Clarity From Confusion: Court Confirms Test for Family Status Discrimination

Workwise Newsletter

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Jonathan Swift once observed that there is nothing constant in the world *but* inconsistency. The truth of that statement is nowhere more apparent than in the Canadian law governing family status accommodation, where the legal test applied to a complaint to determine its merit depends largely upon the geographical location of the complainant. Different jurisdictions have developed different approaches to the issue. The principal controversy concerns the question of whether complainants must demonstrate that they have made sufficient efforts to solve their problems themselves – to "self-accommodate" rather than rely upon their employers for accommodation – to establish a case of *prima facie*[1] discrimination.

Swift's observations notwithstanding, a measure of consistency has finally been achieved – at least in Alberta – with the release of the Court of Appeal's decision in *United Nurses of Alberta v Alberta Health Services*, 2021 ABCA 194 ("*Daigle*"). In *Daigle*, the Court stated with some force that the proper test for establishing a case of *prima facie* family-status discrimination in Alberta is the three-part test for *prima facie* discrimination in general, described by the Supreme Court of Canada in *Moore v British Columbia (Education)*, 2012 SCC 61 ("*Moore*"). The Court thus definitively disapproved of the more-onerous test articulated by the Federal Court of Appeal in *Canada (Attorney General) v Johnstone*, 2014 FCA 110 ("*Johnstone*"), which applies specifically to complaints of family status discrimination in workplaces under federal jurisdiction, and which is sometimes applied in provincially governed workplaces as well.

The Legal Backdrop: *Moore* and *Johnstone*

The central difference between the *Moore* and *Johnstone* tests concerns the issue of self-accommodation: that is, to what extent are a complainant's own efforts to provide reasonable self-accommodation relevant, and at what stage of the analysis should they be considered? In the *Moore* analysis, a complainant attempting to establish a case of *prima facie* discrimination of any kind, including family status discrimination, must prove (on a balance of probabilities) the following three criteria:

1. That the complainant had a protected characteristic under the applicable human rights legislation;
2. That the complainant suffered an adverse impact; and,
3. That the protected characteristic was a factor in or was connected to the adverse impact.

Notably, in the Supreme Court's view, the question of self-accommodation is not a factor at this stage of the analysis. If a *prima facie* case is established, the burden shifts to the respondent (typically an employer) to justify the conduct or practice which led to the adverse impact. This part of the analysis is guided by the principles described by the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 ("*Meiorin*"), including assessing accommodation to the point of undue hardship. Since accommodation is a multi-party inquiry, efforts to identify accommodation solutions (particularly in a workplace) will almost inevitably involve the complainant sharing

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information with the respondent concerning the protected characteristic to explore options for accommodation. In family status matters, this discussion likely requires the employee to provide the employer with information concerning the family-status issue and what can or cannot be done to solve the problem absent employer accommodation. Accordingly, the question of self-accommodation measures available to a complainant becomes relevant at the "undue hardship" stage of the analysis.

Two years after the Supreme Court issued the *Moore* decision, the Federal Court of Appeal considered the nature of the test applicable to establishing a *prima facie* case of discrimination – specifically in family status matters – in *Johnstone*. *Johnstone*, like *Daigle*, featured a complainant whose childcare obligations came into conflict with workplace obligations. The Federal Court found it appropriate to modify the test provided by the Supreme Court in *Moore* in cases involving claims of family status discrimination. In effect, the Federal Court added a fourth requirement for establishing a case of *prima facie* discrimination – the complainant must demonstrate that reasonable efforts to self-accommodate have been undertaken. In the words of the Federal Court, it:

…is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully and remains unable to fulfill his or her parental obligations, that a prima facie case of discrimination will be made out (at para 88)

The *Johnstone* approach was considered and ultimately rejected by the Alberta Court of Queen's Bench in *SMS Equipment Inc. v Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162 ("*SMS*"). In that case, which was also a family status discrimination matter, Ross J. favoured the *Moore* analysis, finding that the:

…flexible and contextual application of the Moore test does not justify the application of an entirely different text of prima facie discrimination [in family status cases] and particularly does not justify including with that test a self-accommodation element that is not required with respect to other prohibited grounds of discrimination" (at para 77).

Despite the position adopted by Ross J. in *SMS*, the *Johnstone* analysis still finds adherents both within and without federally governed workplaces (and in a number of other provinces). It took centre stage – at least at first instance – in the *Daigle* matter.

