Human Resources Professionals Association
HRPA
Durham Chapter

FALL 2017

Resource

Shaping Organizational Excellence

CHANGING COMMUNITIES

Family Matters

The Evolving Analysis for Family Status Discrimination

Adam James

Following the 2014 Federal Court of Appeal decision in *Johnstone v. Canada*,[1] employers across Canada appeared to have some certainty in the approach used by adjudicators to determine whether discrimination had occurred on the basis of family status. However, for Ontario employers, that was certainty short-lived. On September 20, 2016, the Human Rights Tribunal of Ontario (the Tribunal) released its decision in *Misetich v. Value Village Stores Inc.*,[2] lowering the threshold to establish family status discrimination.

After the release of Misetich, employers were left wondering which of the two decisions reflected the prevailing law—*Johnstone* or *Misetich*? The recent decision of the Public Service Labour Relations and Employment Board in *Guilbault v. Treasury Board (Department of National Defence)*[3] suggests the answer for federally regulated employers is *Johnstone*. However, for employers regulated provincially in Ontario, the recent decision in *Ananda v. Humber College Institute of Technology & Advanced Learning*,[4] signals Tribunal adjudicators will be endorsing the *Misetich* approach.

This inconsistency highlights the difficulty employers in Canada now face, where the test for family status discrimination differs among jurisdictions despite direction from the Supreme Court of Canada that human rights legislation is to be interpreted consistently.

The *Johnstone* Test

Johnstone addressed an employer's obligation to accommodate schedule changes associated with an employee's childcare responsibilities. The Federal Court of Appeal held that in order to successfully claim discrimination on the basis of family status, an employee had to demonstrate four things:

1. The child was under the employee's care and supervision.
2. The childcare obligation engaged a legal responsibility for the child, as opposed to a personal choice.
3. The employee had first made reasonable efforts to self-accommodate.
4. The impugned workplace rule interfered with the fulfillment of the childcare obligation in a way that was more than trivial or insubstantial.

The Tribunal's Evolving Perspective

In *Misetich*, the issue was whether the employee, ultimately terminated for refusing to work her scheduled shifts, had been discriminated against as a result of her eldercare responsibilities.

The Tribunal disagreed with earlier decisions, including the Federal Court of Appeal's decision in *Johnstone*, particularly on the issue of self-accommodation. According to the Tribunal, requiring self-accommoda-

1 2014 FCA 110 [Johnstone]
2 2016 HRTO 1229 [Misetich]
3 2017 PSLREB 1 [Guilbault]
4 2017 HRTO 611 [Ananda]

tion "conflate[d] the test for discrimination and accommodation." In other words, discrimination, if it exists, does so regardless of an employee's ability to self-accommodate.

Instead, the Tribunal held that to establish discrimination on the basis of family status, an employee must only show:

1. Membership in a protected group.
2. Adverse treatment.
3. The protected ground of discrimination was a factor in the adverse treatment.

In reaching this conclusion, the Tribunal acknowledged that not *all* adverse treatment constitutes discrimination and, in the context of family status and employment, "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."

The Tribunal also noted the importance of considering "context" in assessing the impact of an allegedly discriminatory act or rule, including other supports available to the employee. While considering other available supports sounds a lot like the third step in *Johnstone* (i.e., the obligation to attempt self-accommodation), the Tribunal noted this did not mean an employee is required to self-accommodate. Rather, although the supports available may affect the impact of the act or rule (and thus whether the employee's familial relationship has suffered a "real disadvantage"), the employee does not bear the burden of attempting self-accommodation in order to establish discrimination.

Misetich Endorsed by Other Tribunal Adjudicators

The test adopted by the Tribunal in *Misetich* is a concern for Ontario employers, as it lowers the bar for discrimination on the basis of family status. While it remains to be seen whether Ontario labour arbitrators will adopt the *Misetich* test, more recent decisions from the Tribunal affirm its adjudicators are endorsing *Misetich* and its critique of the *Johnstone* analysis.

