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Clarifying the Legal Test for "Family Status" Discrimination: Federal Court of Appeal Rules Employers Discriminated by Failing to Accommodate Employees' Childcare Needs


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Two recent decisions from the Federal Court of Appeal are the latest word in the ongoing debate over workplace discrimination on the basis of "family status". These decisions are important to employers, as they signal a continued movement towards a more expansive definition of "family status" in the human rights law context, while still attempting to strike a balance between the childcare obligations of working parents and the needs of employers.

In *Attorney General of Canada v Johnstone,* 2014 FCA 110, and *Canadian National Railway Company v Seeley,* 2014 FCA 111, the Federal Court of Appeal set out a new legal framework for determining when an employee has been discriminated against on the basis of family status. In both decisions, released concurrently, the Court concluded that the respective employers discriminated against their employees on the grounds of family status when they refused to accommodate their employee's childcare needs.

In *Johnstone,* the employee and her husband were both employed by the Canadian Border Services Agency (CBSA). They each worked a rotating shift schedule, which required working different days/times, with no predictable pattern. As a result of scheduling problems, neither was in a position to provide reliable child care to their two children.

Ms. Johnstone requested a fixed shift schedule on a full-time basis, but the CBSA refused. In the CBSA's view, it was under no legal duty to accommodate an employee with childcare obligations by adjusting work schedules.

Ms. Johnstone thus filed a complaint with the Canadian Human Rights Commission, arguing that her employer's refusal to accommodate her childcare obligations constituted discrimination on the basis of family status, contrary to the *Canadian Human Rights Act,* RSC 1985, c H-6.

The facts in *Seeley* were similar: it involved an employee of CN Rail who requested accommodation when her employer attempted to transfer her from Jasper to fill a work shortage in Vancouver. After her requests for accommodation were denied, she brought a human rights complaint, alleging discrimination on the grounds of family status.

"Family status" is a relatively new prohibited ground of discrimination under human rights legislation. In *Johnstone* and *Seeley,* the Federal Court of Appeal provided needed clarity on this ground, which is being accessed with increasing frequency.

The Court had no trouble concluding that the term "family status" includes parental obligations such as childcare obligations. This conclusion reflects the wide and purposive interpretation that is appropriate for human rights issues, and is "an approach that favours a broad participation and inclusion in employment opportunities for those parents who wish or need to pursue such opportunities."

However, the Court also noted that the concept is not without limitations. The Court drew a distinction between parental *obligations* and parental *choices.* Childcare obligations which a parent cannot avoid without engaging legal liability will receive protection; personal family choices, such as family vacations and participation in extra-curricular activities, will not. Such limitations, the Court opined, ensure that human rights legislation is not trivialized.

The Court then turned to the issue of the proper legal test for discrimination on the grounds of family status. Specifically, the *Johnstone* decision focused on whether the employee had shown a *prima facie* case of discrimination.

Contrary to some prior authority on this issue, the Federal Court of Appeal held that the test for *prima facie* discrimination should be substantially the same as that for other prohibited grounds of discrimination. Significantly, there is no requirement that an employee demonstrate a higher level of disturbance – a "serious interference" with a "substantial" parental duty – as some prior authorities had suggested. The Court then outlined a 4-part test for determining whether an employee has established a *prima facie* case of family status discrimination:

1. The employee must show that a child is under his/her care and supervision;
2. The childcare obligation engages the employee's legal responsibility for the child (as opposed to personal choice);
3. The employee has made reasonable efforts to meet childcare obligations through alternative solutions, and no such alternative solution is reasonably accessible; and
4. The workplace policy or rule interferes with the childcare obligation in a manner that is more than trivial or insubstantial.

In the result, the Court concluded that Ms. Johnstone had made out a case of *prima facie* discrimination. The Court reached a similar conclusion in *Seeley*.

The *Johnstone*/*Seeley* analysis has recently been embraced by the Alberta Human Rights Commission. In *Clark v Bow Valley College*, 2014 AHRC 4, the Commission relied upon this analysis to find that an employer discriminated against an employee when it terminated her employment after she failed to return from her maternity leave on a pre-determined date. The employee had advised the employer that she was unable to secure suitable childcare by her return date, but did have suitable care arranged beginning a month later. The employer refused to accommodate by providing an extended leave.

While the Supreme Court is yet to weigh in on this issue, the *Johnstone* and *Seeley* decisions suggest a continued movement away from a higher threshold for family status discrimination cases, while still maintaining a balance between the obligations of the employee and the employer. Employers will want to consider the impact of these decisions when dealing with employees' requests for accommodation based on their family care responsibilities. Field Law can help employers determine how to deal with such requests.