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HUMAN RIGHTS TRIBUNAL OF ONTARIO REVISITS TEST FOR FAMILY STATUS DISCRIMINATION

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In the 2014 case of *Canada (Attorney General) v. Johnstone*, the Federal Court of Appeal caused a great deal of consternation among employers when it established a test to determining whether an employee had been discriminated against based on family status. We previously commented on *Johnstone* here and have followed other family status cases as the law in this area continues to develop.

Johnstone has been widely accepted as the law in both provincial and federal jurisdictions. However, with its recent decision in *Misetich v. Value Village Stores Inc.* ("*Misetich*"), the Human Rights Tribunal of Ontario (the "HRTO") has muddied the waters by setting a different standard for finding family status discrimination.

Dispute in *Misetich*

Misetich involved a dispute over whether an employee was entitled to a modified work schedule to accommodate the employee's alleged obligations to care for her elderly mother. The employee had previously sought accommodated work as a result of a physical injury. However, when Value Village provided a modified duties plan, the employee refused to participate and refused any evening, weekend or "on-call" shifts.

Value Village repeatedly requested information about the employee's accommodation needs, including confirmation of the mother's medical need for care. The employee refused and stated that the requests were insulting and she provided only bare-bones statements or notes from her own doctor. Eventually, after the employee refused a final request to provide the necessary information, she was dismissed for having abandoned her position.

Analysis and Test for Family Status Discrimination

In its analysis, the HRTO examined the case law dealing with alleged family status discrimination since *Johnstone*. The HRTO found that prior decision-makers have inconsistently applied the longstanding test for finding discrimination and, in doing so, have set a higher threshold for finding discrimination based on family status than for other forms of discrimination.

The HRTO set out the following steps when evaluating whether or not there has been discrimination based on

family status in the employment context:

- The employee must show a negative impact based on a family need that results in a real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work;
- Assessing the alleged impact must be done contextually and may include consideration of other supports available to the applicant – this is a reduced threshold from considering whether the employee can "self-accommodate", the standard established in *Johnstone*
- If the applicant can prove discrimination, the onus shifts to the employer to show that the applicant cannot be accommodated without undue hardship.

In *Misetich*, the applicant failed at the first step because she had made no effort to prove to her employer that its schedule would negatively impact her obligations to her mother.

What Employers Should Know

Given the attempt in *Misetich* to alter the test for finding family status discrimination, as well as the relatively nascent nature of the issue, the law on family status discrimination is not settled.

What *Misetich* does make clear, however, is that employers must continue to be vigilant in making a reasonable effort to engage employees with family obligations, including, where necessary, obtaining particulars about an employee's family status needs. It is not sufficient for an employee to simply state that a workplace rule impact on the ability to provide childcare or eldercare – there must be evidence that there is a negative impact the results in a "real disadvantage". Employers must also keep in mind that employees are not entitled to their preferred accommodation (though that may ultimately be what is implemented). The employer must provide a reasonable accommodation that fits the need of the employee, but may not necessarily match the employee's "first choice".

Finally, both employers and employees need to continue to view accommodation as a two-way street, that may not end after the implementation of one potential accommodation. Ongoing dialogue is important to ensure that both the procedural and substantive aspects of the accommodation process are being met.

We will continue to provide updates as this area of the law develops. If you have any questions regarding *Misetich* or accommodation for family status, do not hesitate to contact a member of our labour and employment group.

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A Cautionary Note

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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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