The Evolving Area of Accommodation for Family Status: An Update

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The protection afforded to employees in regard to accommodation for family status is an uncertain area, with conflicting approaches being applied by different jurisdictions. Employers are often left wondering what steps they should take in order to address accommodation requests of employees based on family status, and whether they are required to take any steps to accommodate employees based on family status when no request for accommodation has been made of them.

The case law in this area has recently developed to broaden the scope of the protection afforded to employees under both federal and provincial legislation, and to give some clarity to the approaches taken in the two jurisdictions with what appears to now be a common approach.

This paper is intended to clarify the current law as to obligations regarding accommodation on the basis of family status by reviewing the following: the relevant provisions in the legislation (both federal and Ontario); the applicable tests to be applied (pre-mid 2012 and today); the factors the courts have taken into consideration in recent case law; and, what employers should be aware of.

I. The Legislation

(a) Federal: *The Canadian Human Rights Act*

The *Canadian Human Rights Act* ["*CHRA*"] provides a general prohibition regarding discrimination on the basis of family status in section 3(1).[1] However, family status is not defined within the *CHRA*.

The Federal Court recently reviewed the interpretation of "family status" under s. 3(1) of the *CHRA* in the case of *Attorney General of Canada v. Johnstone*,[2] ["*Johnstone*"], and without providing an exhaustive list, ultimately held that the *CHRA* should be given a "fair, large, and liberal construction" in order to interpret the *CHRA* so as to ensure the attainment of its objectives.[3]

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[1] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended.
[2] *Attorney General of Canada v. Johnstone*, 2013 FC 113 ["*Johnstone*"]
[3] *Ibid*, at para. 109.

It is important to note, when considering complaints under s. 3(1) of the *CHRA*, that "failure to accommodate" is not a free-standing right of an employee under the *CHRA*. Rather, the Court or Tribunal must consider whether a 'rule' established by an employer results in an employee receiving adverse differential treatment based on family status.[4]

It is only once an applicant establishes that a rule is *prima facie* discriminatory, that the onus shifts to the respondent to prove on a balance of probabilities that the discriminatory rule has a reasonable and *bona fide* justification. In order to establish this justification, a respondent must show the following:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
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> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. [sic][5]

(b) Ontario: *Human Rights Code*

The Ontario *Human Rights Code* (the "*Code*") defines "family status" in s. 10 as "the status of being a parent and child relationship."[6] The Supreme Court of Canada has held, in *B. v. Ontario (Human Rights Commission)*[7], that: "'family status' in the *Code* is broad enough to encompass circumstances where discrimination results from the particular identity of the complainant's spouse or family member."[8]

To assist in providing guidance in respect to the parameters of the protection afforded to employees in respect to "family status" under the *Code*, below is a list of some of determinations that have been made by the courts and tribunals to date:

(a) family status does not include an individual's family's financial status: *McMaster v. Ubisoft Toronto*, 2011 HRTO 627 at para. 13;

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[4] *Ibid*, at para. 115.
[5] *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 ["*Campbell River*"] at para. 43.
[6] *Human Rights Code*, s. 10.
[7] *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403.
[8] *Ibid.*

(b) the definition of family status is not confined to the fact of being a parent, but rather includes being in a parent-child relationship with a particular person: *B. v. Ontario (Human Rights Commission)* [2002] 3 S.C.R. 403 (S.C.C.);

(c) family status includes the relationship of step-parent and child: *Metcalfe v. Papa Joe's Pizza and Chicken Inc.* (2007), 59 C.C.E.L. (3d) 98;

(d) protection under s. 10 of the *Code* extends to families headed by same-sex spouses, a single gay or lesbian parent and foster relationships under the *Child and Family Services Act*: *Moffatt v. Kinark Child & Family Services* (1998), 35 C.J.R.R., D/205 (Ont. Bd. of Inquiry), obiter

(e) family status includes pregnancy: *Ward v. Godina* (October 2, 1994), No. 94-030 (Ont. Bd. of Inquiry); *Petterson v. Anderson* (1991), 15 C.H.R.R. d/1 (Ont. Bd. of inquiry); and,

(f) family status includes elder-care responsibilities: *Devaney v. ZRV Holdings Limited and Zeider Partnership Architects* 2012 HRTO 1590

II. What was the Applicable Test prior to August 2012?

(a) Ontario Approach:

The applicable test, applied in Ontario, prior to August 2012, was the test as set out in the British Columbia Court of Appeal case of *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*,[9] ["*Campbell River*"].

