Case In Point

An Update on the Status of Family Status – Just in Time for Family Day

Date: February 12, 2019

In a recent decision released by the Human Rights Tribunal of Ontario (Tribunal), the Tribunal found that an employer discriminated against the Applicant, a personal support worker (PSW), by failing to accommodate her special childcare needs. The Tribunal found that the Applicant's employment was terminated at least in part because she was unable to offer more flexible hours due to her childcare obligations. The Tribunal awarded a remedy of $30,000 in compensation for injury to the Applicant's dignity, feelings and self-respect.

In this undefended application, *Simpson v. Pranajen Group Ltd. o/a Nimigon Retirement Home*, the Tribunal accepted the following facts conveyed by the Applicant:

- The Applicant was the only family member able to meet her special needs child's bus after school
- The Applicant was told she would begin a new schedule at the end of May, 2017, in which she would work the midnight shift as opposed to the 3PM – 11PM shift in order to accommodate her child care needs
- The Applicant had her name on waiting lists for several daycares
- The Applicant became ill on the evening of April 22, 2017 and telephoned the supervising RPN at work to say that she would not be able to work the following day
- Following this call, the Respondent emailed the Applicant to warn her that she had neglected her responsibility to find a replacement for herself and was in breach of a policy
- The Applicant had a good attendance record and had always been permitted to report any absences to the PSW working the shift before hers
- On May 19, 2017, the Applicant was informed that she would no longer be switching to the midnight shift because she had called in sick without giving enough notice, and
- On May 23, 2017, the Applicant was informed by telephone that her employment was terminated for a variety of reasons which included attendance, failure to follow instructions, creating a disturbance, performance and work quality.

In determining that the Applicant's termination was discriminatory, the Tribunal found that the stated reasons for the termination were not based in fact and that at least one of the reasons for the termination was the Applicant's unavailability for certain shifts because of her need to provide care to her children. The Tribunal further found that the decision to withdraw the offer to allow the Applicant to work her requested shift was arbitrary, unreasonable and unfair and did not take into

account the Applicant's childcare responsibilities.

In coming to its conclusion, the Tribunal interestingly did not directly address if the test for discrimination based on family status set out in the Federal Court of Appeal decision of *Canada (Attorney General) v Johnstone* was the proper test to apply or if the more recent test outlined in the Tribunal's decision of *Misetich v Value Village Stores Inc.* should be applied.

The so-called *Johnstone* test requires individuals alleging discrimination based on family status to prove that the childcare issue engages the individual's legal responsibility for the child, that reasonable efforts have been made to meet those obligations through reasonable alternatives and that the resulting impact on the individual's ability to fulfill their childcare obligations is more than trivial or substantial. In *Misetich*, the Tribunal rejected the principle that an individual must prove that reasonable alternative solutions were not accessible. The Tribunal stated that the applicable test should be the same in all accommodation cases, and that it was not appropriate to apply (what it viewed as) a different test in family status cases. Here, the Tribunal found that regardless of which test was applied, employer had failed in its duty to accommodate. The Tribunal found as follows:

[32] The applicant was in a parent and child relationship, thus invoking her membership in the group identified by family status. The applicant experienced adverse treatment when she lost her job, and one of the reasons for the termination, if not the sole reason, was that she was unavailable for afternoon shifts because of her childcare requirements. As noted above, the reasons provided to the applicant for her termination were a pretext and not based in fact. The respondent arbitrarily, unfairly and unreasonably withdrew its offer to accommodate the applicant's childcare needs with the midnight shift and then subsequently terminated her employment. There was no evidence that accommodating the applicant's family status would have been undue hardship for the respondent. Consistent with *Misetich*, above, I conclude that the respondent discriminated against the applicant because it failed in its duty to accommodate the applicant's needs arising from her family status.

[33] Even if the Tribunal would be wrong to apply a test different from Johnstone, above, I find that the applicant also met the Johnstone test in establishing discrimination because she tried to "self-accommodate" by trying to access full-day childcare so that her children would be looked after while the applicant and her husband worked. She maintained her name on various daycare lists, including the regional government's list which covers many daycares. She also used her parents-in-law for childcare as much as they were able to provide childcare. I find that the applicant, both mother and guardian of her children, had the legal responsibility to provide childcare for them, and, despite reasonable efforts to find an alternative, no alternative to herself caring for her children in the late afternoon was reasonably accessible. I find that the respondent's expectation that the applicant work in the late afternoon interfered in a manner that is more than trivial or insubstantial with the fulfillment of the applicant's childcare obligation.

With diverging tests arising from the Federal Court of Appeal, the Tribunal and other decision-

makers, the law applicable to family status-based allegations of discrimination across Canadian jurisdictions remains unsettled. Federal employers continue to be governed by the *Johnstone* test, while the Tribunal's *Misetich* test has gained some traction in Ontario. The decision here in *Simpson*, and others, however, have appeared to look through both lenses in arriving at their conclusions.

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; and
- Considering reasonable scheduling accommodations as a transitional measure while appropriate childcare or eldercare arrangements are being made.

Hicks Morley offers in-house accommodation training workshops that can be tailored and delivered at your premises, to meet your organization's specific needs. To learn more about our training solutions, speak with your Hicks Morley lawyer, or complete our client training request form.

Simpson v. Pranajen Group Ltd. o/a Nimigon Retirement Home, 2019 HRTO 10 (CanLII)