THE PARTRIDGE FAMILY STATUS CLAIM: ONTARIO COURT OF APPEAL UPHOLDS JOHNSTONE TEST FOR DISCRIMINATION

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In a bulletin published last year, we advised readers of the Federal Court of Appeal ("FCA") decision in *Johnstone v. Canada Border Services Agency* ("*Johnstone*"), which affirms that parental childcare obligations are included under the protected ground of family status under the *Canadian Human Rights Act*. The decision set out a four-part test to establish discrimination on the basis of family status relating to childcare accommodation. In another bulletin, we advised readers of the Ontario Superior Court of Justice decision in *Partridge v. Botony Dental Corporation* ("*Partridge*"), which was the first reported provincial decision to adopt and apply the *Johnstone* test. In a recent decision, the Ontario Court of Appeal upheld the judgment in *Partridge*, finding the trial court correctly applied the law and made findings that were open to it on the evidence presented at trial.

The Johnstone Test

In *Johnstone*, the FCA held that in order for a claimant to show a *prima facie* case of discrimination on the basis of family status involving childcare obligations, the claimant must demonstrate that:

1. a child is under the claimant's care and supervision;
2. the childcare obligation at issue engages the claimant's legal responsibility for that child, as opposed to a personal choice;
3. the claimant has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
4. the impugned workplace condition or rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

If a *prima facie* case of discrimination is made out by the claimant, the employer must show that the policy or practice is a bona fide occupational requirement and that those affected cannot be accommodated without undue hardship.

The Court of Appeal's Decision in Partridge

With respect to the trial court's finding of discrimination on the basis of family status in *Partridge*, the employer argued that there was no evidence to support the factual finding that the employee could not adapt her childcare responsibilities to her new work schedule or that the childcare arrangements that she put into place upon her return to work were not sustainable. However, the Court of Appeal accepted the trial court's conclusion that the employer's refusals to reinstate Ms. Partridge to the position of office manager following her maternity leave as well as the employer's reprisal in the form of creating an inflexible working schedule amounted to discriminatory treatment because of family status. The Court of Appeal found that Ms. Partridge presented sufficient evidence as to the complex arrangements she made with relatives and others whom she had asked to pick-up her children from daycare. The Court of Appeal also affirmed that what constitutes reasonable alternative childcare arrangements is fact-specific and that the trial court was entitled to accept Ms. Partridge's uncontested evidence as to the sustainability of the new working hours on her childcare arrangements.

Lessons for Employers

The interplay between family status and parental childcare obligations is an area of the law that is likely to be the subject of continued litigation and is ripe for further judicial elaboration.

Johnstone and Partridge both provide an unequivocal affirmation that childcare-related parental obligations may require accommodation, thereby limiting an employer's discretion to schedule work. *Johnstone* and *Partridge* also establish that an employee must be able to show that the employee has made a reasonable attempt to comply with the employee's working schedule by making reasonable alternative childcare arrangements before the employee will be able to establish a *prima facie* case of discrimination because of family status.

While the case law is clear that what will constitute a reasonable attempt to find reasonable alternative childcare arrangements is fact-specific, it is unclear as to the length an employee must go to satisfy that obligation. In *Johnstone* and *Partridge* the courts suggested that alternative childcare arrangements must be "virtually impossible" or "unsustainable" to satisfy that obligation. Given the differences in the factual circumstances in *Johnstone* and *Partridge*, ascertaining when that "virtually impossible" or "unsustainable" threshold has been reached may prove challenging for employers.

Similar issues and accommodation obligations may also arise when an employee has eldercare responsibilities. For a discussion of the considerations applicable to eldercare accommodation requests see our bulletin on Ontario Human Rights Tribunal in *Devaney v. ZRV Holdings Limited*.

When confronted with a request for accommodation on the basis of an employee's childcare or eldercare obligations, an employer should seek the assistance of legal counsel to help it decipher whether the

employee's obligations fall within the scope of family status under the applicable human rights legislation.

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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.