Family status accommodation: Where do we stand?

Following the 2014 Federal Court of Appeal decision in *Johnstone v Canada*, employers across Canada were optimistic there would be some certainty regarding the appropriate test to establish family status discrimination.

Sundeep Gokhale and Thomas Gorsky
LEGAL VIEW

Unfortunately, any such certainty was short-lived, as adjudicators in Ontario, Alberta and British Columbia have rejected the *Johnstone* approach. The result was — and remains — inconsistency among the various Canadian jurisdictions, despite statements from the Supreme Court of Canada that human rights jurisprudence is to be interpreted consistently.

So, where do we stand on the issue of family status accommodation? Let's recap.

The *Johnstone* test

In *Johnstone,* the employer was asked 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:

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

Thereafter, the employer must determine if it can reasonably accommodate the employee's family status needs, to the point of undue hardship to the employer.

Ontario, British Columbia and Alberta have rejected the Johnstone approach.

Ontario and Alberta reject *Johnstone*

On Sept. 20, 2016, the Human Rights Tribunal of Ontario (HRTO) released its decision in *Misetich v Value Village Stores Inc.* in which an employee who requested accommodation for eldercare was dismissed for refusing to work her scheduled shifts.

The HRTO disagreed with the third prong of the *Johnstone* test, namely that the employee must take reasonable steps to "self-accommodate."

According to the tribunal, requiring self-accommodation "conflated the test for discrimination and accommodation." In other words, discrimination, if it exists, does so regardless of whether the employee can reasonably self-accommodate.

As such, the HRTO held that to establish discrimination on the basis of family status, an employee must only establish three things:

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

Significantly, the HRTO 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-

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64 per cent of parents or guardians reported they had no difficulty finding an early learning and child care arrangement.

Types of child care

- Daycare centre 52%
- Family 26%
- Home daycare 20%

Accommodating children up to 5 years old

- 9% of parents changed their work schedule because they had difficulty finding child care
- 7% worked fewer hours
- 6% postponed their return to work

Source: Statistics Canada, 2019

Notable cases

Durikova v. BC Ministry of Justice, 2018 BCHRT 258 (B.C. Human Rights Trib.): Jana Durikova was a store clerk at the B.C. Liquor Distribution Branch (LDB) with a collective agreement that allowed extended childcare leave after parental leave. She went on maternity and parental leave for one year, then took extended childcare leave for another six months. Durikova applied for additional unpaid leave to take care of her daughter and teach her about her Slovakian heritage and language. The LDB determined this wasn't sufficiently family-related and denied the request. The union claimed discrimination on the basis of family status. The tribunal found none of Durikova's reasons qualified as special circumstances versus personal choice, and the LDB's objection didn't cause any disadvantage or adverse impact on her parental responsibilities. The complaint was dismissed.

Guilbault c. Conseil du Trésor (Ministere de la Défense nationale), 2017 PSLREB 1 (Can. Pub. Service Lab. Rel. & Emp. Bd.): Pascal Guilbault, a Department of National Defence (DND) employee, asked for accommodation to take care of his family — two of his children had developmental difficulties — by taking two 15-minute breaks at the end of the day so he could leave early. However, he refused other options such as a compressed workweek, variable schedule or starting earlier. The manager said he couldn't take the breaks at the end of the day as the collective agreement considered them rest periods for occupational health and safety reasons. The two parties eventually agreed to move his lunch break to the end of the day and leave 30 minutes early. However, this solution wasn't initially adopted and led to months of acrimony. The board found the reason for Guilbault's request wasn't necessarily childcare, but rather his spouse's health issues, and there was no evidence he looked at the idea of outside help. DND's initial refusal to grant Guilbault's request didn't hinder his ability to meet his legal obligations toward his family so there was no discrimination.

Standards differ depending on jurisdiction

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child relationship and the responsibilities that flow from that relationship, and/or to the employee's work."

In evaluating the negative impact, the HRTO held that it was appropriate to consider other supports available to the employee.

