Human Rights Challenges: Family Status Accommodation and Undue Hardship

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Notes for Discussion: Mark Hart

Evolving caselaw on Family Status Discrimination and the Duty to Accommodate

There are currently three different tests for family status discrimination and when the duty to accommodate applies that are in play across Canada.

British Columbia

B.C. was the first Canadian jurisdiction to address the issue of the test for family status discrimination and the duty to accommodate in *Campbell River*, 2004 BCCA 260. The test established by the BCCA requires a change in a term or condition of employment imposed by an employer that results in a serious interference with a substantial parental or other family duty or obligation of the employee.

At least since the Federal Court of Appeal decision in *Johnstone*, below, most folks believed that the *Campbell River* test was no longer in play, as it has been highly criticized for setting a higher bar to prove family status discrimination than for other protected grounds.

However, the BCCA recently doubled down on this test despite these criticisms: see *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 (application for leave to appeal to SCC dismissed 2019 CanLII 73206). In that case, the employee claimant was working in Burnaby, B.C. when his spouse gave birth to their first child. A few months later, a project manager employed by the company in Manitoba resigned unexpectedly. The company required the claimant to transfer to Manitoba for 8 -10 weeks with no paid provision to return home until the end of that period. The claimant declined on the basis of his child-care responsibilities, and was terminated. The BCHRT denied the company's request to dismiss the employee's complaint for no reasonable prospect of success, and this decision was upheld on judicial review.

The BCHRT's decision then was overturned on appeal to the BCCA, which applied the *Campbell River* test. While the BCCA's decision says that the Court will not depart from a prior decision unless there is a panel of five judges, it should be noted that a five-judge panel was requested given the criticism of the *Campbell River* test, and was denied. So at least in B.C., it appears that *Campbell River* remains good law.

Of particular interest, it the Court's statement at para. 32:

> In my view, the facts alleged by Mr. Suen are not capable of satisfying the second step of the Campbell River test. Those facts are only capable of establishing the undisputed fact that he is a parent. While Mr. Suen's desire to remain close to home to be with his child and to assist his wife in caring for the child outside of his normal weekday working hours and on weekends is understandable and commendable, he is no different than the vast majority of parents. There are many parents who are required to be away from home for extended periods for work-related reasons who continue to meet their obligations to their children. Nothing in Mr. Suen's complaint or affidavit suggests his child would not be well cared for in his absence.

It is interesting to question whether the decision would have been the same had either the *Johnstone* test or the *Misetich* test been applied.

Federal jurisdiction

In the federal jurisdiction, the test for family status discrimination is governed by the Federal Court of Appeal's decision in *Johnstone*, 2014 FCA 110. The *Johnstone* decision created a four-part test:

1. The child needed to be under the employee's care and supervision;
2. The childcare obligation at issue needed to engage the employee's legal responsibility for that child, as opposed to being a matter of personal choice;
3. The employee needed to have made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, but no such alternative solution was reasonably accessible; and
4. The impugned workplace rule needed to interfere with the fulfillment of the childcare obligation in a manner that is more than trivial or insubstantial.

The *Johnstone* decision has been criticized, primarily for two reasons. First, at part two of the test, the requirement for the employee's "legal responsibilities" to have been engaged has been criticized as imposing too high a burden on claimants, especially in relation to their obligations in terms of elder care. Second, it has been asserted that the third part of the test effectively requires the employee to self-accommodate as part of the *prima facie* test for discrimination, thereby reversing the legal onus on the employer to prove an inability to accommodate without undue hardship: see *Misetich*, below.

To date, however, *Johnstone* remains good law at least in the federal jurisdiction, and has been applied in the labour arbitration context.

Ontario

The HRTO squarely addressed the criticisms of the *Johnstone* test in *Misetich*, 2016 HRTO 1229, and rejected that test due to those criticisms. Instead, the *Misetich* test proposes a contextual assessment as to whether the negative impact of the impugned work requirement results in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work. It is stated that, while the employee does not have to prove an inability to self-accommodate as an essential element of proving discrimination, nonetheless this contextual assessment can include consideration of what other supports are available to the employee.

