The Final (?) Word on Family Status and the Duty to Accommodate

May 1, 2015

Nancy Shapiro, Partner
Koskie Minsky LLP

Gratitude is expressed to Fese Elango, Student at Law, for her assistance in the research for this paper.

Thank you also to Christine Westlake who co-authored an earlier version of this paper which was presented at the OBA in June 2013.

TABLE OF CONTENTS

The Final (?) Word on Family Status and the Duty to Accommodate

By Nancy Shapiro, Koskie Minsky LLP

The protection afforded to employees in regard to accommodation for family status remains a dynamic and evolving legal arena. We were provided with somewhat more certainty as to the evolutionary direction with the decisions of the Federal Court of Appeal in May 2014 in *Canada (Attorney General) v. Johnstone*[1] and *Canadian National Railway Company v. Seeley*[2]. The obligation to accommodate based on family status itself of course is not new. Query perhaps whether we are witnessing the societal evolution of simply the freedom to make that request. In this new world of requests for, and obligations with respect to accommodation based on family status, and a clear broadening of the scope of the protection afforded to employees under both federal and provincial legislation, we can expect to see more the need to consider accommodation requests in this area with increased frequency. It is an area all employment and labour lawyers as well as human resources professionals need to be attuned to.

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).[3] However, family status is not defined within the *CHRA*.

The Federal Court in *Johnstone* reviewed the interpretation of "family status" under s. 3(1) of the *CHRA* and upheld the decision 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.[4]

---

[1] *Canada (Attorney General) v. Johnstone*, 2014 FCA 110["*Johnstone*"].
[2] *Canadian National Railway v. Seeley* 2014 FCA 111 ["*Seeley*"].
[3] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended.
[4] *Canada (Attorney General) v. Johnstone* 2013 FC 113 ["*Johnstone 2013*"] at paras. 61-66.

The Court in *Johnstone* concluded that:

> "…the ground of family status in the *Canadian Human Rights Act* includes parental obligations which engage the parent's legal responsibility for the child, such as childcare obligations, as opposed to personal choices. Defining the scope of the prohibited ground in terms of the parent's legal responsibility (i) ensures that the protection offered by the legislation addresses immutable (or constructively immutable) characteristics of the family relationship captured under the concept of family status, (ii) allows the right to be defined in terms of clearly understandable legal concepts, and (c) *(sic)* places the ground of family status in the same category as other enumerated grounds of discrimination such as sex, colour, disability, etc."[5]

We are left with a clear statement that family status includes the status of being a parent and includes parental responsibilities such as child care.

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.

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;
>
> (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. [sic][6]

---

[5] *Ibid*, at para. 74.

[6] *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 ["*Campbell River*"] at para. 43.

(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."[7] The Supreme Court of Canada has held, in *B. v. Ontario (Human Rights Commission)*, 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]

Over the years there have been some considerations of what does and does not fall within the scope of "family status" under the *Code*, in particular:

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

(b) 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) family status protection 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.

---

[7] *Human Rights Code*, s. 10.
[8] *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403.

II. What was the Applicable Test Prior to the Johnstone - Seeley Decisions?

(a) Ontario Approach

The Federal Court of Appeal upheld the decisions of the Federal Court on the judicial review applications of *Johnstone* and *Seeley*, which were released in January 2013. Prior to that time, the test applied was that established 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 *Campbell River* case was decided by the British Columbia Court of Appeal; it 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 problems and required specific parental and professional attention. Howard was originally employed as a casual transition house worker with the Respondent, a non-profit society, and later became a part-time child and youth support worker. Howard's hours were originally from 8:30 a.m. to 3:00 p.m. However, she was later advised that her hours would be changing to 11:30 a.m. to 6:00 p.m. 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. 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."[10]

The Arbitrator concluded that the words 'family status' refer 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."[11]

---

[9] *Campbell River, supra* note 6.
[10] *Ibid*, at para. 14.
[11] *Ibid*, at para. 19.

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*. The British Columbia Court of Appeal agreed with the arbitrator on the basis that it "conflated the issues of *prima facie* discrimination and accommodation."[12] Justice Low, writing for the Court, commented that to suggest there was *prima facie* discrimination whenever there was a conflict between a job requirement and a family obligation, is an "overly broad definition of the scope of family status" that is "unworkable".[13] 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.[14] 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."[15] 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."[16]

However, in this case, the British Columbia Court of Appeal held that there was a substantial parental obligation. Furthermore, it was held that the change in Howard's hours of work was a serious interference with her discharging her parental obligations.[17] Accordingly, the Court found that the Arbitrator had erred in not finding a *prima facie* case of discrimination on the basis of family status.[18] 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:

---

[12] *Ibid*, at para. 35.
[13] *Ibid*, at para. 35.
[14] *Ibid*, at para. 39.
[15] *Ibid*, at para. 39.
[16] *Ibid*, at para. 39.
[17] *Ibid*, at para. 40.
[18] *Ibid*, at para. 40.