While this sounds a lot like the third step in *Johnstone* (meaning the obligation to try to self-accommodate), the HRTO was clear that this did not mean an employee is required to exhaust self-accommodation. Rather, the availability of other supports should only be considered.

Once discrimination is established, the onus shifts to the employer to reasonably accommodate the employee.

In this context, the HRTO noted an employee's attempts to minimize the work-family conflict may again be relevant:

"It is then that one considers whether the applicant cooperated in the accommodation process. The obligation to cooperate includes providing the respondent with sufficient information relating to the family-related needs and working with the respondent in identifying possible solutions to resolve the family/work conflict."

In Alberta, adjudicators similarly have rejected the *Johnstone* test on the basis the requirement to self-accommodate sets a higher threshold to establish family status discrimination than other forms of discrimination.

In the 2015 *SMS Equipment v. C.E.P. Local 707,* the Alberta Court of Queen's Bench stated in obiter: "A flexible and contextual application… does not justify the application of an entirely different test of *prima facie* discrimination, and, particularly, does not justify including within that test a self-accommodation element that is not required with respect to other prohibited grounds of discrimination. This is unnecessary and contrary to the objects of human rights law."

More recently, in the 2019 *United Nurses of Alberta v. Alberta Health Services,* the Alberta Court of Queen's Bench affirmed its position that self-accommodation plays no role in the test to establish discrimination:

"While Justice Ross's comments (in *SMS Equipment*) were, as discussed, *obiter* and, therefore, not outright binding on the Board, the Supreme Court of Canada's rulings are binding on the Board… In my view, taken together, the Supreme Court of Canada jurisprudence leaves no room for an articulation of the *prima facie* discrimination test that imports or adds an additional evidentiary requirement on a complainant. The analysis of self-accommodation is not irrelevant — it just belongs elsewhere."

In Ontario, the availability of "other supports" may be relevant in assessing whether the employee was adversely impacted by the employer's actions.

Thus, in Alberta and Ontario, the steps an employee may take to self-accommodate are a relevant consideration — but only when evaluating reasonable accommodation — not when determining whether there is discrimination in the first place.

British Columbia confirms *Johnstone* not binding

Even prior to *Johnstone*, adjudicators in British Columbia had adopted a separate, and more rigorous, test to establish family status discrimination.

In the 2004 decision of *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, the British Columbia Court of Appeal expressed concern about the potential "mischief" that could result in the workplace if a broad test for family status discrimination applied.

Instead, the court held discrimination should only be found only if there is a change in an employee's existing terms and conditions of employment which results in serious interference with the discharge of a substantial parental obligation.

In the 2019 *Envirocon Environmental Services, ULC v. Suen,* the issue before the British Columbia Court of Appeal was whether it was discriminatory to terminate an employee after he refused a temporary assignment out of province for family reasons.

The British Columbia Human Rights Tribunal applied the test in *Campbell River* but it questioned whether it remained "good law." On appeal, Brian Suen argued that the test was too restrictive and a lesser standard should be applied.

The Court of Appeal held it was not necessary to address this argument because the court was bound by *Campbell River.* Suen has sought leave to appeal to the Supreme Court of Canada and the matter is still pending.

Tips for employers

Unless and until this issue is resolved by the Supreme Court of Canada, any employer that operates in more than one Canadian jurisdiction may have to comply with differing standards for family status accommodation depending on the jurisdiction.

In British Columbia, the *Campbell River* test applies. For federally regulated employers, the *Johnstone* test applies, including the requirement the employee take reasonable steps to self-accommodate before there can be a finding of discrimination. In Ontario, the availability of "other supports" may be relevant in assessing whether the employee was adversely impacted by the employer's actions.

And in both Ontario and Alberta, the steps an employee may take to reduce or eliminate the need for accommodation may be considered but only as part of the accommodation analysis — not as part of the analysis of whether there has been discrimination in the first place.

Sundeep Gokhale and Thomas Gorsky are lawyers at Sherrard Kuzz in Toronto. They can be reached at (416) 603-0700 (main), (416) 420-0738 (24-hour) or by visiting www.sherrardkuzz.com.