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New Parameters for Family Status Adopted in Alberta

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Recently, human rights decisions in federal tribunals and courts have adopted a broader definition of "family status" as meaning more than just one's relationship to another person, and recognizing childcare responsibilities. Rights groups have been positive about this development, but perhaps some employers are concerned. The leading case, *Canada v Johnstone*, 2014 FCA 111, was discussed in previous posts (see here). Alberta's Human Rights Tribunal has now adopted and applied this jurisprudence in Alberta.

Clark was a nursing instructor with Bow Valley College. She requested and was granted maternity leave from February 1, 2010 to January 31, 2011. She went on sick leave in November 2009, and her child was born nearly seven weeks premature (on January 2, 2010 instead of February 21, 2010 as expected). After the premature birth of the child, there was no communication about the start or end date of the maternity leave. One letter from the College about benefits referred to Clark's maternity leave as being from February 1, 2010 to January 31, 2011 (as was first planned).

Clark and her family lived in Linden, AB, which is approximately 100 km from Calgary. In mid-November, 2010, she became aware that she had been placed on the instructor schedule beginning January 3, 2011. She contacted Bow Valley College to advise that she had childcare in place beginning February 1, 2011, and was not having any success in obtaining childcare before then. Clark offered to take some of her vacation leave in January. Bow Valley College denied her any leave past January 10, 2011, and when she did not report for work on January 13, 2011, they deemed Clark to have resigned from her position and she was terminated (paras 4, 5).

Clark argued that Bow Valley College was aware that she had no options for childcare, and that the denial of leave was discrimination on the basis of family status.

Bow Valley College argued that under the collective agreement, Clark was allowed only 52 weeks maternity leave. They also said that they did not discriminate against Clark; rather, there was a shortage of nursing faculty and they could not locate coverage. Thus, the denial of a vacation request was based on Bow Valley College's operational requirements and not Clark's family status. Further, Bow Valley College had attempted to accommodate Clark by providing her with two alternative childcare options. Thus, Bow Valley College submitted that it did not

discriminate against Clark, and further, they had accommodated her to the point of undue hardship (para 6).

Bow Valley College also argued that Clark had not provided sufficient evidence about her husband's income generating activities or his ability to provide childcare (para 7).

Clark testified that she was the primary breadwinner and caregiver for her family. Her husband contributed about $100 per month to the family income. She did not consider her husband to be a suitable caregiver because of his health issues (para 23). Further, there were no viable extended family caregivers (paras 15, 16). In addition, the two alternatives for childcare proposed by Bow Valley College were not feasible: one did not accept children young enough and the other one involved communal care which would compromise the child's immune system (para 18). Clark did not have the money to purchase a car seat suitable for the commute to Calgary in her vehicle. Both daycare organizations were not open early enough to accommodate her work schedule (para 19).

The Chair of the Tribunal, Sharon Lindgren-Hewlett, noted that correspondence from Bow Valley College to Clark did not address her childcare concerns. They did not request a meeting to work out the problem or understand Clark's concerns (para 30).

The Chair noted also that Bow Valley College had a "fairly high standard of care" to confirm Clark's leave dates (para 38). Thus, there was a mutual mistake on the part of both parties with respect to the leave dates.

In determining whether there was *prima facie* discrimination, the Chair relied on the factors set out by the Supreme Court of Canada in *Moore v British Columbia (Education)*, 2012 SCC 61. The Chair indicated that:

> [42] A complainant is required to show three elements: they have a characteristic protected from discrimination; they have experienced an adverse impact with respect to employment; and the protected characteristic was a factor in the adverse impact.

Bow Valley College and Clark differed on whether a *prima facie* case of discrimination on the basis of family status was made out. During the course of the *Clark* hearing, the Federal Court of Appeal released *Johnstone, supra,* and *Canadian National Railway Company v Seeley*, 2014 FCA 111. Both sides were requested to make submissions based on the four-part test set down in these cases for *prima facie* discrimination in family status childcare obligation cases. The four factors are set out in the following excerpt from *Johnstone*:

> [93] I conclude from this analysis that in order to make out a prima facie case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