The case before the British Columbia Court of Appeal was an appeal brought by the Health Sciences Association of British Columbia (the "Union"), on behalf of one of its members, from a decision of an Arbitrator appointed under a collective agreement. In this case the Union member, Ms. Howard, was married with four children. Her third child, a boy who was thirteen years of age, had severe behavioural programs and required specific parental and professional attention.[10] Howard was originally employed as a casual transition house worker with the Respondent, non-profit society, and later became a part-time child and youth support worker.[11] Howard's hours were originally from 8:30 a.m. to 3:00 p.m. However, she was later advised that

[9] *Campbell River, supra* at 5.
[10] *Ibid,* at para. 7.
[11] *Ibid,* at para. 7.

her hours would be changing to 11:30 a.m. to 6:00 p.m.[12] Howard was very concerned about the change to her work hours because she needed to attend to the needs of her son after he finished school.[13] Howard provided a medical report from her son's doctor which stated that her son, "is a very high needs child with a major psychiatric disorder" and as such, "[h]is need for consistent parenting is best served by his mother, particularly after school."[14]

The Arbitrator considered the decision of the Canadian Human Rights Tribunal in *Brown*[15] (referred to above), however, declined to follow it, finding "that the words 'family status' refers to the status of being a parent per se, and not the innumerable (and yet important) circumstances that arise for all families in regard to their daycare needs."[16]

The Union appealed the Arbitrator's decision on the basis that he erred in not finding discrimination on the basis of family status, contrary to the *Code*.[17] The British Columbia Court of Appeal agreed with the arbitrator and declined to follow *Brown* on the basis that it "conflated the issues of *prima facie* discrimination and accommodation."[18] Justice Low, writing for the Court, stated that *Brown* seemed to hold that whenever there was a conflict between a job requirement and a family obligation, there is *prima facie* discrimination, which is an "overly broad definition of the scope of family status" that is "unworkable".[19] Instead, Justice Low stated that a contextual approach needed to be applied when applying a *prima facie* discrimination test, with each case turning on its own circumstances.[20] A *prima facie* case of discrimination would be made out only "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."[21] Justice Low continued to state in obiter, that "in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case."[22]

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[12] *Ibid*, at para. 9.
[13] *Ibid*, at para. 10.
[14] *Ibid*, at para. 14.
[15] *Ibid*, citing *Brown supra*.
[16] *Ibid*, at para. 19.
[17] *Ibid*, at para. 22.
[18] *Ibid*, at para. 35.
[19] *Ibid*, at para. 35.
[20] *Ibid*, at para. 39.
[21] *Ibid*, at para. 39.
[22] *Ibid*, at para. 39.

However, in this case, the British Columbia Court of Appeal held that there was a substantial parental obligation. Furthermore, that the change in Howard's hours of work was a serious interference with her discharging her parental obligations.[23] Accordingly, the Court found that the Arbitrator had erred in not finding a *prima facie* case of discrimination on the basis of family status.[24] The Court then continued to consider the employer's duty to accommodate Howard's parental obligations. In doing so, the court applied a three-step test for determining whether a *prima facie* discriminatory standard is a *bona fide* occupational requirement. In particular, the employer must establish the following, on the balance of probabilities:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[25]

The Court remitted the matter back to the Arbitrator to determine the issue of accommodation and, damages, if appropriate.[26]

(b) Federal Approach:

The applicable test was the test established by the Canadian Human Rights Tribunal in *Brown v. Canada (Department of National Revenue – Customs & Excise),*[27] ["*Brown*"]. The applicant in *Brown* claimed that she was discriminated against by her employer on two grounds: (1) in failing to accommodate her during a difficult pregnancy, and her resulting medical condition; and (2) in failing to accommodate her request for day shifts due to her inability to arrange for adequate daycare.[28]

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[23] *Ibid*, at para. 40.
[24] *Ibid*, at para. 40.
[25] *Ibid*, at para. 43.
[26] *Ibid*, at paras. 46-47.
[27] *Brown v. Canada (Department of National Revenue – Customs & Excise),* [1993] C.H.R.D. No. 7., ["*Brown*"]
[28] *Ibid*, at para. 4.

