The duty to accommodate family status

The test to establish *prima facie* discrimination varies across Canada

Priya Sarin and Matthew Badrov

WHILE HUMAN rights legislation is to be interpreted in a consistent manner, the test to establish a *prima facie* case of discrimination on the grounds of family status varies across Canada. This can create uncertainty for employers and their counsel. We will look at the tests applied in various Canadian jurisdictions, in the contexts of childcare and eldercare – two of the most common requests for accommodation Canadian employers receive.

The test for a *prima facie* case of discrimination

In the 2012 decision, *Moore v. British Columbia (Education)*,[1] the Supreme Court of Canada held that, to establish a *prima facie* case of discrimination under human rights legislation, an employee must demonstrate three things:

1. They have a characteristic protected from discrimination.
2. They experienced an adverse impact.
3. The protected characteristic was a factor in the adverse impact.

While some jurisdictions follow *Moore*, others have established their own, more nuanced tests to establish family status discrimination. These tests reflect the view that only a conflict between a workplace requirement and family status obligation that results in a significant disadvantage is afforded protection under human rights legislation.

Federal – the *Johnstone* decision

Two years after *Moore*, the Federal Court of Appeal in *Canada (Attorney General) v. Johnstone*[2] established the test for *prima facie* family status discrimination, in the context of childcare, as follows:

1. A child must be under the employee's care and supervision.
2. The childcare obligation must engage the employee's legal responsibility for the child and not a personal choice.
3. The employee must have made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and there must be no such solution reasonably accessible.
4. The impugned workplace rule must interfere with the fulfillment of the childcare obligation in a non-trivial manner.

This decision has been consistently applied to federally regulated employers and expanded to include eldercare obligations.

However, in some Canadian jurisdictions, *Johnstone* has been criticized for being inconsistent with *Moore*, specifically as it requires an employee to exhaust alternative childcare options before seeking accommodation from the employer.

British Columbia – *Campbell River* 1 & 2

In the 2004 decision, *Health Science Association of BC v. Campbell River and North Island Transition Society*,[3] the Court of Appeal for British Columbia held that, typically, a *prima facie* case of family status discrimination is established "... when a *change* in a term or condition of employment imposed by an employer results in a *serious interference* with a *substantial parental* or other family duty or obligation of the employee" [emphasis added]. As with *Johnstone*, *Campbell River* has been criticized for having established a higher threshold for family status discrimination than for other protected grounds.

Recently, the Court of Appeal for British Columbia clarified its decision,[4] noting that an employee need not establish a change in a term or condition of employment to make out a *prima facie* case. However, an employee must still demonstrate a *serious* interference with a *substantial* parental or other family duty or obligation to trigger any duty to accommodate. The court stated this was consistent with the *Moore* analysis:

> ... To put this test in terms of *Moore*, to establish *prima facie* adverse impact discrimination as a result of a conflict between work requirements and family obligations, an applicant must establish that their family status includes a substantial parental or other duty or obligation, that they have suffered a serious adverse impact arising from a term or condition of employment, and

that their family status was a factor in the adverse impact.

Alberta and Manitoba – *Moore* rules the day

Prior to 2021, the law in Alberta was inconsistent with respect to the test for family status discrimination. Some adjudicators adopted *Johnstone* while others applied an analysis closer to *Moore*. In a 2021 decision,[5] the Court of Appeal of Alberta confirmed the appropriate test was *Moore*:

> ... the nature of human rights and the rule of law, require one uniform and consistent test for determining *prima facie* discrimination in all cases. That test was laid down by the Supreme Court of Canada in *Moore*. There is no legal justification for the imposition in *Johnstone* of an additional, burdensome element of proof of family status claimants at the *prima facie* discrimination stage. Imposing a more onerous self-accommodation burden in this manner perpetuates rather than ameliorates human rights inequality...[6]

More recently, the Manitoba Court of King's Bench followed suit,[7] stating that, in Manitoba, "a complainant must establish the criteria set out in *Moore* to demonstrate a *prima facie* case of family status discrimination under the *Code*."

Ontario – the *Misetich* test

While some Ontario decision-makers have applied *Johnstone*, most have followed the reasons of the Human Rights Tribunal of Ontario in the 2016 decision, *Misetich v. Value Village Stores Inc.*

In *Misetich*, the Tribunal recognized that "not every negative impact on a family obligation, or conflict between a family and work obligation, is discriminatory," and to establish family status discrimination, an employee must establish a negative impact on a family need that results in "real disadvantage" to the parent/child relationship and the responsibilities that flow from that relationship.

The assessment of impact is contextual and *may* include consideration of "other supports" available to the employee, like in *Johnstone*. However, unlike in *Johnstone* this does not require an employee to exhaust all attempts to find a solution to the work/family conflict prior to an accommodation request

The role of "reasonable options"

As we now know, in some jurisdictions, whether an employee has a reasonable option for childcare or eldercare is not relevant to the question of whether there is a *prima facie* case of discrimination.

By contrast, the availability of reasonable care options is almost always relevant to the question of accommodation. In other words, even in jurisdictions that strictly apply *Moore*, care options continue to be relevant to the issue of accommodation. This is because accommodation is frequently described as a "multi-party" obligation and an employee has a duty to look for solutions and options that may reduce the work/family conflict. The availability of reasonable care options is therefore an appropriate consideration at the right time and place.

To learn more and for assistance, contact the human rights leaders at Sherrard Kuzz LLP. CL

[1] 2012 SCC 61 ("*Moore*").
[2] 2014 FCA 110 ("*Johnstone*").
[3] 2004 BCCA 260 ("*Campbell River*").
[4] *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168.
[5] *United Nurses of Alberta v. Alberta Health Service*, 2021 ABCA 194.
[6] Leave to appeal to the Supreme Court of Canada denied.
[7] *Desai v. North Ridge Development Corporation*, 2023 SKKB 3.

Priya Sarin and **Matthew Badrov** are lawyers with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing employers. Priya and Matthew can be reached at 416.603.0700 (Main), 416.420.0738 (24-hour), or by visiting www.sherrardkuzz.com.