> (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.[19]

The Court remitted the matter back to the Arbitrator to determine the issue of accommodation and damages, if appropriate.[20]

(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)*[21] ["*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.

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."[22]

---

[19] *Ibid*, at para. 43.
[20] *Ibid*, at paras. 46-47.
[21] *Brown v. Canada (Department of National Revenue – Customs & Excise)*, [1993] C.H.R.D. No. 7. ["*Brown*"].
[22] *Ibid*, at para. 80.

It is therefore, only once a complainant establishes a *prima facie* case of discrimination that the burden 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."[23]

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

This approach was adopted in 1) the first iteration of the *Hoyt* decision of the Federal Court in 2006[24]; and, 2) the *Johnstone* decision by the Federal Court in 2007[25]. 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".[26]

III. The *Johnstone* and *Seeley* Cases

(a) Attorney General Canada v. Johnstone and Canadian Human Rights Commission ["Johnstone"]

The Federal Court of Appeal decision in *Johnstone* was released May 2, 2014, just one year ago. It upheld the judicial review decision which had been released January 31, 2013, a review of the Canadian Human Rights Tribunal decision of August 6, 2010[27], that had had the impact of substantially clarifying the area of family status accommodation. It allowed Johnstone's complaint of discrimination by her employer on the basis of family status.

The Underlying Tribunal Decision

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

---

[23] *Ibid*, at para. 81.
[24] *Hoyt v. Canadian National Railway*, 2006 CHRT 33. ("*Hoyt*").
[25] *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].
[26] *Johnstone 2007*, *supra* at para. 128.
[27] *Johnstone*, *supra* note 1.

to her parental childcare obligations. 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.

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.[28] 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.

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.[29]

---

[28] *Ibid*, at paras 23-24.
[29] *Ibid*, at paras.5-9

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."[30] 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."[31]

In considering the proper test to be applied, the Tribunal considered the higher threshold test set out by *Campbell River*[32], and noted that it had been rejected in the case of *Hoyt*.[33] Accordingly, the Tribunal found that "an individual should not have to tolerate some discrimination before being afforded the protection of the [*CHRA*]."[34]

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.[35]

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."[36]

---

[30] *Ibid*, at para. 21.
[31] *Ibid*, at para. 21.
[32] *Ibid* at para 22, citing, *Campbell River supra* note 6.
[33] *Johnstone 2013*, *supra* note 4, at para. 63, citing *Hoyt*, *supra* note 24.
[34] *Johnstone*, *supra* note 1 at para. 22.
[35] *Ibid*, at para. 23.
[36] *Johnstone 2013*, *supra* note 4 at para. 68.

The Tribunal then proceeded to look at whether there was a *bona fide* occupational requirement which exempted 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.[37]

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.[38]

Federal Court Decision on Judicial Review[39]

On judicial review, the Federal Court considered whether the onus placed on Johnstone to establish discrimination had 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*[40] 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".[41]

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.[42]

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 coupled with a clear duty on the part of an employer to facilitate and accommodate that balance….To consider a lesser approach to the

---

[37] *Johnstone, supra* note 1 at para. 24.
[38] *Johnstone 2013*, *supra* note 4 at para. 79.
[39] *Ibid.*
[40] *Ibid*, at para. 96, citing *O'Malley v. Simpson Sears* [1985] 2 S.C.R. 536 at para. 28 ["*O'Malley*"].
[41] *Ibid* ,at para. 114, citing *O'Malley, supra* at par. 28.
[42] *Johnstone, supra* note 1, at para.76.

problems facing the modern family within the employment environment [would be] to render meaningless the concept of 'family status' as a ground of discrimination."[43]

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."[44]

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."[45] 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.[46] 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."[47] 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.

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,

---

[43] *Johnstone 2013*, *supra* note 4, at para. 105, citing *Brown*, *supra* at paras. 17-18.
[44] *Ibid*, at para. 106, citing *B. v. Ontario (Human Rights Commission),* affirmed [2002] 3 S.C.R. 403.
[45] *Ibid*, at para. 125.
[46] *Ibid*, at paras. 123 and 128.
[47] *Ibid*, at para. 128.