In respect to discrimination on the basis of family status, the Tribunal stated the following:

> …the evidence must demonstrate that family status includes the status of being a parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, the Complainant was unable to participate equally and fully in employment with her employer.[29]

It is therefore, only once a complainant establishes a *prima facie* case of discrimination that the burden then shifts to the employer to demonstrate that they accommodated the employee, in order to "afford her full and equal opportunity to participate in the employment or at the very least that it did everything it could to afford her this right short of undue hardship."[30]

In *Brown*, the Tribunal ultimately found that the Complainant was discriminated against on both grounds alleged.[31]

This approach was adopted in 1) the first iteration of the *Hoyt* decision of the Federal Court in 2006[32]; and, 2) the Johnstone decision by the Federal Court in 2007[33]. In these cases, it expressly considered and rejected the *Campbell River* test as too narrow. It instead established the threshold test as being whether 'the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way".[34]

III. The New Direction: Recent Case Law

Whether a Complainant is claiming discrimination based on family status under the federal or provincial legislation, the factors the Courts and Tribunals consider remain the same. A contextual analysis needs to be undertaken of the circumstances surrounding each request for accommodation.

Below is a summary of three important recent decisions which may have brought a new era of clarity to the uncertain landscape of the law in relation to the prohibition on discrimination on the basis of the family status.

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[29] *Ibid*, at para. 80.
[30] *Ibid*, at para. 81.
[31] *Ibid*, at para. 110.
[32] *Hoyt v. Canadian National Railway*, 2006 CHRT 33. ("*Hoyt*")
[33] *Johnstone v. Canada (Attorney General)* [2007] F.C.J. No. 43 ["*Johnstone 2007*"][Note: first judicial review application which remitted the matter back to the Commission for redetermination].
[34] *Johnstone*, *supra* at para. 128.

(a) *Devaney v. ZRV Holdings Limited and Zeider Partnership Architects* ["*Devaney*"][35]:

In *Devaney*, the Ontario Human Rights Tribunal in a decision released in August 2012, considered the issue of whether the need to care for an elderly parent could be a protected ground under the *Human Rights Code* on the basis of the protection granted to "family status". It answered this question in the affirmative.

Devaney was employed as an architect with an architecture firm for 27 years.[36] Devaney had significant elderly care responsibilities at home, caring for his mother who was 73 years old at the time, with osteoarthritis and osteoporosis. As such, he did not regularly attend at the office between 8:30 a.m. - 5 p.m., as was insisted on by the employer; however, he worked from home, attended at worksites, and regularly communicated with workers. On January 9, 2009, after various warning letters to the employee, the employee was terminated for cause due to his "persistent failure to regularly attend the office."[37]

Devaney brought a claim to the Ontario Human Rights Tribunal alleging discrimination by his employer based on family status, contrary to the provisions of the *Human Rights Code*, for their failure to accommodate his need for a flexible work schedule in order to care for his elderly mother.[38]

The Tribunal heard evidence that Devaney was the principal-in-charge on the Trump International Hotel and Tower in Toronto from 2005 to 2008 and the senior partner in charge of that site knew about his elderly care needs and was comfortable allowing him to have a flexible schedule. It was not until 2007, that other senior partners took issue with the employee's absences from the office and insisted that he be present in the office daily from 8:30 - 5:00 p.m. Despite Devaney not regularly attending the office, the Tribunal heard evidence that he worked from home, took calls for work and meetings in the evenings, and was regularly accessible for the needs of the project.

The Tribunal carefully reviewed the health of Devaney's mother and what other arrangements were available to Devaney for her care. Devaney lived with his mother, and was her primary caregiver. He had a brother who assisted when he could; however, he was not available to assist in the mornings or during the days. Evidence was led that Devaney's mother

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[35] *Devaney v. ZRV Holdings Limited and Zeider Partnership Architects* 2012 HRTO 1590.
[36] *Ibid*, at para. 10.
[37] *Ibid*, at para. 3.
[38] *Ibid*, at para. 1.

wanted to keep living in her home and was very determined to do so. The Tribunal considered the mother's wishes and noted that prior to Devaney's mother's further injury in mid-October 2008, which rendered her entirely incapacitated, it would "not be reasonable to conclude that [the employee] could have simply admitted his mother to a nursing home against her wishes."[39] Evidence was led that after the mid-October 2008, Devaney hired outside care to assist in the home in the evenings. The Tribunal noted that it was not clear as to why Devaney was not able to hire outside assistance prior to mid-October 2008. The Tribunal accepted Devaney's evidence that his mother's needs "were unpredictable and subject to change"; however, the Tribunal was not satisfied that the employee could not have obtained assistance with, at least, some of "the more routine aspects of his mother's care."[40]