In *Thapa v. Suisha Gardens Limited Les Jardins Suisha Limitée*,[5] released a few months after *Misetich*, the Tribunal recognized and applied the lower threshold established by *Misetich* without mentioning or addressing *Johnstone*. More recently, in Ananda the Tribunal agreed with the analysis set out in *Misetich* and its critique of *Johnstone*.

In *Ananda*, the applicant was a nursing student who was denied an extension to complete his nursing program. He alleged that he was required to provide care and support to his mother who had health issues and that this contributed to his inability to complete the requisite courses in the time required by the program. He claimed discrimination on the basis of family status.

On the evidence, the Tribunal concluded the applicant failed to establish his mother's care-related needs prevented him from completing the program. Hence, the application was dismissed.

However, on the appropriate test to apply, the Tribunal reaffirmed *Misetich*:

> In my view, the correct approach to an allegation of a failure to accommodate on the basis of family status is as set out in this Tribunal's decision in *Devaney v. ZRV Holdings Limited* … which requires demonstration by the applicant that a rule or requirement had an adverse effect on her or him because of requirements or needs relating to or arising out of the parent-child relationship: see para. 117. I also fully endorse this Tribunal's critique of the *Johnstone* test as set out in *Misetich v. Value Village Stores Inc.* … and the principle that in order to constitute a "need" or "requirement" relating to or arising out of the parent-child relationship, it is not sufficient that there just be any negative impact, but that the negative impact must result in real disadvantage to the applicant, arising from the parent-child relationship and the responsibilities that flow from that relationship.

Continued on page 13...

5 2016 HRTO 1316

Continued from page 9...

Johnstone Returns at Federal Level

In 2017, the Public Service Labour Relations and Employment Board resuscitated the *Johnstone* analysis. In *Guilbault*, the issue was whether the employer discriminated against a unionized employee by denying his request to take two 15-minute breaks back to back at the end of the day so he could leave work early to care for his children. In support of his request, the employee pointed to his spouse's health problems and the developmental difficulties of two of his four children, explaining that arriving home earlier would relieve the strain on his spouse. While the employer ultimately agreed to the request, the employee nevertheless grieved on the basis of family status discrimination.

In dismissing the grievance, the arbitrator applied the *Johnstone* analysis without reviewing any other legal test. He found the second and third stages of the *Johnstone* test had not been met—the employee's request did not engage a legal obligation to his children, and the employee offered no evidence of self-accommodation.

Looking Ahead

Guilbault and *Ananda* highlight the difficulty Canadian employers now face, where the test for family status discrimination differs among jurisdictions. For now, the decision in *Guilbault* is welcome news to *federally regulated* employers, whereas *Misetich* and its adoption in *Ananda* is troublesome for those in Ontario. We will continue to monitor this evolving area of human rights law and update readers as developments occur. ☐

To learn more and for assistance addressing family status and other human rights matters, contact the human rights experts at Sherrard Kuzz LLP.

Adam James is a lawyer with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing management. Adam can be reached at 416-603-0700 (main)/416-420-0738 (24-hour) or by visiting www.sherrardkuzz.com.

Call for Volunteers

Wednesday, November 8, at 6 p.m.

105 Consumers Drive, Whitby

(our chapter offices)

HRPA DURHAM CHAPTER IS GROWING!

We will soon be among the largest chapters in the province. We need enthusiastic and dedicated members to help us shape the HR profession as we grow and our industry transforms.

If you're a CHRP or CHRL looking for valuable CPD hours, or a Student or Practitioner member seeking to build on your skill set, a volunteer role on one of our committees could be the opportunity you've been looking for!

Join us on Wednesday, November 8, at our bi-annual Volunteer Open House where you'll learn about the current opportunities with our Chapter and how you can get involved. Meet our Membership Director and Volunteer Engagement Team, and get all your questions answered. Refreshments will be served.

RSVP to volunteer@hrpadurham.ca by Sunday, November 5, to reserve your spot!