Federal Court Of Appeal Revises Test For Family Status Discrimination

In another twist in the rapidly developing area of family status discrimination law, the Federal Court of Appeal recently released its decision in Canada v Johnstone. You may recall that Johnstone was a Border Services Agent at Pearson International Airport who alleged discrimination by her employer on the basis that their random scheduling practices prevented her from obtaining childcare for her two young children. The previous step in Johnstone's saga was a judgment from the Federal Court that appeared to set out a very broad test for family status discrimination.

The Federal Court of Appeal recently reviewed that decision.

While upholding the original decision that Johnstone had suffered discrimination on the basis of family status, the Federal Court of Appeal set out a new test, based on the jurisprudence out of British Columbia in the **Campbell River** case, and refined the test as used in earlier decisions. In effect, this decision held that, in order for a claimant to show a prima facie case of discrimination in a situation involving childcare obligations, they must demonstrate the existence of four factors.

i. A child is under the claimant's care and supervision
ii. The childcare obligation at issue engages the claimant's legal responsibility for that child, as opposed to a personal choice
iii. The claimant has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible
iv. The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation

(i) A child is under the claimant's care and supervision

This first branch of the test is a low threshold and will often be met. Parents and legal guardians will automatically qualify. In addition, where extended family such as an older sibling or a grandparent is the primary caregiver, they should qualify under this aspect of the test.

(ii) The childcare obligation at issue engages the claimant's legal responsibility for that child, as opposed to a personal choice

As we mentioned in our previous writings on the subject, this head of the test comes

from Ontario case law. It requires that failure to perform the obligation could be met with some sort of legal consequence. Criminal consequences are not the only consequences contemplated by the Court. For example, the obligations under child protection laws would also trigger this component.

This requirement greatly restricts the size of the class of claimants. The Court stated that this aspect of the test requires that the complainant show that their child(ren) have not yet reached an age where they can reasonably be expected to care for themselves during the parent's work hours.

It will be interesting to see how this aspect of the test is adapted for situations involving elder care such as was seen in the**Devaney** case, since situations in which an individual is legally responsible for an elder are much more rare, and fewer laws govern elder care in general.

(iii) The claimant has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible

That the Court identified the obligation on parents to make reasonable efforts to meet their childcare obligations should be a sigh of relief to employers. In effect, this formalizes the requirement established in Ontario that the childcare obligations of the parent must be a necessity, and not a choice, in order to trigger human rights protection.

One of the concerns raised by employers following the **SGS** decision in Alberta was that the employee had not investigated the availability of social services and other options for childcare. It is possible that, under the new test, the complaint in **SGS** would have failed on the basis of not meeting this requirement, as there was evidence before the arbitrator that the claimant had not investigated the option of accessing social programs that could have assisted her in meeting her childcare obligations.

(iv) The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation

This aspect is to be determined on a case-by-case basis, and is highly factually dependent. Little guidance was offered by the Court. However, the presence of this requirement indicates that there is a necessary threshold of interference that is acceptable under human rights legislation. Some earlier rulings, such as the earlier finding in **Johnstone**, do not appear to have this principle into consideration.

The Federal Court of Appeal ultimately upheld the finding that Johnstone suffered discrimination as a result of her status as a parent. In particular, it noted that she had provided evidence of an exhaustive search for alternative childcare arrangements, and expert evidence that established that Johnstone's personal situation was one of the most difficult childcare situations imaginable.

What employers should know

Interestingly, the Federal Court of Appeal released another case concerning family status discrimination on the same day, applying the **Johnstone** test and finding that the earlier finding of family status discrimination in that case continued to hold. It will be interesting to see how this test may apply on review of earlier successful claims, such as **SGS**.

This decision may not be the final word on this issue, as both parties will have sixty days to decide if they choose to appeal this decision to the Supreme Court of Canada. Given the conflicting case law, and the different tests that have been established by appellate courts in British Columbia and the federal jurisdiction, it is well within the realm of possibility that the Supreme Court will want to weigh in on this topic. Until then, this decision injects some much needed clarity into this dynamic and evolving area of human rights litigation.