Nonetheless, the Tribunal found that a *prima facie* case of discrimination had been made out on the facts. The Tribunal noted that "it is not necessary for the applicant to prove that all of the absences that were counted against him by the respondents were necessary as a result of his eldercare responsibilities", in order to establish a *prima facie* case.[41] Instead, the Tribunal was satisfied that there were a number of absences where Devaney was required to be away from the office due to eldercare responsibilities, which were referred to in the various warning letters given to the employee about his attendance in the office. Accordingly, the onus then shifted to the employer to establish that their attendance requirements were reasonable and furthermore, that the employee's elderly care needs could not have been accommodated without undue hardship on the employer.[42]

Of note is the fact that the Tribunal i) did not require a 'serious interference with a substantial family duty or obligation'; and, ii) it found that even though *Devaney* never made a formal request for accommodation, that fact did not alleviate the employer's obligation to accommodate. The employer had failed to make "meaningful inquiries about the needs to determine whether or not a duty to accommodate exists".[43] In addition, the employer had failed to establish that accommodating the employee would have resulted in undue hardship. There

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[39] *Ibid*, at para. 135.
[40] *Ibid*, at para. 139.
[41] *Ibid*, at para. 150.
[42] *Ibid*, at para. 156.
[43] *Ibid*, at para. 172.

was no evidence before the Tribunal that the Devaney's absences created any actual problems in regard to his assigned projects, aside from a possible negative effect on employee morale.

The Tribunal found that the employer had discriminated against Devaney based upon family status and awarded the employee $15,000.00 for injury to dignity, feelings and self-respect.[44]

(b) *Attorney General Canada v. Johnstone and Canadian Human Rights Commission*[45],[*"Johnstone"*]:

In *Johnstone* released January 31, 2013, the Federal Court considered the second application for judicial review in this case, this one of the Canadian Human Rights Tribunal decision of August 6, 2010, allowing Johnstone's complaint of discrimination by her employer on the basis of family status.[46]

In her complaint, Johnstone alleged that she was discriminated against by her employer, the Canadian Border Services Agency ["CBSA"], on the basis of family status, specifically due to her parental childcare obligations.[47] Johnstone had been employed as a border services officer and, in that role, worked rotating shifts. However, in order to allow Johnstone to arrange childcare for her young children, she requested full-time employment which would afford her fixed day shifts.[48] The Tribunal ultimately found that Johnstone had proven a *prima facie* case of discrimination on the basis of family status and furthermore, that CBSA failed to prove that accommodating Johnstone's request would create undue hardship.[49] However, the *Attorney General Canada* applied for judicial review on the following issues: (a) whether "family status" includes parental childcare obligations; (b) that the Tribunal applied an incorrect test for finding *prima facie* discrimination based on family status; and, (c) contested the remedial orders of the Tribunal.[50]

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[44] *Ibid*, at para. 226.
[45] *Johnstone*, *supra* at para. 1.
[46] *Ibid*, at para. 1.
[47] *Ibid*, at para. 2.
[48] *Ibid*, at para. 3.
[49] *Ibid*, at para. 4.
[50] *Ibid*, at para. 5.

The Underlying Tribunal Decision:

The analysis applied in family status cases, is a contextual analysis, taking into consideration the particular circumstances of the Complainant. Accordingly, some of the important facts before the Tribunal are briefly summarized below:

- Border Service Officers at Pearson work rotating and variable shifts under the Variable Shift Scheduling Agreement ["VSSA"];
- Johnstone gave birth to her first child in January 2003, and took a year of maternity leave. In 2005, Johnstone's second child was born;
- Johnstone was the primary parent caring for both her children and she could not arrange childcare which would allow her to return to full-time work at CBSA with shift work;
- Johnstone's husband also worked on a rotating shift schedule in the position of Customs Superintendent at the Pearson Passenger Operations District. However, as a supervisor, Johnstone's husband's shift hours were more onerous than her own; and
- Johnstone's husband was not able to fulfill family childcare obligations, when Johnstone was at work, on a reliable basis.[51]