The Ontario Div. Ct. recently had an opportunity to decide whether the *Johnstone* test or the *Misetich* test applies in Ontario, but spit out the bit instead. In *Peternel v. Custom Granite & Marble Ltd.*, 2019 ONSC 5064, the Div. Ct. upheld a trial decision that had dismissed an allegation of family status discrimination. Without deciding between the competing *Johnstone* and *Misetich* tests, the Court held that there was no evidence that an 8:30 a.m. start time interfered with the employee's ability to provide care for her children, so her evidence would not satisfy either test.

What lies ahead?

Obviously, which of these three competing tests (or any others that may come along) will prevail ultimately will need to be determined by the Supreme Court of Canada. It is unfortunate that the Supreme Court denied leave in the *Envirocon* case, above, as that could have afforded a golden opportunity to sort out this mess. Until the Supreme Court decides to address the issue, we will need to struggle along with these three different tests, and try to figure out which one applies. It is clear that the *Campbell River* test applies in B.C., and that the *Johnstone* test applies in federal jurisdiction. In Ontario, it is unclear whether the appropriate test is *Johnstone* or *Misetich*. In other jurisdictions, it's anybody's guess.

In my view, what each of these tests is trying to get at is to distinguish between "needs" and "wants", with a person's needs requiring accommodation while a person's wants do not. This is not new territory in human rights law. This distinction between needs and wants is seen every day in disability accommodation cases, and is resolved based on objective medical evidence that establishes the employee's disability-related needs.

Similarly, in creed accommodation cases, the test established by the SCC decision in *Amselem*, 2004 SCC 47 tries to get at the same distinction, particularly in relation to the third way in which the Court enumerates that a claimant can prove discrimination because of creed, by establishing a sincerely belief that the practice at issue engenders a personal, subjective connection to the divine or to the subject or object of the claimant's spiritual faith, as long as that practice has a nexus with religion.

So in the absence of the kind of objective evidence available in disability accommodation cases, courts and tribunals are trying to articulate some kind of language that speaks to the distinction between needs and wants in the context of family status discrimination, as has been done in the context of defining what constitutes creed-related needs for the purpose of triggering the duty to accommodate in that context.

If I were to place a wager on what test ultimately will prevail, my money is on the *Misetich* test, given what I view as the legitimate criticisms of the *Campbell River* and *Johnstone* tests.

Family Status Discrimination in the context of COVID-19

When you are considering family status discrimination and the duty to accommodate in the context of COVID-19, it seems to me that there are at least three variables at play in the context of an employee's request for accommodation because of family status.

The first variable obviously is the nature of the work at issue, and particularly whether it is possible for the employee's work to be performed at home. For employees in jobs on the front lines of the pandemic, it obviously is not possible for these jobs to be performed from home. This is clearly the case for virtually all health care workers involved in treatment. But it also would apply in the context of other businesses which have continued to remain in operation, including pharmacies, grocery stores, and even construction sites. If the company or institution remains in operation and the employee is unable to perform meaningful or productive work from home, then the employer may need to accommodate the employee's absence from work based on family status needs, but would not be required to continue to pay the employee while absent.

The issue of whether the employee needs to paid while at home hinges on whether the employee is able to perform useful and productive work for the employer from home. As I stated in *Vanegas v. Liverton Hotels International Inc.*, 2011 HRTO 715 at para. 139, in order for the employer to be obliged to provide paid accommodation, "ultimately an employee must be able to perform a useful and productive job in the context of the employer's operation". If the employee cannot do so from home, then the duty to accommodate does not require the employer to pay the employee, although it may require accommodation of the unpaid absence from work.

On the other hand, if the company remains in operation but is still requiring its employees to physically attend work when meaningful and productive work could be performed by the employee from home, then the company would need to accommodate an employee's family status needs not only by allowing the employee to work from home, but also by continuing to pay the employee. I am well aware that prior to the pandemic, employers were largely resistant to the idea of providing accommodation to employees by allowing them to work from home. However, if the evidence indicates that

meaningful and productive work could be performed from home, then I think that the arguments against this form of accommodation would fall to the wayside in the context of this pandemic.

