The Debate Regarding an Employer's Duty to Accommodate On the Basis of Family Status Continues…

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Courts and Human Rights Tribunals have long debated the extent of an employer's legal obligations when it comes to accommodating employees in their family status responsibilities. Unfortunately, in Ontario, the test for family status accommodation continues to remain unsettled with the latest decision, *Simpson v. Pranajen Group Ltd. o/a Nimigon Retirement Home*, 2019 HRTO 10.

The Facts

In this Ontario human rights case, Simpson worked for the employer as a personal support worker for approximately four years. She was a mother of two children. Her oldest child, who was five years old, was autistic and required the attendance of a caregiver to meet the school bus at the end of each school day. Simpson was the only caregiver in her family who was able to pick up her son from the bus. The employer was always aware of Simpson's son and his special needs circumstances.

In March, 2017, the employer proposed to amend Simpson's work hours but Simpson was unable to accept the changes, as the scheduling changes would conflict with her childcare obligations. Initially, the employer showed willingness to accommodate Simpson's schedule by offering her midnight shifts. However, the employer retracted the offer in April 2017, when Simpson called in sick to work without giving enough notice. Upon receiving the notice of absence from Simpson, the employer issued a written warning, which alleged that Simpson neglected her employment responsibilities by failing to source a substitute colleague to cover her shift. A few days after the incident, the employer issued an advisement which stated that all personal support workers are required to provide 48 hours' notice of absence or accept the responsibility of sourcing a substitute colleague to cover any absenteeism.

On May 19, 2017, Simpson was informed that she would no longer be switching to the midnight shift because she had called in sick in April without giving enough notice. When Simpson informed the employer that she was unable to accept the change in schedule as a result of her previously-disclosed childcare obligations, Nimigon terminated her employment. The employer claimed that the termination was based on

several cases of misconduct which included poor attendance, failing to follow instructions, creating a disturbance and poor performance.

Tribunal Decision

The tribunal found that Simpson's termination was discriminatory because it was based, at least in part, because of her inability to work afternoon shifts due to childcare responsibilities. The tribunal further determined that the employer's decision to withdraw the offer to allow Simpson to work midnight shifts was a failure to accommodate her family status obligations.

The vice chair noted that during the course of her employment with Nimigon, Simpson had a very good attendance record and was rarely absent from work due to illness. On previous occasions, Simpson would provide advanced notice of just a few hours if she or her children were ill and it was the employer, and not Simpson, who would source a substitute colleague to cover her shifts. It was therefore evident that Nigimon departed from its usual practices and procedures by issuing the written warning to Simpson and claiming that she was responsible for sourcing a substitute colleague.

Perhaps the most important element of the decision was that the tribunal declined to take the opportunity to clarify whether the test derived from the Federal Court of Appeal decision of *Canada (Attorney General) v Johnstone* (*Johnstone*) or the more recent test outlined in the tribunal's decision of *Misetich v Value Village Stores Inc.* (*Misetich*) should be applied in cases of discrimination on the basis of family status.

The Federal Court of Appeal in *Johnstone* held that applicants must demonstrate that: 1) their childcare obligations engages the applicant's "legal responsibility" for that child, as opposed to personal choice; 2) the applicant has made reasonable efforts to meet those obligations through reasonable alternative solutions and that no such alternative solution is reasonably assessable (as a form of "self-accommodation"); and finally, 3) that the resulting impact of the workplace rule interferes with the individual's ability to fulfill their childcare obligations in more than just a trivial or insubstantial way.

The tribunal rejected this approach in *Misetich* as being too onerous and inappropriately conflating the test to meet for discrimination and accommodation on the basis of family status by, for example, requiring applicants to demonstrate that they attempted to "self-accommodate." The tribunal held that the test to be applied for human rights cases should always be the same, regardless of the prohibited ground that it involves. Thus, the applicant must only be able to prove that they are in a parent and child relationship, that they have experienced adverse treatment, and that that treatment was due, at least in part, to discrimination based on their family status.

In this case, the tribunal did not determine which test should be applied for determining family status cases but noted that, regardless of the appropriate standard, Nimigon's decision to terminate Simpson was discriminatory and that the employer ultimately failed in its obligation to accommodate her.

Ultimately, the tribunal awarded Simpson $30,000 in compensation for injury to dignity, feelings and self-respect.

Takeaway for Employers

While this case did very little to clarify the appropriate test for family-status discrimination and accommodation under the Ontario *Human Rights Code,* the key lesson for employers is to consider scheduling accommodations as a temporary measure (wherever possible) while also assisting their employees to explore other childcare or eldercare arrangements. This will go a long way in demonstrating that both tests for accommodating an individual's family status responsibilities, as outlined in *Johnstone* and *Misetich,* are satisfied.

By

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