THE PARTRIDGE FAMILY STATUS CLAIM: SUPERIOR COURT APPLIES *JOHNSTONE* TEST FOR DISCRIMINATION

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In a *recent bulletin*, we advised readers of the Federal Court of Appeal ("**FCA**") decision in *Johnstone v. Canadian 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*. Given the similarities between the federal and provincial human rights legislation, we anticipated that the test articulated by the FCA in *Johnstone* would be adopted by provincial decision-makers confronted with similar claims. Recently, in *Partridge v. Botony Dental Corporation*, the Ontario Superior Court of Justice ("**Court**")[1] released the first recorded decision to do just that.

The Facts

Ms. Partridge was employed by Botony for seven years and four months, initially as a Dental Hygenist and, for the last four years of her employment, as an Office Manager. Prior to the end of her second maternity leave, Botony advised Ms. Partridge that, upon her return to work, she would be scheduled as a Dental Hygenist from 8:00am to 3:00pm four days per week.

When Ms. Partridge reminded Botony that she had a statutory right to be reinstated to her former position, Botony advised her that her former position was no longer available and then demanded that she work as a Dental Hygenist from 9:00am to 6:00pm four days per week, hours it knew conflicted with her daycare arrangements. Botony terminated Ms. Partridge's employment for cause when she failed to report to work on the first day following her maternity leave.

Ms. Partridge commenced an action against Botony for wrongful dismissal in which she also alleged that the changes to her employment were discriminatory on the basis of family status given her childcare obligations. The Court agreed.

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.

Application of the *Johnstone* Test

Having found that Botony did not have cause to terminate Ms. Partridge's employment, the Court applied the *Johnstone* test to determine whether there was a *prima facie* case of discrimination.

Given Ms. Partridge's clear legal obligation to ensure her young children were cared for while she was working, the Court found that "there [was] no question that the first two factors [were] satisfied". With respect to the third and fourth factors, the Court was satisfied that when informed of the revised schedule, Ms. Partridge put in place a complex set of childcare arrangements so that she could be available to work until 6:00 pm. The Court agreed that the arrangements were not sustainable and, consequently, the interference was more than trivial. The Court explained:

Not only would she be charged a significant sum for picking up her children after 6:00pm from the daycare, but that fact necessitated her relying on family members and a neighbour, inconveniencing their schedules, or having her husband (who is self-employed) leave his business premises, with much room for potential "glitches" in those plans on any given day. By necessity, the plan differed for each child, as each was required to attend a different daycare because of their ages.

Satisfied that Ms. Partridge made out a *prima facie* case, the Court went on to find that the revised schedule was not a *bona fide* occupational requirement, as there was no rational connection between the requirement and the job duties, and that Botony failed to demonstrate that it could not accommodate Ms. Partridge without undue hardship.

Damages Award

Given the "seriousness of breaches of this nature", the Court awarded Ms. Partridge the "just and proper" sum of $20,000 in damages for injury to dignity, feelings and self-respect. The Court explained:

[W]here the discrimination has ultimately taken the form of dismissal, this particular breach affects a group of individuals who typically require childcare arrangements out of economic motivation. The discrimination not only has the effect of causing injury to dignity, feelings and self-respect, but may have an economic impact on individuals who can often least afford it. The Court's censure is warranted by way of an award that will act as a deterrent to employers who are unwilling to accommodate childcare arrangements, except where legitimate, justifiable grounds exist for being unable to do so.

This case, therefore, is also significant as a statement by at least one judge about the adverse effects of discrimination on the basis of family status relating to an employee's childcare obligations and the factors employers should consider when faced with a request for accommodation.

Lessons for Employers

While 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, both *Johnstone* and *Partridge* provide an unequivocal affirmation that childcare-related parental obligations may require accommodation, thereby limiting an employer's discretion to schedule work. In *Johnstone* and *Partridge*, the courts found that the discrimination arose out of the employers' wilful and reckless disregard for its legal obligations as an employer under the *Code*. Thus, when confronted with a request for accommodation on the basis of an employee's parental childcare obligations, employers should carefully consider whether the employee's obligations fall within the scope of family status under the *Code*. If so, employers should consider whether accommodation of the employee's childcare obligations will amount to undue hardship for the employer.

by Stefanie Di Francesco

[1] On June 30, 2008, the *Ontario Human Rights Code* ("*Code*") was amended to include section 46.1, which allows a civil court to order remedies for an infringement of a right under the *Code*.

A Cautionary Note