What is the Test for Family Status Discrimination? The Saga Continues

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Misetich v. Value Village Stores Inc. 2016 HRTO 1229

Recently, we have noticed a trend in discrimination claims by employees of clients in which the employee combines a disability claim with a family status claim. These claims tend to be uniquely difficult because the employee is invariably seeking accommodation involving both recognition of physical limitations and scheduling changes. A further difficulty arises from the lack of clarity and uniformity surrounding the legal test for family status discrimination. A recent decision of the Human Rights Tribunal of Ontario, *Misetich v. Value Village Stores Inc.* 2016 HRTO 1229 ("*Misetich*") (released September 20, 2016) illustrates the latter difficulty.

The Applicant in *Misetich* worked in "production" at Value Village. Her duties included sorting items, handling items on racks and moving items to the retail floor. The production employees worked days, Monday to Friday. It was common practice for the employer to transfer employees requiring accommodation for physical reasons from production to "retail". The retail job involved in-store and telephone sales assistance, as well as checkout. The hours were days, evenings, weekends and on-call.

The Applicant developed repetitive strain injury and provided medical evidence of bending, twisting and lifting restrictions involving her left arm, wrist and hand. She was moved from production to retail. She then advised the employer that she was unable to work evenings, weekends or on-call because she cared for her elderly mother.

Arbitrators, Courts and Human Rights Tribunals have attempted on numerous occasions to define family status discrimination. It is at least clear that "family status" includes both the status of being in a parent and child relationship (i.e. may involve either or both child care and elder care) as well as the obligations that flow from those relationships. The difficulty arises when one attempts to define precisely what obligations will, if interfered with, amount to discrimination as well as what steps, if any, a family status claimant must take to ameliorate the situation

Many observers thought that the Federal Court of Appeal had made great strides in clarifying the test in *Canada (Attorney General) v. Johnstone* 2014 FCA 110 (CanLII) ("*Johnstone*"). In *Johnstone*, the Court established a four-part test emphasizing, in a

childcare context, that the parent's obligation must be one that, if neglected, would result in legal consequences for her or him, that the claimant must have taken steps to explore alternative arrangements and that the workplace rule being questioned must interfere with the obligation in a manner that is more than trivial or insubstantial.

In *Misetich*, Vice-Chair Scott reviews the principal family status cases and proposes yet another test for discrimination. The new test is not precisely formulated but implicitly is not limited to situations of care obligations whose breach would involve legal consequences to the caregiver or would involve a failure to provide the necessities of life. Rather, the obligations must only be "significant". Moreover, it appears as if the test will be "contextual" in that it will change if the employee is a sole caregiver. The proposed test also appears to relieve the employee of the obligation to show that she or he has attempted to find alternative solutions to the problem, since the Tribunal reiterates that the onus of proving that accommodation would involve undue hardship rests with the employer.

Somewhat ironically, the Tribunal in *Misetich* dismissed the employee's claim on the basis that her assertion only that she was required to prepare dinner for her mother did not allege a significant care obligation the interference with which would amount to discrimination.

Sadly, it appears as if the struggle to formulate a universally-accepted test for family status discrimination will continue for some time to come.

By

Brian Mulroney

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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