> [94] The first factor requires the claimant to demonstrate that a child is actually under his or her care and supervision. This requires the individual claiming prima facie discrimination to show that he or she stands in such a relationship to the child at issue and that his or her failure to meet the child's needs will engage the individual's legal responsibility. In the case of parents, this will normally flow from their status as parents. In the case of de facto caregivers, there will be an obligation to show that, at the relevant time, their relationship with the child is such that they have assumed the legal obligations which a parent would have found.
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> [95] The second factor requires demonstrating an obligation which engages the individual's legal responsibility for the child. This notably requires the complainant to show that the child has not reached an age where he or she can reasonably be expected to care for himself or herself during the parent's work hours. It also requires demonstrating that the childcare need at issue is one that flows from a legal obligation, as opposed to resulting from personal choices.
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> [96] The third factor requires the complainant to demonstrate that reasonable efforts have been expended to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible. A complainant will, therefore, be called upon to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or an alternative arrangement is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a bona fide childcare problem. This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances.
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> [97] The fourth and final factor is that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation. The underlying context of each case in which the childcare needs conflict with the work schedule must be examined so as to ascertain whether the interference is more than trivial or insubstantial.

The Chair concluded that all four elements of the *Johnstone* test for childcare obligations under family status fall within the first element of *Moore* test for *prima facie* discrimination. The Chair concluded that Clark clearly satisfied the first two Johnstone factors, and the fourth factor as well (not a trivial interference), but that Clark must also demonstrate a *bona fide* childcare problem remains and that she had not been able to locate a solution on her own (the third factor) (para 49).

Unlike *Johnstone* or *Seeley, supra*, this case was not about a permanent change in hours, or a permanent shift adjustment, or a request for further benefits, or increased payment. The matter at hand merely involved a mistake in the return to work date, followed by a denial of a three-week vacation, followed by termination of employment. The Chair determined that the issue to be determined was whether Clark expended reasonable efforts to locate reasonable childcare

solutions, including her partner's availability and suitability to care for the child (para 50). The Chair also concluded that Clark was actually given between six and 21 days' notice (over a holiday season) to find childcare or be considered to have abandoned her job.

Although Bow Valley College asserted that Clark's credibility was an issue because she did not call her partner as a witness, her own testimony established that it was not reasonable for her partner to quit his work to care for the child for one month. Thus, Clark was truthful and reasonable in not asking her partner to quit his employment because of a three-week childcare challenge (para 56). Further, Clark faced many obstacles in obtaining childcare because of the mistaken return to work date.

In applying the three factors from *Moore*, *supra*, the Chair concluded that Clark had a *bona fide* childcare problem which satisfied the protected ground of family status; the neutral rule of returning to work on January 3, then January 10, adversely impacted Clark; and, the only reason for her absence from work was the childcare problem, thus demonstrating the connection of the adverse impact to the ground of family status (para 65). Thus, *prima facie* discrimination on the basis of family status was established.

Bow Valley College defended its position, relying on the *Alberta Human Rights Act*, RSA c A-25.5, section 11, reasonable and justifiable discrimination, and section 7(3) *bona fide* occupational requirement. Bow Valley College argued that there was a shortage of nursing faculty at the time and that they believed that Clark was abandoning her position because she believed she had no childcare options (paras 66, 67).

The Chair noted that when Clark communicated her childcare problem, she was, for all practical purposes, requesting an accommodation. In this situation, Bow Valley College did not seek any information upon which they could conduct an assessment; nor was there any consideration of the information provided by Clark at the time. No collaboration or alternative approach was explored with Clark. Clark had 35 days of accrued vacation, and granting her vacation leave would have been a possible accommodation (paras 70-75).

Although Bow Valley College submitted that its operational requirements did not permit any additional absence, there was no demonstrated undue hardship for Bow Valley College to have implemented a shared instructor situation as they did in other cases. Further, Bow Valley located an instructor to replace Clark without even advertising for one (paras 77, 78). Thus, Bow Valley College failed to accommodate Clark to the point of undue hardship, and the defences failed.

The remedy awarded to Clark included $15,000 for injury to dignity, and lost wages for the period of February to May 1, 2011 (to be calculated by the parties).

The overall implication of these cases (including *Clark*) is that courts and tribunals are clearly recognizing the continued gendered aspects of childcare arrangements. Women, who are increasingly in the workplace, also shoulder the bulk of responsibility for childcare. To discriminate against a worker because she has childcare challenges will amount to discrimination on the basis of family status. Parents' childcare concerns will need to be accommodated to the point of undue hardship.