(c) the finding that Johnstone was discriminated against was reasonable, based upon the evidence before the Tribunal.[48]

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 Johnstone over a period of time when she had opted for an unpaid leave.

The Federal Court of Appeal

The Federal Court of Appeal upheld the finding of discrimination and by and large dismissed the appeal.[49] The Court in concluding that family status includes childcare obligations immediately cautioned that the precise nature of childcare activities contemplated by the prohibited ground must be carefully considered and should have immutable or constructively immutable characteristics "that form an integral part of the legal relationship between a parent and a child. The childcare obligations comprising family status are those which "a parent cannot neglect without engaging his or her legal liability"[50]. The Court expressly noted that it would trivialize human rights to extend protection to personal choices such as participation of children in dance classes and sporting events.[51]

The Court supported the test for workplace discrimination on family status resulting from childcare obligations as being:

A) the employee must show a *prima facie* case of discrimination. To do so the employee must show:

1) that a child is under his or her care and supervision;

---

[48] *Ibid*, at para. 6.
[49] *Johnstone*, *supra* note 1. The appeal was allowed with respect to variance in the wording of two of the remedial remedies granted only.
[50] *Ibid*, at para. 70.
[51] *Ibid* at para. 69.

2) that the childcare obligation at issue engages the individual's legal responsibly for the child, as opposed to a personal choice;

3) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and;

4) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.[52]

B) the employer must show that the policy or practice is a *bona fide* occupational requirement and that those affected cannot be accommodated without undue hardship (as detailed under the *Meirorin* test).

The Court expressly refused to find that there was any need for there to have been a "change" in the workplace imposed by the employer in order to trigger the duty to accommodate, nor was "serious interference" the correct standard to impose.

(b) *Canadian National Railway v. Seeley* ["Seeley"]

The *Seeley* decision was released by the Federal Court of Appeal the same day as the *Johnstone* decision. It was an appeal from the application for judicial review decision released in January 2013, from the consideration 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"].

The Underlying Tribunal Decision

Seeley alleged that CN discriminated against her by failing to accommodate her parental childcare obligations and instead, terminated her. Seeley was a freight train conductor who was recalled by CN following a layoff, and ordered to report to a temporary assignment to cover a shortage of workers in Vancouver, British Columbia. However, Seeley's home terminal was

[52] *Ibid* at para. 93

Jasper, Alberta. Accordingly, the Complainant advised that she could not work in Vancouver due to childcare obligations. 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.

Federal Court Decision on Judicial Review

The Federal Court upheld the finding that there was an established *prima facie* case of discrimination based on family status.[53] 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.[54] In addition, it was noted that Seeley "did not have a realistic opportunity to respond to what CN by its own evidence and submissions, [states] was a major shortage recall well outside the ordinary course of events."[55] Accordingly, 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 shortage or accessing accommodation if available under CN policy or the collective agreement."[56] The Federal Court thus determined that the Tribunal was reasonable in its finding that CN had failed to meet its duty to accommodate.[57]

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

---

[53] *Canadian National Railway v. Seeley*, 2013 FC 117, at paras. 90 and 94.
[54] *Ibid*, at para. 90.
[55] *Ibid*, at para. 92.
[56] *Ibid*, at para. 92.
[57] *Ibid*, at para. 109.

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.[58]

Accordingly, on the basis of the above, the application for judicial review was dismissed.[59]

Decision by the Federal Court of Appeal

For the same reasons as in *Johnstone*, applying the same test, the Court dismissed the appeal.

IV. Family Status Cases Since *Johnstone* and *Seeley* (almost)

We will turn next to a review of the recent cases in the area, plus the decision of *Devaney* because it is a family status case which, while predating *Johnstone* and *Seeley*, relates to another area of family status accommodation and should not be overlooked.

(a) Child Care Responsibilities

(i) *Wing v. Niagara Falls Hydro Holding* Corporation[60]

This is a decision of the HRTO released October 2, 2014. The applicant, Janice Wing, held a job as a municipal councillor and also sat on a Board of Directors of the Niagara Falls Hydro Holding Corporation ("HOLDCO"). A resolution was later passed requiring directors to attend 3:30 p.m. meetings with the caveat that they may not miss two consecutive meetings. Ms. Wing complained that the scheduled HOLDCO Board meetings at 3:30 p.m. were discriminatory as they would interfere with her parental obligation to pick her daughter up from school.

---

[58] *Ibid*, at paras. 114-115.
[59] *Ibid*, at para. 117.
[60] *Wing v. Niagara Falls Hydro Holding Corporation* 2014 HRTO 1472 ["Wing"].