The second variable is the identity of the family member at issue, and particularly whether the person is a child, a spouse or a parent (while I appreciate that issues relating to a spouse would fall under marital status rather than family status, there is no point discussing issue and leaving out the spouse). Obviously, this makes a big difference under the *Johnstone* test. Under that test, it is uncertain what level of care required by a parent would be covered, given the apparent requirement for the need to engage the employee's legal responsibilities: in this regard, see *Canada (Attorney General) v. Bodnar*, 2017 FCA 171, in which the Court suggests that in the context of elder care, the legal obligation requirement of the *Johnstone* test may need to be "nuanced" if there is "a practical and moral need to provide urgently needed care for a disabled parent or to take them to medical appointments as opposed to a legal requirement to do so as would exist in the case of a child" (at para. 37). The bottom line is that there may be a different standard applicable, depending on whether the family member at issue is a child or whether that person is a parent or a spouse.

The third variable is the nature of the family status-related needs at issue. To illustrate, I will divide these care issues into two broad scenarios: (1) where the family member has COVID-19; or (2) where the family member is subject to social distancing or self-isolation measures.

If the family member has COVID-19, one question would be whether the family member is living with the employee. If so, the best course would be for the employee not to attend work, in order to minimize the risk of spreading the infection. If the employee stays at home, whether or not the employer needs to pay the employee or just accommodate the absence depends on the nature of the work and whether meaningful and productive work could be performed from home while caring for an ill family member.

On the other hand, if no meaningful and productive work can be performed from home and the employer takes the position that the employee needs to report for work in order to get paid, the issue becomes what happens if the employee tries to report for work. If the employer wants to prevent the employee from attending work on the basis that a family member has COVID-19, and consistent with the caselaw on employers who try to prohibit pregnant employees from working (see for example *Emrick Plastics v. Ontario (Human Rights Comm.)*, 1992 CanLII 8545 (ON SCDC) at paras. 21-22), the employer would need to have concrete, objective evidence to support its belief that there is a health and safety risk to other employees (on the basis that insufficient precautionary measures are being or can be taken to address the risk). In this regard, I note that health workers are exposing themselves to COVID-19 patients every day, and yet are going home to their families after taking serious precautions to sanitize. The same

measures could be equally effective in reverse, if an employee has a family member at home with COVID-19 but takes serious precautions to sanitize before coming to work.

With children, they often will be living with the employee, although if the parents are separated, this may depend on custody arrangements. For example, if the child became ill while staying with one parent, then it may not be safe for the child to transfer to the other parent in accordance with the established custody schedule. If the child is living with the other parent, then no family status-related need would arise for the other parent. The same analysis would apply if the employee's spouse has COVID-19, if they are living together. But in the case of an employee's parent, most often the parent would not be living with the employee. If the parent has COVID-19 and is not living with the employee, then the employee very likely is not even permitted to have physical contact with the parent, let alone attend to their care. So while the employee may be rightly concerned about the health of a parent with COVID-19, there likely would not be any family status-related needs for accommodation in these circumstances.

In the second scenario, we are all too well aware that social distancing measures have required children to be at home. As a result, the usual child-care and school attendance arrangements that parents have made in order to allow them to go to work are no longer operative. So in these circumstances, a parent or caregiver would need to be at the home in order to look after young children. If an employee requests accommodation in such circumstances in order to be home with their children, then either under *Johnstone* or *Misetich*, an appropriate consideration is what alternative arrangements are available. This would include whether any spouse of the employee is at home to provide care (which many are in the current circumstances), or whether someone else is living in the home who could provide care while the employee is at work, such as an older sibling, a parent or other relative.

With parents who do not have COVID-19 but who have been told to self-isolate due to the risk, an employee who is not living with their parent would not be able to provide direct care in any event. Even if the parent is living with the employee, it is hard to see a need for accommodation if the parent is not infected.