Background

Ms. Daigle was a registered nurse working in the emergency department of an acute care facility. She was married with two young children, one of whom was deaf and had enhanced care needs. She worked shifts – two day shifts, followed by two night shifts, followed by four days off. Her husband also worked shifts, but they had been able to balance their respective work obligations with their parental obligations because of the relative stability of their shift schedules.

After some time, changes were made to the collective agreement that governed Daigle's workplace. One of these changes permanently added an extra day to her shift schedule so that instead of a four-on/four-off scenario, she was now faced with a five-on/four-off situation. The extra day meant that her schedule no longer aligned with her husband's, which created gaps in their childcare coverage, particularly on evenings and weekends, when it is more difficult to find professional caregivers. The Daigles examined several options (including standard retail daycare, teenage babysitters, and assistance from friends and neighbours) but ultimately concluded that the new shift schedule was unworkable. Daigle requested accommodation from her employer but was denied. Eventually, she requested a transfer from her full-time position to a casual one so that she could meet her childcare obligations. This resulted in reduced hours, as well as reduced compensation, benefits, vacation, and more.

Legal History

Daigle's union filed a grievance on her behalf, alleging that she had suffered family status discrimination as a result of the change in the shift schedule. The grievance advanced to arbitration, where a majority of the board determined that the preferred test for *prima facie* discrimination in family status matters is the one set out in *Johnstone*. The board found that while the Daigles had considered several self-accommodation measures, they had not seriously discussed options that required them to incur costs, such as "the possibility of sharing a nanny or hiring childcare providers to cover overlaps". The board majority concluded that Daigle failed to establish that "other reasonable alternatives were not available which would have allowed [her] to remain in her full-time position and maintain the benefits and entitlements she gave up by going casual". As a result, the grievance was denied.

The union applied for judicial review of the arbitration board's decision before the Court of Queen's Bench. The Reviewing Judge assessed the *Johnstone* approach and concurred with Ross J.'s analysis in *SMS*, finding that *Johnstone* is "contrary to the objects of human rights law" in that "it imposes one-sided and intrusive inquiries on complainants in family status discrimination cases". In the Reviewing Judge's view, the arbitration board applied the wrong test. She sent the matter back to a freshly constituted arbitration board for re-consideration using the *Moore* test. The employer appealed that ruling to the Court of Appeal.

Court of Appeal's Decision

The Court of Appeal left little room for further debate on whether *Moore* or *Johnstone* supplies the proper test for *prima facie* discrimination in family status matters in Alberta. On this point, the Court is unequivocal:

In our view, the nature of human rights and the rule of law require one uniform and consistent test for determining *prima facie* discrimination in all cases. That test was laid down by the Supreme Court of Canada in *Moore*. There is no legal justification for the imposition in *Johnstone* of an additional, burdensome element of proof on family status claimants at the *prima facie* discrimination stage. Imposing a more onerous self-accommodation burden in this manner perpetuates rather than ameliorates human rights inequality (at para 7).

In light of this finding, the appeal was dismissed. The Court upheld the Reviewing Judge's decision in all respects, with the result that the matter was sent back to be re-heard by a freshly constituted arbitration panel.

Takeaways

The *Daigle* case is a welcome one as it provides employers and employees alike with certainty concerning which test will be applied in cases of alleged family status discrimination. The Court makes it clear, with some emphasis, that the *Moore* test is the proper one. While self-accommodation measures taken by or available to complainants are still important, they do not go to the initial question of whether a complainant has suffered discrimination. Evidence concerning the complainant's self-accommodation efforts will become relevant only after *prima facie* discrimination has been established, under the three-part test in *Moore*, when the burden to show undue hardship shifts to the employer per the principles set down in *Meiorin*.

The *Daigle* decision is also a timely one. Both the private and public sectors are gripped with uncertainty as they emerge from lockdown, with thousands of employees across the province returning from layoff or transitioning from remote-work arrangements back to in-office assignments. In such a context, many families will probably struggle to harmonize shifting work obligations with new (or old) childcare or eldercare obligations, and a surge in family status complaints may follow as a result. In the wake of *Daigle*, all parties will be better equipped to assess the merits of those complaints.

Employers should review each situation carefully and ideally seek legal assistance when dealing with employee requests for accommodation based on child-care and similar family-related responsibilities. Contact **Kelly Nicholson** or any member of Field Law's **Labour and Employment Group** for assistance determining how to deal with such requests.

[1] *Prima facie: "sufficient to establish a fact or raise a presumption unless disproved or rebutted."*