The Tribunal found that "the freedom to choose to become a parent is so vital that it should not be constrained by the fear of discriminatory consequences. As a society, Canada should recognize this fundamental freedom and support that choice wherever possible."[52] As to what this meant for employers, in the eyes of the Tribunal, it meant "assessing situations…on an individual basis and working together … to create a workable solution that balances …parental obligations with ... work opportunities, short of undue hardship."[53]

In considering the proper test to be applied, the Tribunal considered the higher threshold test set out by Health Sciences Association of *B.C. v. Campbell River and North Island Transition Society* ["*Campbell River*"][54], and noted that it had been rejected in the case of *Hoyt*.[55]

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[51] *Ibid*, at paras. 19-24,
[52] *Ibid*, at para. 62.
[53] *Ibid*, at para. 62.
[54] *Ibid*, at para. 63, citing *Campbell River, supra.*
[55] *Ibid*, at para. 63, citing *Hoyt v. Canadian National Railway*, [2006] C.H.R.D. No. 33

Accordingly, the Tribunal found that "an individual should not have to tolerate some discrimination before being afforded the protection of the [*CHRA*]."[56]

Importantly, the Tribunal found that while the CBSA accommodated individuals on the basis of medical and religious reasons, they refused to accommodate Johnstone on the basis of family status. The Tribunal found that CBSA's treatment of Johnstone adversely differentiated against her on the basis of family status, which affected her employment opportunities, including, promotions, training, transfer, and benefits.[57]

The CBSA's position was that requests based on responsibilities surrounding childcare issues were the result of a "worker's personal choice" and as such, the employer should not have to bear responsibility for those choices."[58]

The Tribunal then proceeded to look at whether there was a *bona fide* occupational requirement which exempt the CBSA from accommodating Johnstone. However, the Tribunal found that no *bona fide* occupational requirement was made out by the CBSA, nor had they established that accommodating Johnstone would create undue hardship.[59]

Johnstone was found by the Tribunal to have been discriminated against on the basis of family status contrary to the *CHRA*, and as such, Johnstone was awarded $15,000.00 in general damages for pain and suffering and $20,000.00 for special compensation.[60]

Federal Court Decision on Judicial Review:

On judicial review, the Federal Court considered the onus placed on Johnstone to establish discrimination has occurred contrary to *CHRA* and found that the proper test of what constitutes a *prima facie* case of discrimination in human rights cases was set out by the Supreme Court of Canada in *O'Malley v. Simpson Sears,*[61] as follows:

> A *prima facie* case is 'one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent'. [62]

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[56] *Ibid*, at para. 64.
[57] *Ibid*, at para. 65.
[58] *Ibid*, at para. 68.
[59] *Ibid*, at para. 75.
[60] *Ibid*, at para. 79.
[61] *Ibid*, at para. 96, citing *O'Malley v. Simpson Sears* [1985] 2 S.C.R. 536 at para. 28 ["*O'Malley*"].
[62] *Ibid* ,at para. 114, citing *O'Malley, supra* at par. 28.

Accordingly, Johnstone was required to demonstrate that CBSA's conduct, policies or practices had a differential impact on her due to a personal characteristic recognized as being a prohibited ground under the *CHRA*, in this case, family status.[63]

On the question of whether "family status" in the *CHRA* includes regular childcare obligations, the Federal Court found in the affirmative. The court relied on the case of *Brown*, wherein it was held that a purposive interpretation of "family status" in the *CHRA* is recognition "of a parent's right and duty to strike that balance couple with a clear duty on the part of an employer to facilitate and accommodate that balance….To consider a lesser approach to the problems facing the modern family within the employment environment [would be] to render meaningless the concept of 'family status' as a ground of discrimination."[64]

Furthermore, the Federal Court cited the Tribunal's decision in *B. v. Ontario (Human Rights Commission)*, affirmed by the Supreme Court of Canada, wherein the Tribunal referred to the judicial definition of family status being, "…practices or attitudes which have the effect of limiting the conditions of employment of, or employment opportunities available to, employees on the basis of a characteristic relating to their family."[65]

The Federal Court then was required to determine what threshold of differential treatment was required, in order for Johnstone to establish a *prima facie* case of discrimination. The Federal Court held that, "[i]t is when an employment rule or condition interferes with an employee's ability to meet a substantial parental obligation in any realistic way that the case for *prima facie* discrimination based on family status is made out." [66] The Federal Court rejected a higher threshold test of "serious interference" finding that it would lessen the protection against discrimination on the basis of family status, as compared to other grounds.[67] Accordingly, the Federal Court, simply stated the question to be asked in family status cases was "whether the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way."[68] It did not matter that the employee was the one seeking the change owing to a new circumstance, as opposed to the employer imposing changes on the employee.

