

MANAGEMENT COUNSEL

Employment and Labour Law Update



Family Matters: The evolving analysis for family status discrimination

Following the 2014 Federal Court of Appeal decision in *Johnstone v Canada*,¹ employers across Canada appeared to have some certainty in the approach to be adopted by adjudicators when determining whether discrimination has occurred on the basis of family status.

However, for Ontario employers that certainty was 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, the answer remains unclear.

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

The *Johnstone* test

Johnstone addressed the obligation of an employer 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.



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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-accommodation "conflate[d] the test for discrimination and accommodation". In other words, discrimination, if it exists, does so regardless whether the employee can reasonably self-accommodate.

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

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 this sounds a lot like the third step in *Johnstone* (i.e., the obligation to try to self-accommodate), the Tribunal noted this did not mean an employee is required to exhaust self-accommodation. Rather, the availability of other supports should be part of the broader context considered.

The impact of the *Misetich* test on employers

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. What remains to be seen is whether this

approach will be adopted by other adjudicators and, if so, the extent to which "other supports" will be considered.

While it is still too early to know with certainty, at least one recent Tribunal decision - *Thapa v Suisha Gardens Limited Les Jardins Suisha Limitée*⁴ - recognized and applied the lower threshold established by *Misetich* without mentioning or addressing *Johnstone*.

Johnstone returns at the 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 health problems of his spouse and 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 highlights the difficulty Canadian employers now face, where the test for family status discrimination differs among jurisdictions despite statements from the Supreme Court of Canada that human rights jurisprudence is to be interpreted consistently.

For now, the decision in *Guilbault* is welcome news to federally regulated employers, whereas *Misetich* may be troublesome for those in Ontario. We will continue to monitor this evolving area of human rights law and update readers as developments occur.

¹2014 FCA 110 [*Johnstone*].

²2016 HRTO 1229 [*Misetich*].

³2017 PSLREB 1 [*Guilbault*].

⁴2016 HRTO 1316.

For more information and assistance, contact the employment law experts at Sherrard Kuzz LLP.

DID YOU KNOW?

On March 8, 2017, the Federal Government passed Bill S-201, *An Act to Prohibit and Prevent Genetic Discrimination*. In addition to other measures, Bill S-201 amends the *Canada Labour Code* and the *Canadian Human Rights Act* to prohibit an employer from treating a current or prospective employee adversely based on an actual or perceived genetic characteristic.

To learn more about the potential impact of Bill S-201 on your workplace, see our newsletter of [February 2017](#), and contact the human rights experts at Sherrard Kuzz LLP.

Vicissitudes:

The ebb and flow of our courts' approach to termination clauses



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In its original meaning, *vicissitudes* referred to the ebb and flow of the tides. In its broader sense, *vicissitudes* refers to any situation which repeatedly moves back and forth. *Vicissitudes* is therefore an apt characterization of our courts' approach to the interpretation of employment contract termination clauses, as exemplified by a recent decision of the Court of Appeal for Ontario (*Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158).

What happened?

Julia Wood ("Wood") was a sales and event planner for Fred Deeley Imports Ltd. ("Deeley"). After more than eight years of employment, Deeley terminated Wood's employment, providing her with 13 weeks of working notice and benefit continuation, and an eight week lump sum severance payment thereafter.

Wood believed her entitlement to be greater, so she sued for wrongful dismissal. Deeley defended the lawsuit by relying on Wood's employment contract which contained the following termination clause:

[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment ... If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph.... The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the Employment Standards Act, 2000.

From a layperson's perspective, this may seem to be a straightforward provision entitling Wood to 18 weeks' notice or pay in lieu (based on nine complete or partial years of employment). However, from the perspective of a knowledgeable employment lawyer, there were two potential defects in the Deeley clause:

- a) It made it possible for Deeley to satisfy its obligations by providing only 18 weeks' working notice. However, this would deprive Wood of her entitlement to *Employment Standards Act, 2000* ("ESA") severance pay, thereby providing her less than her statutory entitlement.
- b) It did not expressly state benefits would be continued for the ESA notice period, which is a requirement of the ESA.

The courts step in

On a motion for summary judgment, the judge dismissed Wood's claim, satisfied the termination provision provided her with a greater entitlement than under the ESA, and that Deeley had complied with its obligation to continue benefits during the statutory notice period.

Dissatisfied with this outcome, Wood appealed to the Court of Appeal for Ontario, which overturned the motions judge, noting the following:

- A termination clause should be interpreted in a way that encourages an employer to draft an agreement compliant with ESA obligations. If the only consequence for drafting a non-compliant termination clause is an order to comply, the employer will have little incentive to draft a lawful termination clause at the outset.
- A termination clause will rebut the presumption of reasonable notice only if its wording is clear; an employee should know at the beginning of employment what his or her entitlement will be at the end.
- If a termination clause can reasonably be interpreted in more than one way, a court should prefer the interpretation that gives the greater benefit to the employee.

The enforceability of a termination clause depends only on its wording - not the employer's actions.

The court disagreed with Deeley's argument its compliance with the ESA cured any ambiguity in the contractual language, confirming that the enforceability of a termination clause depends only on its wording - not the employer's actions.

Having found the Deeley clause void in the ways identified above, the court allowed the appeal and awarded Wood nine months' pay in lieu of notice.

Lessons for employers

The *Deeley* decision reminds us of these important lessons:

- A termination clause must clearly state the employer will provide no less than what is required under the ESA.
- Even if a clause appears to be as or more generous than the ESA, courts have been clear that any ambiguity will be resolved in favour of the employee.
- Drafting an employment contract is not for the *do-it-yourselfer*. An old template or agreement found on the internet is unreliable and highly likely to be invalid.
- Even a well drafted employment agreement may be unenforceable as a result of how and when the employee signed it. Those and other issues are beyond the scope of this article; as such employers are encouraged to obtain expert advice regarding procedures to follow when entering into an employment agreement.

For more information and assistance, contact the employment law experts at Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Let's Talk About Sex: Workplace Indecencies and Indiscretions

Workplace indecencies and indiscretions, particularly of a sexual nature, can have catastrophic consequences for an employer. Not only do these types of infractions often attract high profile (and unwanted) media attention, they also risk the degradation of workplace morale, company reputation and, by extension, business productivity and success. Join us as we identify issues and best practices relating to:

Sexual Harassment

- What is sexual harassment?
- When is an employer liable for sexual misconduct in the workplace?
- What is the range of penalty?

Workplace Romance

- Is an anti-fraternization policy a good idea?
- What type of conduct can an employer legitimately prohibit in the workplace?

Off Duty Conduct

- When does sexual misconduct that occurs outside of the traditional workplace become a workplace issue?
- What is an employer's responsibility when it comes to "sexting", sexualized emails, and other explicit social media based communications?
- When can an employer discipline or discharge an employee for off duty conduct?
- How should an employer respond to questions from the media?

DATE: Wednesday, September 27, 2017, 7:30 – 9:30 a.m. (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: Hazelton Manor, 99 Peelar Road, Vaughan, ON L4K 1A3

COST: Complimentary

RSVP: By Monday, September 11, 2017 at www.sherrardkuzz.com/seminars.php (spaces limited)

Law Society of Upper Canada CPD Hours: This seminar may be applied toward general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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