The HRTO following the decision in Johnstone held that Ms. Wing failed to prove discrimination on the basis of family status. The Tribunal critically noted that Ms. Wing had *chosen* not to find, or even consider, alternative ways of meeting her childcare obligations, such as enrolling her daughter in after school care. Moreover, she was not in an employment relationship with the Corporation, notwithstanding that she was paid an honorarium, and her sporadic attendance record for previous Board meetings drew scrutiny. It was concluded that her concerns about family status discrimination were deemed to be more speculative than actual and no *prima facie* case of discrimination had been established.

(ii) *Clark v. Bow Valley College*[61]

This decision of the Alberta Human Rights Tribunal released July 17, 2014, involved an employee requesting an extension of her return date from maternity leave, because she was unable to secure adequate childcare by her return to work date.

Clark had given birth prematurely and was notified by a colleague that she was required to return to work following one year from the birth of her child. Clark was unable to secure childcare to commence until the return date she had planned for based upon her expected delivery date one month later. She contacted her employer and advised them that she could not secure childcare until a date approximately one month later, and had no childcare alternatives. Bow Valley College denied her request to use her vacation days in lieu of returning early and instead offered her a one-week grace period following the early return date they had already proposed. When she did not report to work, they deemed it a resignation and a termination of her employment.

The Tribunal applied the *Johnstone* test and concluded the action of the employer amounted to discrimination on the basis of family status. Clark had proven a *prima facie* case of discrimination and had shown that she had undertaken reasonable efforts to secure childcare unsuccessfully. She had notified her employer of such difficulties and that no alternatives existed. Bow Valley College had a duty to accommodate her as required.

---

[61] *Clark v. Bow Valley College* 2014 AHRC 4.

The Tribunal's analysis was as follows:

> "i) Ms. Clark was clearly in a legal relationship with her baby and had a *bona fide* childcare problem thus satisfying a protected ground of family status;
>
> ii) the neutral rule of 'returning to work on January 3, then January 10th adversely impacted Ms. Clark; she was effectively told to deal with her childcare issues and subsequently terminated from her employment on the basis of abandonment; and,
>
> iii) the only reason for Ms. Clark's absence was her childcare problem, thus satisfying the relational factors or connection of the adverse impact to the protected ground.
>
> In light of the above, *prima facie* discrimination has been established on the ground of family status."[62]

Bow Valley failed to establish that it could not have accommodated a longer period of leave. The employee was awarded five months of lost wages (less than actually suffered) reduced owing to Clark's significant delay in starting her job search.)

(iii) *Partridge v. Botony Dental Corporation*[63] ["Partridge"]

Partridge was the first reported Superior Court decision to apply the 4 factor test in *Johnstone* to establish a *prima facie* case of family status discrimination in a wrongful dismissal case. *Partridge* held that an employer has a duty to reinstate an employee to the most recently held position upon their return to work following maternity or parental leave. Failure to comply may amount to discrimination on the basis of 'family status' under the Ontario *Human Rights Code*.

The plaintiff, Lee Partridge, was employed at a dental office as an office manager for over three years. As office manager she had standard hours of work of 9-5, Tuesday through Friday. Upon her return to work following maternity leave, she was advised the position of office manager was no longer available and that she would return as a dental hygienist. She was advised she would be required to work the fluctuating hours of a hygienist which would often

---

[62] Ibid par. 65.
[63] *Partridge v. Botony Dental Corporation* 2015 ONSC 343.

conflict with her childcare arrangements. Despite her objections, the employer did not relent and further advised that she would be assigned altered work hours which were known to conflict with her childcare obligations. When she complained, she was dismissed by her employer allegedly for cause.

The Court rejected that Partridge's communications constituted cause or that the other conduct complained of had occurred or would amount to cause. With respect to the family status discrimination, the Court held that the revised work schedule created significant hardship for the plaintiff in arranging childcare and meeting her legal obligations thereof. It found clear evidence of family status discrimination and rejected the employer's argument that the dismissal was for just cause. Accordingly, Partridge was entitled to damages for wrongful dismissal.

The Court then considered discrimination. It held that a *prima facie* case of discrimination had been established. Partridge was legally obligated to ensure that her children were adequately cared for while she was working. The last minute changes to the schedule as well as the working until 6 pm when she had no childcare was *prima facie* discrimination. The Court found that working the hours of 10:00 a.m. - 6:00 p.m. absent evidence as to why this was required could not be found to be a *bona fide* occupational requirement.[64] There was no evidence that her required hours and reinstatement into her position could not be accommodated without undue hardship. She was awarded $20,000 in respect of the infringement.

