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Federal Court of Appeal Clarifies Requirements for Family Status Discrimination

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Case commented on: *Canada (Attorney General) v Johnstone*, 2014 FCA 110

In an earlier post (see here) which discussed the case of three women who argued that they were discriminated against on the basis of family status, I included reference to another family status case where a new human rights hearing was ordered (see *Johnstone v Canada (Attorney General)*, 2007 FC 36, [2007] FCJ No 43 (*Johnstone*); affirmed in 2008 FCA 101, [2008] FCT No 427 (Fed CA)). The Federal Human Rights Commission referred the matter to the Canadian Human Rights Tribunal (CHRT), and in 2013, both the CHRT and the Federal Court agreed that the Canadian Border Services Agency (CBSA) had discriminated against Fiona Ann Johnstone on the ground of family status, by refusing to accommodate her childcare needs through work schedule changes. The CBSA appealed the matter to the Federal Court of Appeal. The Women's Legal Education and Action Fund (LEAF) intervened in the *Johnstone* case on appeal, arguing that discrimination on the basis of family status is closely related to sex discrimination because most caregivers in Canada continue to be women. (See LEAF Factum here).

The Federal Court of Appeal in *Johnstone* 2014 was asked to address several issues, including whether the CHRT erred when:

- concluding that family status includes childcare obligations;
- setting out the legal test for finding a *prima facie* case of discrimination on the basis of family status; and
- finding that there *was* a *prima facie* case of family status discrimination (at para 35).

The Federal Court was also asked to address the remedies that had been provided by the CHRT. Justices Mainville, Pelletier and Scott (concurring) held that the standard of review in this case was correctness, as the issues involved quasi-constitutional human rights matters, among other reasons (at paras 44 to 52).

While the appellant CBSA argued that "family status" should be given a restrictive interpretation that excluded childcare obligations (at paras 53 to 58), the Court of Appeal noted that judges and adjudicators had been "almost unanimous in finding that family status incorporates parental obligations such as childcare obligations" (at para 59). The Court of Appeal supported this assertion by citing the earlier *Johnstone* decision, as well as a number of tribunal and labour arbitration cases from across Canada (at para 59). Justice Mainville stated:

> [66] There is no basis for the assertion that requiring accommodation for childcare obligations overshoots the purpose of including family status as a prohibited ground of discrimination. Indeed, without reasonable accommodation for parents' childcare obligations, many parents will be impeded from fully participating in the work force so as to make for themselves the lives they are able and wish to have. The broad and liberal interpretation of human rights legislation requires an approach that favours a broad participation and inclusion in employment opportunities for those parents who wish or need to pursue such opportunities.

The Court of Appeal noted that the French version of the *Canadian Human Rights Act*, RSC 1985 c H-6, uses the phrase "situation de famille" for family status, implying that the term "family status" includes family circumstances, such as childcare obligations (at para 67).

The Court also stated that the types of childcare activities that are contemplated by the ground of "family status" must be "carefully considered" (at para 68). The types of childcare needs protected under "family status" must "be those which have an immutable or constructively immutable characteristic" (at para 68). Thus, personal family choices, such as participation of children in dance classes, sports events or other voluntary activities would not be covered by "family status" (at para 69). Childcare obligations that could be considered part of "family status" are "those which a parent cannot neglect without engaging his or her legal liability" (e.g., leaving a young child at home alone in order to go to work) (at para 70).

The Court of Appeal held that "[p]rotection from discrimination flows from family status in the same manner that protection against discrimination on the basis of pregnancy flows from the sex of the individual" (at para 73). This means that "family status" is in the same category as the other listed grounds of discrimination, such as sex, colour and disability (at para 74). From this and other cases, one can conclude that childcare responsibilities are clearly part of "family status", and that this ground of discrimination should be given equal footing with the other grounds.

However, in *Johnstone* 2014, the parties disagreed about how a *prima facie* case of family status discrimination could be made out by a complainant. Previous discussions of discrimination on the basis of family status had resulted in two lines of cases. The British Columbia Court of Appeal in *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*, 2004 BCCA 260 (at para 39) (*Campbell River*) said that "a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or family duty or obligation of the employee." Thus, there needs to be more than a conflict between work requirements and regular parental obligations in order to establish a *prima facie* case of family status discrimination. In *Campbell River*, there was a legitimate change in work hours that was going to affect the complainant's ability to care for her disabled son. While the court found that the employer had *prima facie* discriminated against the complainant on the basis of family status, the matter was remitted to the arbitrator to determine whether the employer had met its duty to accommodate her to the point of undue hardship.

