.
- Providing programs through the employee assistance plan or assisting the employee directly with the search for services in their local area.
- Exploring whether other employees are prepared to cooperate to facilitate accommodation.
- Considering reasonable scheduling accommodations as a transitional measure while appropriate childcare or eldercare arrangements are being made.

We will continue to monitor this area and provide you with updates on developments. For more information about this case or further guidance on best practices, please contact any member of Hicks Morley's Human Rights practice group.

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