

## **Yet Another Test for Family Status Discrimination - The Human Rights Tribunal of Ontario Muddies the Waters**

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After the release of the 2014 Federal Court of Appeal decision in *Johnstone v. Canada* (“*Johnstone*”), it appeared Ontario employers had some certainty in the approach being adopted by adjudicators on how to establish discrimination on the basis of family status.

Unfortunately, the certainty provided by *Johnstone* may have been short-lived. On September 20, 2016, the Human Rights Tribunal of Ontario (“Tribunal”) released its decision in *Misetich v. Value Village Stores Inc.* 2016 HRTO 1229 (“*Misetich*”) in which the Tribunal rejected the *Johnstone* test and set out yet another approach for establishing family status discrimination. The new test is troubling for employers as it sets a lower bar for establishing family status discrimination.

### **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 individual would need to demonstrate:

1. The child at issue was under the individual’s care and supervision.
2. The childcare obligation engaged the individual’s legal responsibility for that child, as opposed to a personal choice.
3. The individual had made reasonable efforts to meet those childcare obligations through alternative solutions, and no such alternative solution was reasonably accessible.
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 New Perspective**

In *Misetich*, the issue was whether the employee, who was ultimately terminated for refusing to work her scheduled shifts, provided sufficient evidence to support her position she could not work evenings and weekends due to eldercare responsibilities. In evaluating whether Ms. Misetich’s

obligations triggered her employer's duty to accommodate, the Tribunal reviewed the various tests for family status accommodation which had evolved over the years, including in *Johnstone*.

The Tribunal disagreed with the position taken by other adjudicators, including the Court of Appeal in *Johnstone*, that the test for establishing family status discrimination ought to be any different than the test applied with respect to any other protected ground. Having a different test for family status discrimination, the Tribunal held, led to both uncertainty and a higher threshold for establishing discrimination on this ground than others.

The Tribunal also took issue with the approach of some adjudicators in considering an individual's efforts to "self-accommodate" (*i.e.*, the steps the individual had taken to resolve the childcare or eldercare issues), in determining whether discrimination had been established. In the Tribunal's view, this "conflated the test for discrimination and accommodation". In other words, discrimination, if it exists, does so regardless whether the employee can reasonably self-accommodate.

### **The New Test for Discrimination on the Basis of Family Status**

The Tribunal concluded the test for establishing discrimination on the basis of family status was the same as for any other protected ground. An individual must establish:

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

The Tribunal acknowledged not all adverse treatment would necessarily constitute 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".

Significantly, the Tribunal also noted the importance of considering "context" in assessing the impact of a potentially discriminatory act or rule, including other supports available to the employee. While this sounds a lot like the third step in *Johnstone* (the obligation the employee must try to self-accommodate), the Tribunal noted this did not mean an employee would be required to exhaust all attempts to self-accommodate. Rather, the other supports available would be part of the broader context considered in determining the impact of adverse treatment and whether this constitutes discrimination.

Once discrimination has been established, the onus then shifts to the employer to accommodate the employee's family related needs to the point of undue hardship. The employee has a duty to participate in this accommodation process, including providing the employer with sufficient information about the employee's restrictions and working with the employer to identify possible solutions.

## What This Means for Employers

This new test adopted by the Tribunal is troubling for employers as it sets a lower bar for establishing family status discrimination. What remains to be seen is whether this approach is adopted by other adjudicators and, if so, how broadly they consider the “context” of the impugned action and the other supports available to the employee. It may no longer be sufficient to rely on an employee’s own failure to sufficiently fully explore reasonable child- or eldercare options as a defence to a request for accommodation.

We will continue to monitor this constantly-evolving area of family status discrimination and update you as developments occur.

***To learn more about how to effectively handle family status accommodation requests, contact the human rights experts at Sherrard Kuzz LLP.***

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