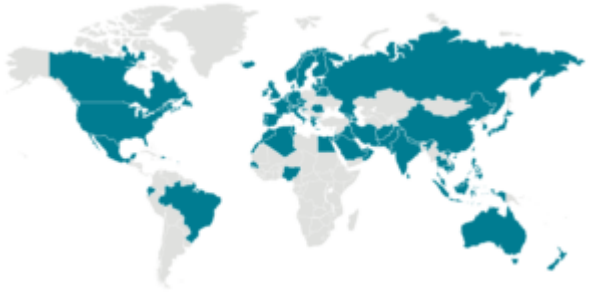
Family Status Accommodation Requests: How Far Do Employers Need To Go?



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In Ontario, employers continue to have uncertainty regarding the extent of their legal obligations when accommodating an employee's family status responsibilities. The human rights landscape in Ontario has been fraught with differing legal standards and understandings of what an employer's legal obligations are regarding family status accommodation.

The recent decision, *Simpson v Pranajen Group Ltd. o/a Nimigon Retirement Home,* 2019 HRTO 10, ("*Simpson*") did not clarify the legal test for family status accommodation, but has provided some additional considerations for employers when assessing family status accommodation requests.

In the *Simpson* decision, the employee was a personal support worker in a retirement home. The employee's eldest child was autistic, and it was essential for a caregiver to be at the employee's home when the school bus dropped the child off after school. The employee was the only family member available to be at home during the drop-off. The employer proposed to change the employee's work shift to the afternoon. The employee advised the employer of her inability to attend this shift due to her child care obligations for her autistic son, and instead offered to work the midnight shift. The employer agreed to this change, and later retracted the offer, once the employee had called into work sick one day without notice. A few days after retracting the offer for the employee to work the midnight shift, the employer terminated the employee's employment due to "attendance, failure to follow instructions, conduct, creating disturbance [*sic*], work quality." The employee had only been absent a few times during her four year tenure, and the employer had never previously raised any performance concerns. As a result of losing her job, the employee faced many negative consequences, such as: the employee had to take out a second mortgage, had lost confidence, and could no longer afford speech therapy for her son.

The HRTO found that the employer's stated reasons for the termination were not based in fact, and the employee was fired, at least in part, because of her inability to attend the afternoon shift due to her childcare obligations. The HRTO also found that the employee's childcare concerns could have been easily accommodated by scheduling her for the midnight shift.

The employee had requested $30,000 in monetary damages. The HRTO found such an award was appropriate given the loss of long term employment and the employee

was particularly vulnerable given her son's disabilities.

This case is important for employers for the following reasons:

- The HRTO did not clarify the legal test for family status accommodation. It continues to be unclear whether the test as outlined in *Canada (Attorney General) v Johnstone*, 2014 FCA 110 ("*Johnstone*") or the more recent test outlined in *Misetich v Value Village Stores Inc.,* 2016 HRTO 1229 ("*Misetich*") should be applied in cases of discrimination on the basis of family status.
    1. In *Johnstone,* it was held that applicants must demonstrate that (i) the childcare obligations stem from the applicant's "legal responsibility" for the child, not merely personal choice; (ii) the applicant has made reasonable efforts to meet their childcare obligations through reasonable alternatives, and no alternative solution is reasonably accessible, this is also known as the requirement for "self-accommodation"; and (iii) the impact of the applicable workplace interferes with the applicant's ability to fulfill their childcare obligations in more than a trivial or insubstantial way.
    2. In *Misetich,* the HRTO found the *Johnstone* test was too onerous, particularly the requirement for applicants to self-accommodate. The HRTO found the test should remain the same, regardless of the ground of discrimination, therefore, an applicant must only establish: (i) the parent and child relationship; (ii) the adverse treatment; and (iii) the adverse treatment was due, at least in part, to the family status discrimination.
- The HRTO found that the applicant was particularly more vulnerable given her son's autism. Therefore, it is prudent for employers to consider the employee's circumstances and consider the potential increased vulnerability of employees when assessing family status accommodation requests.

Given the lack of clarity regarding the legal test for family status accommodations in Ontario, employers should be assessing family status accommodation requests on a case by case basis, while understanding that the previously held requirement for employees to self-accommodate may not be upheld by the HRTO.