Compliance Briefing: How Far Must You Go to Accommodate Employees' Child Care Needs?



Note: This is an article from 2020, reflective upon the COVID-19 pandemic, but the principles and cases mentioned are still applicable for HR directors facing challenges regarding employee child care needs.

As coronavirus spreads, employees may request scheduling changes so they can care for their kids or elderly dependents. While unreasonably refusing to accommodate these needs can result in family status discrimination liability, you don't have to agree to every request. Legally, the question of whether denying an employee's family-based scheduling needs constitutes discrimination depends on where in Canada the case takes place. Here's a rundown of the 4 competing standards.

Discrimination Law, 101: The Prima Facie Case

Although you don't have to be a trial lawyer, knowing how human rights litigation works is a huge help in managing family status discrimination liability risks. The starting point is that employees have the burden of proof. Once the employee lays out the evidence, the employer typically asks the court to dismiss the case without a trial. To survive the motion to dismiss, the court must determine that the employee has made out what's called a "prima facie" (pronounced "PRIME a FAY see", Latin for "first view") case.

This is the moment of truth. If the court finds no prima facie case, it will dismiss the complaint right then and there; but if it comes to the opposite conclusion, the case goes to trial. That shifts the balance of negotiating power to the employer who now must face the risk of trial.

The 4 Different Tests of Family Status Discrimination

The tricky part is that across Canada, there are 4 different tests for making out a prima facie case of family status discrimination.

1. Pro-Employer *Campbell River* Standard (BC, SK, NS)

The oldest and most pro-employer standard arose from a 2004 BC case involving a social worker who complained that a shift change requiring her to work late afternoon hours directly interfered with her need to look after her behaviourally-challenged

son after school. The employer held to the schedule change and the social worker claimed family status discrimination. The employer moved to dismiss.

The employer's schedule demands clearly affected the social worker's family obligations, the BC Court of Appeal acknowledged. But just about all employment policies are bound to have that effect. So, the Court laid down a stricter test. To make out a prima facie case of family status discrimination, the employee must prove that:

- The employer imposed a change in the terms of employment; and
- The change resulted in "serious interference" with a "substantial" family obligation.

[*Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 (CanLII)].

The *Campbell River* standard is tough on employees. Consider the single parent fired for refusing to work overtime so she could care for her son. The BC Human Rights Tribunal found no prima facie case and tossed the complaint. Although working overtime disrupted her daycare arrangements, it wasn't "serious interference" with a "substantial family obligation." The employee's situation was no different from the "ordinary obligations of parents trying to juggle the demands of their employment" with their child care obligations [*Falardeau v. Ferguson Moving*, 2009 BCHRT 272 (CanLII)].

Courts in other provinces also apply the *Campbell River* standard, including:

- (*Palik v. Lloydminister Public School Div. No. 99*, 2006 CanLII 84480 (SK HRT)—not discrimination to fire employee for taking 2 days off without permission to attend her diabetic son's hockey tournament); and
- Nova Scotia (*S.U. v CUPE,* [2006] N.S.L.A.A. No. 15—not discrimination to not consider employee who can't relocate due to family obligations for promotion).

2. Pro-Employee *Johnstone* Test (FED)

Campbell River has been criticized as being too hard on employees and as requiring family status claims to meet higher standards than claims for other forms of discrimination, e.g., disability, religion, age, race, etc. Consequently, a rival standard has emerged that's much more friendly to employees. It was created by a federal court ruling that an employer committed family status discrimination by refusing to let an employee worked a fixed schedule so she could make childcare arrangements [*Johnstone v. Canada (Attorney-General),* [2007] F.C.J. No. 43, aff'd 2008 FCA 101]. Under the so-called *Johnstone* test, an employee must show 4 things to make out a prima facie case of family status discrimination:

1. A child is under his/her care and supervision;
2. A childcare obligation is more of a legal responsibility for the child than a personal choice;
3. Reasonable efforts were made to meet those childcare obligations via reasonable alternative solutions, but no such alternative solution is reasonably accessible; and
4. The policy interferes in a manner that's more than trivial or insubstantial with the fulfillment of a childcare obligation.

Bottom Line: *Johnstone* differs from *Campbell River* in 2 key ways:

- It covers all policies, not just *changes in* policies; and
- Employees need only show that the policy had an adverse effect *on them* to make

out a prima facie case.

3. Hybrid *SMS Equipment* Test (AB)

In 2012, Alberta established its own hybrid test. The case involved a mother of 2 small children who had to work at night and couldn't afford childcare during the day. The Alberta court said the test for family status discrimination should be the same as the test for other forms of discrimination where the employee need only show that:

- He/She has a characteristic protected from discrimination, i.e., family status;
- He/She experienced an adverse impact; and
- The protected characteristic was a factor in that adverse impact.

But, the court added 2 more things for courts to consider in applying the test for family status discrimination, namely whether:

1. A child is under the employee's care and supervision; and
2. The childcare obligation is more of a legal responsibility for the child than a personal choice.

[*SMS Equipment Inc v. Communications, Energy and Paperworks Union, Local 707*, 2015 ABQB 162]

4. Neutral *Misetich* Test (ON)

After initially following *Johnstone*, the Human Rights Tribunal of Ontario (HRTO) rejected the approach and came up with still another test during a 2016 case involving an employee returning from a repetitive strain injury who complained that her temporary modified work hours interfered with her responsibilities to prepare evening meals for her elderly mother. The test for family discrimination shouldn't be any harder or easier than the test for other forms of discrimination, according to the HRTO. To make out a prima facie case for family status discrimination, all an employee should have to do is meet the 3 elements required for anyother grounds of discrimination that:

- He/She has a characteristic protected from discrimination, i.e., family status;
- He/She experienced an adverse impact; and
- The protected characteristic was a factor in that adverse impact.

[*Misetich v. Value Village Stores Inc*., 2016 HRTO 1229]. Unlike Alberta, Ontario doesn't introduce new elements into this 3-prong test for family status discrimination claims.

Takeaway & Practical Impact

Having to contend with 4 separate standards makes it hard to determine what does and doesn't constitute family status discrimination. All it would take to put this headache to bed is for the Canadian Supreme Court to step in and establish a uniform test for all of Canada. And, in fact, the Court could have done just that by deciding a case from BC, the province where this all started. But in August 2019, the Court declined the opportunity to resolve the mess by refusing to take the appeal of the case (called *Envirocon Services, ULC v. Suen*, 2019 BCCA 46 (CanLII)). Consequently, HR directors will continue to have to navigate the different rules that apply to their particular jurisdiction.