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Feature

Clarity on the Test for Discrimination in Relation to Family Status

The three-part Moore Test still holds in Alberta

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There has been ongoing confusion about the legal test for discrimination relating to family status. A recent decision of the Alberta Court of Appeal appears to have settled this issue.

The *Alberta Human Rights Act* prohibits employers from discriminating on the basis of family status. Discrimination on the basis of family status typically arises in cases where an employer seeks to apply a seemingly neutral employment policy to all employees, but the policy has an unintended negative impact upon employees who possess a characteristic protected by human rights legislation (e.g., imposing a new shift schedule that results in a parent being unable to satisfy his/her child care obligations).

At law, the test for establishing discrimination was settled by the Supreme Court of Canada decision *Moore v British Columbia (Education)* ("Moore"). Moore requires a complainant to demonstrate that: 1) he/she has a characteristic that is protected from discrimination; 2) he/she has experienced an adverse impact; and 3) the protected characteristic was a factor in the adverse impact.

Following the Moore decision, the Federal Court of Appeal in *Canada (Attorney General) v Johnstone ("Johnstone")* imposed a fourth element to the test for establishing discrimination based on family status. Johnstone indicates that in addition to the three requirements set out in Moore, it "is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a prima facie case of discrimination will be made out."

As a result of this conflicting jurisprudence, decision makers have grappled with whether or not the test for prima facie discrimination relating to family status includes this fourth element, that the complainant must demonstrate reasonable attempts to self-accommodate, without success.

This confusion is evident in the decisions leading up to the Alberta Court of Appeal's recent decision, *UNA v AHS,* which clarifies the proper test for discrimination based on family status.

In *UNA v AHS*, the Grievor was a registered nurse working full-time with AHS. Originally, the Grievor worked the required shift rotation of four on, four off. The Grievor, the mother of two infant children, was able to coordinate childcare around these shift obligations. However, two years after the Grievor started with AHS, a new shift rotation was announced. The inconsistent nature of this new shift work meant the Grievor and her husband would require 24-hour childcare, a requirement that was financially and logistically infeasible. The Grievor asked to maintain her existing shifts, which AHS refused. Accordingly, her union, UNA, filed a Grievance on her behalf, alleging that AHS failed to accommodate the Grievor.

A grievance arbitration board followed the analysis in the Johnstone decision, concluded the Grievor had not satisfied the element of "self-accommodation," and dismissed the Grievance.

UNA filed a judicial review of the Board's decision with the Alberta Court of Queen's Bench. The Court concluded that the Board had deviated from the Supreme Court of Canada's jurisprudence and indicated

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that the Moore test leaves no room to add an additional evidentiary requirement on a complainant. "The analysis of self-accommodation is not irrelevant – it just belongs elsewhere."

AHS appealed the Alberta Court of Queen's Bench decision, but was unsuccessful. The Court of Appeal definitively confirmed the proper test for discrimination in the context of family status is the Moore test. The Court confirmed that it is wrong to "import an additional requirement into the test for *prima facie* discrimination in family status cases" and held "family status claimants to a higher standard than other kinds of discrimination."

The Court of Appeal explained that "Johnstone unacceptably conflates prima facie discrimination which is determined at the first stage of the test, with that of duty to accommodate which is determined only at the second justification stage."

What does this mean for employers? It means the test for family status discrimination is the same as any other form of discrimination, the three-part Moore test. Employers are not able to combat an employee's claim for discrimination on the basis of family status where there is insufficient evidence that the employee attempted to remedy the adverse effect. This decision does not mean that employees have no obligation to self-accommodate; it just means that failure to self-accommodate does not form part of the test for establishing discrimination.

Once discrimination against an employee has been established, the analysis turns to the bona fide occupational requirement/duty to accommodate justification stage. There, an employer can point to a lack of reasonable participation in the accommodation process to defend an employee's discrimination claim.

This decision serves as a useful reminder that employers may refuse accommodation requests when the employer believes an employee has not taken reasonable steps to reconcile family and work obligations. It is important to approach each case with an open mind and conduct an individualized assessment on how a workplace requirement impacts an employee's family obligations, what solutions might be available and what impact those solutions will have on the workplace.

Most importantly, this decision has definitively confirmed that in Alberta, the test for discrimination in relation to family status is the three-part Moore test.

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