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Family Status Accommodation in Ontario - Taking the Middle Road

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The still evolving debate on family status discrimination in Canada has turned on how broad the scope of protection provided to employees should be. Increasingly, it appears that there are two divergent approaches in this area. At the federal level, support is given to a broad protection for the employee. Conversely, the seminal British Columbia Court of Appeal decision, *Health Sciences Assn. of British Columbia v Campbell River and North Island Transition Society*,[1] provided for a more narrow scope of protection for employees seeking to establish family status discrimination. In Ontario, the exact scope of protection afforded to employees has historically remained nebulous, with conflicting decisions providing poor guidance. More recently however, it appears that an amalgamated approach (combining federal and *Campbell River* approaches) has started to take form. This article details these developments.

The two leading approaches in Canada on family status accommodation are: (i) the British Columbia *Campbell River* approach; and (ii) the federal approach, as recently outlined in the decision of the federal court on judicial review in *Canada (Attorney General) v Johnstone*[2]. The *Campbell River* approach recognizes a *prima facie* case of discrimination where "a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee."[3] In short, *Campbell River* provided an employer friendly test whereby a non-employer initiated change in the employee's life was not captured within the scope of family status accommodation. As such, a change in the factual circumstances of the employee's life *caused by* the employee would not meet the test to establish a *prima facie* case for family status discrimination.

The federal approach, as developed in *Johnstone* and *Hoyt v Canadian National Railway*,[4], rejected *Campbell River*'s imposition of a higher standard of proof on an employee seeking to establish a *prima facie* case for family status discrimination. In both cases, it was held that it would be inappropriate for family status to have a more restrictive definition than other prohibited grounds of discrimination. Such an approach,

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[1] 2004 BCCA 260 (CanLII) [*Campbell River*].

[2] 2013 FC 113 (CanLII) [*Johnstone*].

[3] *Campbell River*, at para. 39.

[4] 2006 CHRT 33 (CanLII).

the Tribunal in *Hoyt* reasoned, would not foster the spirit of inclusiveness envisioned in the *Human Rights Code*. Thus, federally, the test for family status discrimination is premised on a broader test that asks whether "the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way"[5] where the court expressly rejects the higher standard of there being a "serious interference" for *prima facie* discrimination required by *Campbell*.[6]

In Ontario, the arbitration decision, *Power Stream Inc. And IBEW, Local 636 (Bender)* (2009),[7] has become the basis for an amalgamated approach of both the federal and the *Campbell River* approaches. *Power Stream* understood that most changes originate in the family of the employee (such as the birth of a child), rather than from changes to the employer's policies. *Power Stream* recognized the inherent tension between an employee's obligations related to the family and an employer's right to manage its workforce. Although there was an acceptance that an employer's rights would, in the face of human rights, require some degree of flexibility in the face of an employee's familial duties, an employer should not be considered to have breached the *Human Rights Code* because an employee misses a child's school play to attend to his/her work duties. This approach was succinctly summarized in *Alliance Employees Union, Unit 15 v Customs and Immigration Union (Loranger Grievance)*,[8] as follows: an employer will be required to accommodate an employee on the basis of family status where a refusal to do so would otherwise result in a "serious interference with a substantial parental obligation."[9]

In keeping with the *Power Stream* amalgamated approach, a recent case underscored why Ontario's adjudicators have hesitated to fully adopt the *Campbell River* approach. The Ontario Human Rights Tribunal, in *Devaney v ZRV Holdings Ltd.*,[10] rejected *Campbell River* and held that the *Human Rights Code* ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it. According to the Tribunal, there is no legal basis for establishing a higher threshold for family status discrimination, as compared to discrimination on other *Code* grounds.[11] Relying instead on the principles enunciated in the federal approach, the Tribunal outlined the appropriate test for establishing a *prima facie* case of family status discrimination to be one where: the applicant is adversely affected by a respondent's policy.[12] Further, the adverse effect must not relate to the employee's ***preferences***; instead, the applicant must establish that the workplace policy has adversely impacted a caregiver ***requirement***. Applying the test to the facts of the case, the Tribunal held that the applicant's employment was terminated based on absences, a significant portion of which were *required* due to his family circumstances. As the applicant was terminated

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[5] *Johnstone*, at para. 128.

[6] *Johnstone*, at para. 123.

[7] 186 L.A.C. (4th) 180.

[8] 2011 LAC (4th) 343 [*Loranger Grievance*].

[9] *Loranger Grievance* at para. 44.

[10] 2012 HRTO 1590 (CanLII) [*Devaney*].

[11] *Devaney* at para. 115.

[12] *Devaney* at para. 117.

based on absence relating largely to his family circumstances, the Tribunal found that a *prima facie* case of discrimination had been established.

Despite an increased move toward the amalgamated approach outlined in *Power Stream*, case law indicates there is still some uncertainty regarding the appropriate test in Ontario. In a recent arbitration decision, *Siemens Milltronics*,[13] Arbitrator Stout chose to build on the federal approach instead of directly applying *Power Stream*. In line with the federal position, the arbitrator noted that family status protection is not limited to situations where the employer has changed a term or condition of employment giving rise to a "serious interference with a substantial family duty or obligation."[14] Going one step further however, the arbitrator read into the federal approach the notion that not every employer action that has a negative impact on a parental obligation would be *prima facie* discriminatory. As such, a contextual approach is required to examine all the circumstances when determining if the employer's conduct is *prima facie* discriminatory. Using this contextual lens, Arbitrator Stout reviewed whether the union had established a link between family status and the adverse treatment (penalization for violation of a work attendance/holiday pay policy). A component of this analysis included whether the treatment was in fact stereotypical to all employees or arbitrary, and whether it affronted concepts of human dignity. In other words, did the protected ground (family status) truly play a role in creating the disadvantage? The arbitrator concluded that while the employer's conduct did have a negative impact on the grievor, the disadvantage she suffered was not arbitrary and did not perpetuate prejudice or stereotyping.

Although *Siemens Milltronics* indicates a continuing ambiguity regarding the test for *prima facie* family status discrimination in Ontario, it does endorse the proposition that Ontario adjudicators have increasingly taken a middle of the road approach (designed to accommodate both the employer's and the employee's needs). In short, what appears clear is that Ontario adjudicators are increasingly moving toward the *Power Stream* amalgamated approach of requiring a 'serious interference with a substantial parent/child obligation' in order to find that protections under family status are engaged, where a 'substantial obligation' must be in the nature of a care requirement, and not the employee's preference on how such care should be provided.

About the Author

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[13] *Siemens Milltronics Process Instruments Inc v. Employees Association of Milltronics*, 2012 CanLII 67542 (ON LA) [*Siemens Milltronics*].

[14] *Siemens Milltronics* at para. 63.