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[63] *Ibid*, at para. 106.
[64] *Ibid*, at para. 105, citing *Brown*, *supra* at paras. 17-18.
[65] *Ibid*, at para. 106, citing *B. v. Ontario (Human Rights Commission)*, affirmed [2002] 3 S.C.R. 403.
[66] *Ibid*, at para. 125.
[67] *Ibid*, at paras. 123 and 128.
[68] *Ibid*, at para. 128.

Findings of Federal Court on Judicial Review:

The Federal Court ultimately made the following findings:

(a) the Tribunal reasonably found that parental obligations came within the scope and meaning of "family status" in the *CHRA*;

(b) the Tribunal applied the proper legal test for its finding of *prima facie* discrimination on the basis of family status; and

(c) the finding that Johnstone was discriminated against was reasonable, based upon the evidence before the Tribunal.[69]

Accordingly, the Federal Court dismissed the application for judicial review, with slight variation to the remedial award on the basis that it was outside the Tribunal's jurisdiction to order Johnstone be consulted in the development of the CBSA's written policy. In addition, the Federal Court referred the matter back to the Tribunal to reconsider a portion of wages and benefits awarded to the Johnstone over a period of time when she had opted for an unpaid leave.[70]

(c) *Canadian National Railway v. Seeley* ["*Seeley*"][71]:

The *Seeley* decision was released the day following the *Johnston* decision. In this case, the Federal Court considered an application for judicial review of the Canadian Human Rights Tribunal ["Tribunal]'s decision of September 29, 2010, wherein the Tribunal allowed Seeley's complaint of discrimination based on family status by her employer, the Canadian National Railway ["CN"].[72]

The Underlying Tribunal Decision:

Seeley alleged that the CN discriminated against her by failing to accommodate her parental childcare obligations and instead, terminated her.[73] Seeley was a freight train conducter who was recalled by the CN following a layoff, and ordered to report to a temporary assignment

[69] *Ibid*, at para. 6.
[70] *Ibid*, at para. 168.
[71] *Canadian National Railway v. Seeley*, 2013 FC 117.
[72] *Ibid*, at para. 1.
[73] *Ibid*, at para. 2.

to cover a shortage of workers in Vancouver, British Columbia.[74] However, Seeley's home terminal was Jasper, Alberta. Accordingly, the Complainant advised that she could not work in Vancouver, due to childcare obligations.[75] The CN temporarily granted her an extension of time to report to the new assignment; however, ultimately terminated her for failing to report to the new assignment.

The Tribunal found that the Complainant had proven *prima facie* discrimination on the basis of family status and furthermore, that the Respondent had failed to meet its duty to accommodate Seeley.[76]

Federal Court Decision on Judicial Review:

The issues before the Federal Court on judicial review included the following:

(a) did the Tribunal err in finding *prima facie* discrimination on the evidence before it;

(b) did the Tribunal err in finding a failure to accommodate; and

(c) did the Tribunal err in its order for remedies.[77]

The Federal Court found that the proper test to be applied is the *prima facie* test, as set out in O'*Malley* (referred to above).[78] Applying that test, the Federal Court found that there was enough evidence before the Tribunal to establish a *prima facie* case of discrimination based on family status, and that its finding was reasonable.[79] Seeley was the primary caregiver for two young children, wherein her husband worked full time and, as such, was the family breadwinner. Seeley had looked into childcare arrangements in her area; however, the evidence before the Tribunal had demonstrated that she would have difficulty in fulfilling childcare responsibilities in reporting for an indefinite recall assignment in Vancouver.[80] In addition, it was noted that Seeley "did not have a realistic opportunity to respond to what CN by its own evidence and submissions, was a major shortage recall well outside the ordinary course of events."[81] Accordingly, the CN's failure to respond to Seeley was found to have "denied her the opportunity to realistically explore and consider options for childcare in responding to the

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[74] *Ibid*, at para. 3.
[75] *Ibid*, at para. 3.
[76] *Ibid*, at para. 4.
[77] Ibid, at para. 30.
[78] Ibid at para. 46.
[79] *Ibid*, at para. 90 and 94.
[80] *Ibid*, at para. 90.
[81] *Ibid*, at para. 92.

