Family Status Accommodation: The Road to an Amalgamated Approach

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Abstract
The duty to accommodate family status has garnered significant attention in recent years due to the changing nature of familial obligations. Courts, tribunals and arbitrators alike have struggled with how to define the concept of family status accommodation, resulting in two conflicting tests. The uneven application of these tests has led to a variance in case law regarding how broadly family status accommodation should be interpreted. This paper will begin by examining the evolution of the duty to accommodate in labour law. The two tests that have divided the Canadian jurisprudence and the subsequent problems that arise from each test will then be examined. This paper will then analyze recent cases that have attempted to combine the two approaches to create a new amalgamated approach. It is proposed that this amalgamated test is the proper test for family status accommodation, as it strikes the appropriate balance between the various competing interests and will not unduly favour the employer or the employee in future family status claims.

Keywords
family, labour law, employment law, accommodation, discrimination, test, human rights
FAMILY STATUS ACCOMMODATION:
THE ROAD TO AN AMALGAMATED APPROACH

MELODY JAHANZADEH*

INTRODUCTION

Family status discrimination claims have surged recently in Canada. This rise in
work–family conflicts is the product of several factors including the constantly-
changing nature of family composition, increased demands placed on employees, and
lack of accessible public resources to assist with childcare. The state of Canadian law
on this issue is largely unsettled. Courts, tribunals, and arbitrators alike have struggled
to appropriately balance the competing interests in these disputes.

This paper argues that family status claims are best resolved through a middle-
ground approach that incorporates both employer and employee interests. The unique
nature of family status claims necessitates a different approach that first places a duty
on the employee to attempt self-accommodation before requesting accommodation from
the employer. Section I will begin by examining the historical evolution of human rights
in labour law, with a particular emphasis on the duty to accommodate. Section II will
trace the development of the duty to accommodate family status and outline the two
conflicting tests that have divided Canadian jurisprudence. Section III will examine how
the application of these competing tests has led to the construction of a synthesized,
amalgamated approach. Lastly, Section IV will outline the consequences of applying an
overly broad or narrow test, and demonstrate that the new amalgamated approach is the
proper test that should be applied in family status claims.

I. HOW DID WE GET HERE? THE EMERGENCE OF HUMAN RIGHTS
AND THE DUTY TO ACCOMMODATE IN CANADA

Over the past two decades, the interpretation of Canadian labour laws has been
heavily influenced by the dual principles of human rights and equality. The importation
of these principles, and the duty to accommodate in particular, stem largely from two

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1 The influence of these principles can be gleaned from the enactment of various labour law statutes
incorporating human rights and equality principles. See: Canada Labour Code, RSC 1985, c L-2; Labour
Relations Act, 1995 SO 1995, c 1, Sch A; Employment Standards Act, 2000, SO 2000, c 41; Employer
sources: the Canadian Charter of Rights and Freedoms\textsuperscript{2} and the 1984 publication of the Royal Commission Report entitled Equality in Employment.\textsuperscript{3}

The Charter brought an increased emphasis on human rights laws and policies. The values implied by the Charter and the express inclusion of the Section 15 right to equality in 1985 both created an impetus for the broad interpretation of discrimination and equality claims.\textsuperscript{4}

The Abella Report promoted further change by spurring the creation of legislation with respect to employment equity. Moreover, the Report recommended the importation of two well-established American concepts into Canadian law: indirect or adverse effect discrimination\textsuperscript{5} and the “duty to reasonably accommodate on civil and human rights grounds.”\textsuperscript{6} The concept of indirect discrimination in particular marked a fundamental shift away from the previously held notion that proof of intent to discriminate was a prerequisite in establishing workplace discrimination.\textsuperscript{7} The Supreme Court of Canada confirmed the influence of the Abella Report only six months later when the court cited the report in Ontario (Human Rights Commission) and O’Malley v Simpsons-Sears Ltd.\textsuperscript{8}

The combined effect of the Abella Report and the Charter culminated in an emphasis on the significance of human rights, evidenced from various Supreme Court pronouncements that assigned “fundamental”\textsuperscript{9} and “quasi-constitutional”\textsuperscript{10} status to human rights legislation.