This case mixes many employment issues together and no doubt alleging and not proving cause coupled with the fact that there was no evidence as to why Partridge was told her position was not available when it was, coloured the Court's view of these matters considerably. The decision however deviates from the family status discrimination threshold in *Johnstone* and its application should be approached cautiously.

---

[64] Ibid par 92.

(iv) SMS Equipment Inc. v. Communications, Energy and Paperworkers Union, Local 708 ["SMS v. CEP"][65]

In a judicial review decision of the Alberta Court of Queen's Bench released March 10, 2015 we see a further adoption by a provincial court of the Federal standards established in *Johnstone* this time in Alberta.

Here an employee had alleged discrimination on the basis of family status based upon the employer's requirement that she work rotating night and day shifts, working 7 days one week followed by 7 nights the following week. The employer refused to accommodate the employee's request to work only days on the basis that she was a single mother of two children and encountered childcare difficulties at night. The employee had made the request for accommodation on her first night shift of work after being transferred into the role of welder (she was formerly employed as a general labourer also with rotating 14 day / 14 night shifts) in response to a job posting which included disclosure of the rotating night and day shifts.

The employee adduced evidence of the change of her personal circumstances such that she lacked family support. She also explained it was too expensive to both purchase childcare for nights and days and so economically she was forced to try to function without enough sleep.

The arbitrator had found the policy requiring employees to work these rotating shifts to be *prima facie* discriminatory and the duty to accommodate had not been complied with nor had the employer established undue hardship. The employer applied for judicial review.

The Court found that the arbitrator had made no error and found the decision to be both reasonable[66] and correct[67] in all respects."

[65] *SMS Equipment v. Communications, Energy and Paperworkers Union Local 707*, 2015 ABQB 162 (CanLII).
[66] *ibid at par. 68.*
[67] *ibid* at par. 71, 82, 84, 87 and 89.

(b) Elder Care Responsibilities

(i) *Devaney v. ZRV Holdings Limited and Zeider Partnership Architects* ["Devaney"][68]

The decision of the Ontario Human Rights Tribunal in *Devaney* was released in August 2012. It dealt with 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".

Devaney was employed as an architect with an architecture firm for 27 years. 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." 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.

The Tribunal heard evidence that Devaney was the principal-in-charge on the Trump International Hotel and Tower in Toronto from 2005 to 2008. 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 a.m. - 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.

---

[68] *Devaney v. ZRV Holdings Limited and Zeider Partnership Architects* 2012 HRTO 1590.

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 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."[69] 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."[70]

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.[71] 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.[72]

---

[69] *Ibid*, at para. 135.
[70] *Ibid*, at para. 139.
[71] *Ibid*, at para. 150.
[72] *Ibid*, at para. 156.

Of note is the fact that the Tribunal made this finding even though Devaney never made a formal request for accommodation. That 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".[73]

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.[74]

(ii) *Misetich v. Value Village Inc. et. al.*[75]

This case remains before the HRTO and is "one to watch". It may seek to challenge the *Johnstone* test for family status discrimination in relation to elder care responsibilities. The OHRC requested and was granted leave to intervene as a party to make oral submissions on the applicable legal test in cases involving family status obligations, and asserts the test set out in *Johnstone* is "unreasonable and unworkable" following an interim production order was made in which the adjudicator applied the *Johnstone* case as referred to in *Wing v. Niagara Hydro Holding Corporation*[76].

The Commission's intervention in *Misetich* has resulted in the respondent requesting an adjournment in order to address the issues raised by the OHRC. It is likely that the OHRC seeks to argue that the applicable legal test in *Johnstone* is distinguishable from that which should apply to elder care responsibilities or that the applicable legal test under Provincial legislation should be considered as *Johnstone* was a Federal case. The legal obligation to a child may not meet the same standard that applies to an elder. As such, this may afford the Tribunal more latitude to reconsider the efficacy of the *Johnstone* test in the broader context of family status.

---

[73] *Ibid*, at para. 172.
[74] *Ibid*, at para. 226.
[75] *Misetich v. Value Village Inc. et. al*. 2014 HRTO 1781.
[76] *Wing*, supra note 60.

V. Conclusion

The decisions in *Johnstone,* and *Seeley* were a merging of the federal and provincial approaches to determination of family status accommodation as well as a mark of a strong shift away from the stringent tests applied in the past which had required a "serious interference" with a "significant parental obligation". Discrimination on the basis of family status is no longer 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 required and it is clear that open and honest communication will be a cornerstone of family status accommodation as it is in the disability arena.

1580828v1