Human Rights Tribunal of Ontario rejects Johnstone test for family status discrimination – “the test for discrimination is the same in all cases”

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The debate over the proper legal test for establishing discrimination on the basis of family status has been reignited by a recent decision of the Human Rights Tribunal of Ontario (“HRTO”). In *Misetich v. Value Village Stores Inc.* (September, 2016), the HRTO rejected the more recent line of jurisprudence and instead applied what it referred to as “well-established human rights principles” to set out the test for family status discrimination. In doing so, the HRTO explicitly rejected the test developed by the Federal Court of Appeal.

The applicant in *Misetich v. Value Village Stores Inc.* claimed that her employer had discriminated against her on the basis of family status by requiring her to work evening, weekend and/or "on call" shifts. The change in shifts was introduced in order to accommodate the applicant’s physical restrictions. Nevertheless, she claimed that her eldercare obligations to her mother, specifically her need to prepare her mother’s dinner, were in conflict with the requirement to work evenings. At various times the employer requested supporting information relating to the mother’s health needs and whether there were alternative means to provide the necessary care. The applicant refused to provide the necessary information on the basis that her employer was not entitled to private information about her mother. The applicant did not attend for her scheduled shifts and eventually the employer terminated the employment for job abandonment.

In considering whether the employer discriminated against the applicant on the basis of family status, the HRTO canvassed the existing case law relating to family status discrimination, including the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Johnstone* (2014) (“*Johnstone*”). Readers of Focus will recall that the *Johnstone* test (developed in the context of an employee’s childcare obligations) requires a claimant to prove the following elements in order to establish discrimination on the basis of family status:

- the child is under his or her care and supervision;
- the childcare obligation at issue engages the individual’s legal responsibility for that child, as opposed to personal choice;
- the individual has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
- the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

The HRTO rejected the *Johnstone* test, as well as the other tests emanating from different courts

and arbitrators across the country, on the basis that the test for family status discrimination should be the same as for other forms of discrimination. The HRTO set out the following reasons for this conclusion:

1. There is no principled basis for developing a different test for discrimination depending on the prohibited ground of discrimination alleged.
2. The different tests for family status discrimination have resulted in inconsistency and uncertainty in the law.
3. The different tests for family status discrimination are higher than for other kinds of discrimination. (The HRTO noted that according to *Johnstone*, the childcare obligation at issue must engage a legal responsibility, notwithstanding that many obligations that caregivers have are essential to the parent/child relationship but do not engage a legal obligation.)
4. The test of legal responsibility is difficult to apply in the context of eldercare where an adult child's legal responsibility to care for a parent is not as clear as a parent's legal responsibility to care for a minor child.
5. The test for discrimination has been conflated with the test for accommodation resulting in applicants having to establish that self-accommodation was not possible in order to prove discrimination.

In light of the issues arising from the current state of the law, the HRTO set out the following approach for family status discrimination:

> In order to establish family status discrimination in the context of employment, the employee will have to do more than simply establish a negative impact on a family need. 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.

In assessing the negative impact on the family need, the HRTO provided the following guidance:

> Assessing the impact of the impugned rule is done contextually and may include consideration of the other supports available to the applicant. These supports are relevant to assessing both the family-related need and the impact of the impugned rule on that need. For instance, if the applicant is a single parent, both the family-related need and the impact of the impugned rule on the family-related need may be greater.

The consideration of other supports available to an applicant was distinguished from the requirement to self-accommodate that arose under the various other tests for family status discrimination. The HRTO noted that requiring an applicant to self-accommodate as part of the test for discrimination means that the applicant bears the onus of finding a solution to the family/work

conflict and only where he or she cannot is discrimination established.

As is always the case, once discrimination is established, the onus shifts to the employer to show that the employee cannot be accommodated to the point of undue hardship. This stage of the analysis involves a consideration of whether the employee has cooperated in the accommodation process, including by way of providing the employer with sufficient information relating to his or her family-related needs and working with the employer to identify possible solutions.

In applying the above approach to the case at hand, the HRTO found that the applicant's ability to provide evening meals for her mother was not adversely affected by the change in her schedule. The HRTO stated that the applicant could have worked days, evenings and weekends and still provided evening meals for her mother in the same way she was able to provide a meal in the middle of the day. As a result, the HRTO held that the applicant failed to establish discrimination and dismissed the application.

It should be noted that the HRTO's decision was made in the context of the information that was available to the employer at the time, which was limited because the applicant had refused to provide information relating to her eldercare obligations to her employer. In this regard, the HRTO made the following comments:

> The applicant took an intransigent position regarding her human rights. When the respondent attempted to move the applicant to less physically demanding work in retail and schedule her on a variety of shifts, the applicant took the position that it could not do so because of her family status. The applicant believed that all she needed to do was to assert her family status and that would be the end of it. The applicant was wrong. The applicant was required to provide sufficient information to substantiate her eldercare responsibilities. She failed to do so.

While the *Johnstone* test is the law for those employers governed by the *Canadian Human Rights Act*, unless and until the Supreme Court rules otherwise, the decision in *Misetich* still leaves uncertainty with respect to the proper test for family status discrimination for provincially regulated employers. What does remain clear is that employers must be flexible in considering ways to accommodate family-related needs of employees. At the same time, this latest decision from the HRTO confirms that employees are required to cooperate fully in the accommodation process and must provide pertinent information to the employer in order to canvass potential solutions.

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