A less restrictive standard was set out by the CHRT in *Hoyt v Canadian National Railway*, 2006 CHRD No 33, and endorsed by the Federal Court of Canada in *Johnstone v Canada (Attorney General)*, [2007] FCJ No 43, affirmed [2008] FCT No 427 (Fed CA) (*Johnstone*). In *Johnstone*, the Federal Court of Canada held that the test in *Campbell River* was too stringent, and instead

held that family status discrimination claims should be analyzed in the same way as other discrimination claims. The Court said that the *Campbell River* test effectively established a hierarchy of grounds of discrimination, thus making family status less important than the others. In particular, the requirement that the complainant must establish a "serious interference" with family status had the impact of relegating family status to an inferior type of discrimination.

In *Cindy Richards v Canadian National Railway*, 2010 CHRT 24, *Kasha Whyte v Canadian National Railway*, 2010 CHRT 22, and *Denise Seeley v Canadian National Railway*, 2010 CHRT 23, CHRT member Michel Doucet declined to apply the *Campbell River* test, yet he nevertheless concluded that the complainants faced a "serious interference with [their] parental duties and obligations" if they were forced to work in Vancouver (which was far away from their homes in Alberta) (*Seeley*, at para 109). This suggests that he would have found that there was a *prima facie* case of family status discrimination whether he followed the *Campbell River* or the *Johnstone* approach. Thus, childcare issues constitute a parental responsibility that falls within the ground of "family status". In an appeal of the *Seeley* case to the Federal Court, Justice Mandamin held that the CHRT's interpretation of the meaning of "family status" was reasonable (see *Canadian National Railway v Denise Seeley and Canadian Human Rights Commission*, 2013 FC 117).

The parties in *Johnstone* 2014 disagreed about whether there needed to be a "serious interference" with a "substantial" duty or obligation before a *prima facie* case of family status discrimination is made out (at para 79). Justice Mainville held that "there should be no hierarchies of human rights" and the test should be substantially the same as the one that applies to the other listed grounds of discrimination (at para 81). He also noted that the test for family status discrimination would also have to be "flexible and contextual" (at para 81).

Justice Mainville agreed with the Federal Court Judge's conclusion that the childcare obligations claim must be substantive and the complainant must have tried to reconcile family obligations with work obligations, but this does not "constitute creating a higher threshold test for serious interference" (at para 87, citing Federal Court's reasons at para 120). Justice Mainville provided guidance about requirements to make out a *prima facie* case of family status discrimination in the workplace:

> [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.

The type of evidence required to meet the four factors outlined above will vary with the facts of each case and must be determined on a case-by-case basis (at para 99). In Ms. Johnstone's case, she had one and then two children under her care and supervision. She shared the responsibility with her husband. Both children were toddlers and could not have been left on their own without

adult supervision during work hours without violating the law, and it was not a matter of personal choice. The Tribunal had concluded that Ms. Johnstone had made several serious but unsuccessful efforts to secure reasonable childcare for the children. Her regular work schedule interfered with her childcare obligations in a manner that was more than trivial or insubstantial (at paras 100-106).

Thus, Ms. Johnstone had clearly made out a case of *prima facie* discrimination, and the Tribunal had committed no reviewable error in finding the same (at para 108). The CBSA had not asserted any argument about the working hours being a *bona fide* occupational requirement or that it would be an undue hardship to accommodate Ms. Johnstone's shift requirements, so her complaint was substantiated (at para 109).

The decision of the lower court and Tribunal was upheld with some minor amendments to the remedies (see paras 110 to 127).

It should be noted that on the same day, the Federal Court of Appeal released a decision dismissing an appeal in the case of *Seeley v Canadian Railway Company*, 2014 FCA 111.

LEAF released a statement noting that it was pleased at the outcome of the *Johnstone* 2014 case because it "is a win for those who have been shut out of meaningful work because of workplace schedules and other rules constructed around the outdated norm of a male employee with a spouse at home doing all the childcare" (see here). Hopefully, childcare is now considered part of family status in the same way that pregnancy is considered part of sex.