\textsuperscript{2} Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].
\textsuperscript{3} Royal Commission, Equality in Employment (Ottawa: Minister of Supply and Services Canada, 1984) [Abella Report].
\textsuperscript{5} For the purposes of this paper, “indirect discrimination” and “adverse effect discrimination” will be used interchangeably.
\textsuperscript{6} Lynk, “Disability and Work”, supra note 4 at 205.
\textsuperscript{7} Ibid at 205–206. As a result of this shift, a workplace policy could now be found to be discriminatory despite the fact that it was implemented for a valid reason and in the absence of an express intent to discriminate.
\textsuperscript{8} Ontario (Human Rights Commission) and O’Malley v Simpsons-Sears Ltd, [1985] 2 SCR 536 at 550 [O’Malley].
\textsuperscript{9} Insurance Corp of British Columbia v Heerspink, [1982] 2 SCR 145 at 158.
\textsuperscript{10} Craton v Winnipeg School Division No 1, [1985] 2 SCR 150 at 156; the court did not specifically refer to human rights legislation as “quasi-constitutional” per se, but this can be inferred from McIntyre J.’s statement that

\begin{quote}
[i]t is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.
\end{quote}
Subsequently, a surge of case law in the late 1980s and early 1990s advocated for broader human rights obligations and standards, particularly with respect to the workplace.through these cases, the duty to accommodate began to emerge in a tangible way, demonstrated notably through *O’Malley*. This case involved an allegation of discrimination on religious grounds due to a workplace policy that required employees to work on Fridays and Saturdays, causing a conflict between the complainant’s religious convictions as a Seventh Day Adventist. The Supreme Court found that although the employer had valid reasons for implementing such a policy, it nonetheless had an adverse impact on employees of that particular faith. The employer was required to accommodate those employees. The *O’Malley* decision was crucial to developing the notion that intention was not a precondition to establishing a finding of discrimination and that an employer would be required to accommodate in cases of indirect discrimination.

Despite the advances being made in human rights, a complex and bifurcated approach was in place up until 1999 that treated direct and indirect cases of discrimination differently. Indirect discrimination claims rarely considered the validity of an impugned rule and the analysis typically focused only on the employer’s duty to accommodate. Conversely, employers could defend a finding of direct discrimination by establishing that the impugned workplace policy or standard was a “*bona fide* occupational requirement” (“BFOR”).

Change to this system occurred with the Supreme Court’s ruling in *British Columbia (Public Service Employee Relations Commissions) v British Columbia Government and Service Employees’ Union* (the *Meiorin* case). The female complainant was a member of the British Columbia Forest Firefighting Crew for three years and had a satisfactory work performance. During the course of her employment, a new fitness test was implemented; she failed to pass the new test and was dismissed. The employer argued that the standard was a BFOR, while the union opposed its adverse impact on women, as physiological differences between men and women led to the standard being much more difficult for women to pass. Moreover, the union argued that this standard was not reasonably necessary to perform the job. The Supreme Court explicitly overturned their previous bifurcated approach with respect to discrimination and created a new unified test for establishing a BFOR in all cases of discrimination. The new test outlined two stages: the first required the employee to establish there was a *prima facie* case of discrimination. Once this was demonstrated,

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13 *British Columbia (Public Service Employee Relations Commissions) v British Columbia Government and Service Employees’ Union*, [1999] 3 SCR 3 [*Meiorin*].
14 *Ibid* at para 12.
the second stage shifted the burden to the employer to demonstrate the otherwise discriminatory standard is a BFOR based on three factors:

1. The standard was adopted for a purpose rationally connected to the performance of the job;
2. The employer adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
3. The employer would incur undue hardship if they were to accommodate the employee, as the standard is reasonably necessary to the accomplishment of that purpose.\(^\text{15}\)

The duty to accommodate often hinges on the third factor—the ability of the employer to establish that undue hardship would result if they were to accommodate the employee. The Supreme Court in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*\(^\text{16}\) outlined a list of six non-exhaustive factors to assist in determining what constitutes “undue hardship”, including:

1. Financial cost;
2. Impact on the collective agreement;
3. Problems of employee morale;
4. Interchangeability of the workforce and facilities;
5. Size of the employer’s operations; and
6. Safety.\(^\text{17}\)

It should be noted there is also a seventh emerging factor, which considers the legitimate operational requirements of the workplace.\(^\text{18}\)

The duty to accommodate to the point of undue hardship is a settled concept in Canadian labour and employment law and the specific grounds of discrimination have been steadily expanding. The duty to accommodate family status under s 5(1) of the

\(^\text{15}\) *Ibid* at para 54.

\(^\text{16}\) *Central Alberta Dairy Pool v Alberta (Human Rights Commission),* [1990] 2 SCR 489 [Central Alberta].

