

# FAMILY STATUS DISCRIMINATION: TRIBUNAL REJECTS JOHNSTONE TEST

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The Human Rights Tribunal of Ontario's recent decision in *Misetich v. Value Village* is precedent setting. In this decision, the Tribunal confirmed that the Federal Court of Appeal's decision in *Johnstone v. Canada Border Services* – which set out a four-part test to establish discrimination on the basis of family status– will not be applied by the Tribunal.

The Tribunal confirmed that the test for discrimination is the same in all cases. An applicant must establish that he or she is a member of a protected group, has experienced adverse treatment, and the ground of discrimination was a factor in the adverse treatment.

The Tribunal also confirmed that the assessment of whether an applicant had made reasonable efforts to meet family status obligations by seeking out reasonable alternative solutions conflates the test for discrimination with the test for accommodation. In order to prove family status discrimination, an applicant is not required to self-accommodate the adverse impact caused by a workplace rule.

The Tribunal proceeded to outline the following analysis for establishing family status discrimination in employment:

- The employee must establish more than a negative impact on a family need. The negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work.
- Assessing the impact of the impugned rule is done contextually and may include consideration of the other supports available to the applicant. These supports are relevant to assessing both the family-related need and the impact of the impugned rule on that need.
- Once the applicant proves discrimination, the onus shifts to the employer to establish that the applicant cannot be accommodated to the point of undue hardship. At this stage, the employee's co-operation – including providing the employer with supporting information regarding the family-related needs and collaborating on solutions to resolve the family/work conflict – is considered.

More generally, the Tribunal also made clear that employees cannot take an intransigent position regarding

their human rights. Employees are required to provide sufficient information about their family status, including details of their specific childcare or eldercare responsibilities. Accommodation is a joint process.

### **Employer Best Practices**

While this decisions helps to clarify the analysis the Tribunal will apply when considering an allegation of discrimination in employment on the basis of family status, the case law on family status discrimination is far from settled.

At present, it is unclear what the Tribunal will consider “more than a negative impact on a family need” or a “real disadvantage”. It is also unclear how the Tribunal will assess the impact of other available supports and whether the Tribunal’s approach will differ greatly from the approaches of other adjudicators and courts.

In light of this uncertainty, prudent employers should continue to adopt best practices when considering employee requests for family status accommodation. These include:

- Accepting requests for accommodation in good faith;
- Limit requests for information to what is necessary and obtain expert advice, where needed;
- Taking an active role in canvassing accommodation options;
- Keeping records of accommodation requests and actions taken to consider accommodation options;
- Grant accommodation requests to the point of undue hardship, or provide substantive reasons if request is denied for the reason of undue hardship.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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