How Far Must You Go to Accommodate Employees' Child + Elder Care Needs?



Every jurisdiction bans employers from discriminating on the basis of family status, such as by refusing to bend work hours to accommodate the child or elder care needs of working parents. But there are significant differences in how much adverse treatment an employee must endure before the line is crossed. More precisely, there are different tests courts use to determine if an employer's work hour demands constitute family status discrimination, depending on where in Canada the case takes place. Here's a rundown of the 4 competing standards and where each applies.

Discrimination Law, 101: The Prima Facie Case

Although you don't have to be a trial lawyer, there are some basic legal concepts that HR directors need to understand to get a grasp of how the family status discrimination rules work. The first is how complaints are adjudicated, i.e., ruled on by courts, tribunals and arbitrators (which we'll refer to collectively as "courts"). Employees have the burden of proof in most discrimination cases. Once the employee presents the complaint laying 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" case (pronounced "PRIME a FAY see", Latin for "first view").

This is the moment of truth in any case. 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. At that point, the balance of power shifts to the employee. The employer now faces a tough decision: Pay the employee to settle the case or go to trial and risk an even bigger judgment.

So, what does an employee have to do to make out a prima facie case of family status discrimination?

The 4 Different Tests of Family Status Discrimination

The answer to that crucial question depends on where in Canada the case takes place. Here's a look at the 4 competing tests.

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 raising the question of whether the social worker made out a prima facie case of discrimination.

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 to at least some degree. It would thus be unrealistic and "unworkable" to find a policy discriminatory merely because it affects an employee's family obligations, the Court reasoned.

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. One employee who learned this the hard way is 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 to attend her diabetic son at hockey tournament without permission); 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 in 2007 (3 years after *Campbell River*) by a federal court ruling that it was family status discrimination for an employer to refuse 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 stated that to make out a prima facie case for family status discrimination, an employee need only show the 3 things the Canadian Supreme Court said in a case called *Moore v. British Columbia (Education),* 2012 SCC 61, that an employee must show for other grounds of discrimination:

- 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, in applying the *Moore* test, courts should also consider the first 2 elements of *Johnstone*, 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]

Bottom Line: Unlike *Johnstone* and *Campbell River*, the Alberta *SMS Equipment* test doesn't create a higher threshold for establishing discrimination based on family status relative to other prohibited grounds of discrimination. But it does limit family status discrimination to legal parental obligations by incorporating the first 2 steps of the *Johnstone* test.

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 in the course of 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 other grounds of discrimination by *Moore*, namely 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].

Bottom Line: *Misetich* follows the same basic approach as the Alberta *SMS Equipment* test in the sense that the bar for family status discrimination is the same as it is

for other types of discrimination. The big difference is that the Ontario test doesn't require an employee to establish a legal parental obligation the way the Alberta test does.

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.