\(^\text{17}\) It should be noted that the *Ontario Human Rights Code* lists only three factors that should be considered in the undue hardship analysis: cost, health and safety requirements and external sources of funding. Moreover, the Ontario Human Rights Commission stipulated no other factors should be incorporated into the analysis (Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (November 2000) online: <http://www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate>). Arbitrators have nonetheless chosen to follow the *Central Alberta* guidelines and it is currently undecided what the appropriate approach should be.

\(^\text{18}\) *Central Alberta, supra* note 16 at 521.

\(^\text{19}\) Michael Lynk, “The Duty to Accommodate in the Canadian Workplace” (2005) [unpublished, archived at Western University Faculty of Law Library] [Lynk, “Duty to Accommodate”].
Ontario Human Rights Code (“OHRC”)\textsuperscript{20} has received considerable attention in recent years, requiring courts and arbitrators to define the precise scope of family status and how extensively an employer is required to accommodate employees with family obligations.

II. THE DUTY TO ACCOMMODATE FAMILY STATUS: COMPETING APPROACHES

The duty to accommodate family status is rooted in s 5(1) of the Ontario Human Rights Code, which reads:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

The particular scope of what constitutes family status discrimination has undergone a number of changes. Initially, Canadian courts interpreted family status broadly, evidenced by the 1993 decision in \textit{Brown v Canada (Department of Revenue – Customs and Excise)}.\textsuperscript{21} The Canadian Human Rights Tribunal held that a broad, purposive definition was the correct way to define family status and that to “consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of "family status" as a ground of discrimination.”\textsuperscript{22} The Tribunal further held that family status should include both the status of being a parent \textit{per se} and the corresponding duties and obligations.\textsuperscript{23}

Subsequently, the Court of Appeal in \textit{Ontario (Human Rights Commission) v Mr A}\textsuperscript{24} outlined that family status discrimination can be established merely by demonstrating “practices or attitudes that have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic relating to their family.”\textsuperscript{25} This broad definition was subsequently adopted by the Canadian Human Rights Tribunal in \textit{Woiden v Lynn}.\textsuperscript{26}

However, Canadian jurisprudence has recently diverged regarding the appropriate scope of the definition of “family status”. As it currently stands, there are two primary schools of thought. The first stems from the ruling in \textit{Health Sciences

\textsuperscript{20} Human Rights Code, RSO 1990, c H.19 [HRC].
\textsuperscript{21} Brown v Canada (Department of Revenue – Customs and Excise) (1993), 19 CHRR D/39 [Brown].
\textsuperscript{22} Ibid at para 75.
\textsuperscript{23} Ibid at para 57.
\textsuperscript{24} Ontario (Human Rights Commission) v Mr A, [2000] OJ No 4275 [Mr A].
\textsuperscript{25} Ibid at para 54.
\textsuperscript{26} Woiden v Lynn, [2002] CHRD No 18 at para 107 [Woiden].
Association of British Columbia v Campbell River and North Island Transition Society, which interprets this ground very narrowly and promotes a high threshold to make out a *prima facie* case of family status discrimination. The second approach is a by-product of the ruling in *Johnstone v Canada (Attorney-General)* and advocates a broad interpretation of family status. Each of these will be discussed in turn.

*Campbell River* was a judicial review of an arbitration award. The grievor was a married woman with four children; one child experienced “severe behavioural problems requiring specific parental and professional attention.” The grievor’s work schedule was changed for *bona fide* occupational reasons. This interfered with her ability to provide the necessary care for her son and she subsequently requested accommodation. The arbitrator held that family status was limited to the status of being a parent *per se* and excluded parental obligations. For this reason, her request was denied.

The British Columbia Court of Appeal rejected the arbitrator’s strict interpretation, described what family status should properly encompass, and then analyzed prior case law. Justice Low, writing for the Court, held that the broad interpretations in “*Brown* and *Woiden* conflated the issues of *prima facie* discrimination and accommodation.” As the *Meiorin* test indicates, these are analyses that should be clearly delineated and separately considered. Justice Low was also reluctant to impose such a broad definition with respect to family status and to subsequently impose a duty to accommodate wherever a workplace obligation conflicted with a family duty. This overly-inclusive approach was deemed to be “unworkable” and had the potential to “cause great disruption and mischief in the workplace.”

However, Justice Low did acknowledge that an overly-restrictive definition would not alleviate the negative impact of employers’ decisions on employees with family responsibilities. As such, he rejected the arbitrator’s interpretation that family status simply includes “the status of being a parent *per se*.”