shortage or accessing accommodation if available under CN policy or the collective agreement."[82]

In regard to the question of whether the Tribunal erred in its determination that the CN failed to accommodate Seeley, the CN argued that the effect of accommodating Seeley would be undue hardship due to the fact that Seeley would be granted "super seniority based on her family status."[83] The Federal Court noted that the issue of super seniority would bring forward an "issue of interference with rights of other employees" under the collective agreement.[84] However, the CN did not respond to Seeley's request by relying upon the terms of the collective agreement, nor did it raise this issue with Seeley's union, prior to her termination. Accordingly, the Federal Court held that it was not open for the CN to raise this as an issue, after the fact.[85] The Federal Court thus determined that the Tribunal was reasonable in its finding that the CN had failed to meet its duty to accommodate.[86]

Lastly, the Tribunal had awarded compensation for a discriminatory practice on the basis that CN's conduct was reckless. CN submitted to the Federal Court that the Tribunal erred in this respect by failing to take into consideration the uncertain state of the law at the time in regard to family. However, the Federal Court found the Tribunal's determination of recklessness on the part of CN was reasonable given that CN had an accommodation policy in place which included family status, but ignored their responsibilities and accommodation guidelines under their own policy.[87]

Accordingly, on the basis of the above, the application for judicial review was dismissed.[88]

IV. What is the Applicable Test Today?

The recent cases of *Johnstone, Seeley* and *Devaney* mark a strong shift from the stringent tests which have been applied by both Courts and Tribunals previously, in regard to discrimination based on family status, as well as a merging of federal and Ontario approaches.

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[82] *Ibid*, at para. 92.
[83] *Ibid*, at para. 108.
[84] *Ibid*, at para. 108-109.
[85] *Ibid*, at para. 109.
[86] *Ibid*, at para. 109.
[87] *Ibid*, at paras. 114-115.
[88] *Ibid*, at para. 117.

Both federally and provincially, in Ontario, the courts are moving toward a broader interpretation of "family status" which has a much lower threshold for employees to establish a *prima facie* case of discrimination if *Devaney* is the shape of the future. A "serious interference" may no longer be required in order to make out discrimination based on family status in the Ontario arena. Nor is discrimination on the basis of family status restricted to factual circumstances where an employer makes a unilateral change to an employment rule. Instead, the courts and tribunals are placing more importance on parental/family obligations (both for child-care and elderly-care), recognizing its societal importance. Accordingly, findings of discrimination based on family status seem to be no longer restricted to the most extraordinary circumstances. That said, discrimination based on family status will still not be made out on factual circumstances where employees make choices based on their preferences. Importantly, while the employer must try to accommodate the employee, the employee must also make attempts to accommodate the employer's policies. The case law often describes the practice of determining an accommodation solution as being a multi-party inquiry, in order to determine what the best practice is in the context of each request for accommodation. A careful balancing act is attempting to be applied by the courts. A middle road approach is being following in the current case law, as stated in *Johnstone* as being a question of whether the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way. Accordingly, the interference must be one of substance, but not to the extent of a "serious interference".

V. What Employers Need to Know

All the above-noted cases, and *Devaney* in particular, underscore the need for employers to make "meaningful inquiries" to determine whether or not a duty of accommodation exists once they become aware of possible circumstances which may lead to such a duty. The Tribunal in *Devaney* clearly demonstrates that it will not be sufficient for an employer to simply state that the employee did not make a formal request for accommodation in attempts to defend against family status claims. As noted by the Supreme Court of Canada in *Central Okanagan School*

District No. 23 v. Renaud,[89] "[t]he search for accommodation is a multi-party inquiry" and that there is "a duty on the complainant to assist in securing an appropriate accommodation."[90] It is evident in the case law that accommodation requires individualized assessments, and the recognition by employers, that there may be different ways to perform a job.[91]

Furthermore, the *CHRA* cases of *Johnstone* and *Seeley*, should be seen as warnings to employers that they cannot apply accommodation policies solely to employees on the basis of medical and religious reasons, and then disregard accommodation on the basis of family status, as such conduct, may amount to differential treatment contrary to the provisions of the *CHRA*.

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[89] *Ibid*, at para. 173, citing *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 ["*Central Okanagan*"], at para. 43.

[90] *Ibid*, at para. 173, citing *Central Okanagan*, *supra* at para. 43.

[91] *Ibid*, at para. 173, citing *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362 at paras. 36-40.