The Court emphasized the importance of taking a contextual approach in allegations of family status discrimination and considering the individual circumstances of each case. Ultimately, the Court held that absent any bad faith on the part of the employer, a *prima facie* case of family status discrimination will be established only

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28 *Johnstone v Canada (Attorney-General)* 2007 FC 36; [2007] FCJ No 43 [*Johnstone*].
29 *Campbell River*, *supra* note 27 at para 7.
31 *Ibid* at para 35.
32 *Ibid*.
33 *Ibid*.
34 *Ibid* at para 38.
35 *Ibid*.
where “a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty.”

The Canadian Human Rights Tribunal in Hoyt v Canadian National Railway criticized the restrictive nature of this test two years later. The Tribunal discussed numerous cases that emphasized the importance of broad and liberal interpretations of quasi-constitutional human rights legislation so that discrimination can be eliminated. The Tribunal further stated that considerations of how the workplace would be disrupted as a result of accommodation should appropriately be analyzed in the BFOR stage of the discrimination test.

A year later, the Federal Court in Johnstone affirmed the Hoyt reasoning and rejected the high threshold test laid out in Campbell River. Justice Barnes for the Federal Court held that there is no reason to insist that family status discrimination can only be established where the employer implemented a change in the workplace. To do so would preclude grievors from the benefit of s 5(1) of the OHRC where a change within their family conflicts with a workplace obligation. This appears to be a particularly unjust result as these situations are no less deserving of human rights protection. Moreover, there is no compelling reason to uphold a more restrictive definition for one prohibited ground of discrimination in comparison to the other s 5(1) grounds.

The Court agreed with the applicant’s argument that a prima facie case of discrimination is established where the complainant demonstrates that the impugned workplace policy or standard adversely affected a family obligation. This new approach reflects the well-established notion that there is no level of “acceptable” discrimination a person must first endure before requesting accommodation, thereby

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36 Ibid at para 39.
37 Hoyt v Canadian National Railway, [2006] CHRD No 33 [Hoyt].
38 Ibid at para 147; See e.g. O’Malley, supra note 8 at 547; Canadian National Railway Co v Canada (Canadian Human Rights Commission), [1987] 1 SCR 1114 at 1134–1136; Robichaud v Canada (Treasury Board), [1987] 2 SCR 84 at 89–90.
39 Specifically, the Tribunal stated that such factors best fall under the third branch of the Meiorin test for a BFOR, which considers the reasonable necessity of a workplace policy: Hoyt, supra note 37 at para 121.
40 Johnstone, supra note 28 at para 29.
41 Ibid. See also: ONA v Orillia Soldiers Memorial Hospital (1999) OJ No 44, DLR (4th) 489 at para 44 and Meiorin, supra note 13 at paras 45–46.
removing the need to establish a “serious interference”.\textsuperscript{43} As a result, the matter was remitted back to the Commission.

The \textit{Campbell River} and \textit{Johnstone} tests present conflicting approaches, with no firmly established pronouncement on which test is the correct one to adopt. While \textit{Campbell River} promotes the view that family status discrimination should be defined narrowly, the \textit{Johnstone} test is broader and merely requires the employee to demonstrate that she has experienced an adverse effect as a result of a workplace policy.

The variation between these two tests allows adjudicators to develop a bias, rendering it difficult to achieve consistency in formulating the definition of family status. The following section will examine the way these diverging tests have been applied and the amalgamated approach that has subsequently emerged as a third alternative in defining family status.

\section*{III. APPLICATION OF THE COMPETING TESTS IN THE POST CAMPBELL RIVER AND JOHNSTONE ERA.}

The unclear definition of family status discrimination leaves open the possibility that the personal bias of an adjudicator will influence his application of the \textit{Campbell River} and \textit{Johnstone} tests, thereby resulting in conflicting decisions.\textsuperscript{44} The absence of a clear definition of family status has led to numerous cases that support both sides.\textsuperscript{45} Most notably, three 2010 cases against Canadian National Railway (“CNR”) rejected the \textit{Campbell River} approach.\textsuperscript{46} These cases involved separate claims filed by three female employees alleging family status discrimination by their employer, CNR, when they declined their respective job transfers from Jasper to Vancouver, citing parental

\footnotesize{
\textsuperscript{43} Ibid at para 30-31; O’Malley, supra note 8 at para 28; Canada v Minister of National Revenue, [2004] 1 FCR 679 at para 15 [National Revenue]; Morris v Canada (Canadian Armed Forces), [2005] FCJ No 731 at para 27 [Morris] where it was held that the legal definition of a \textit{prima facie} case does not require the Commission to adduce any particular type of evidence to prove the facts necessary to establish that the complainant was the victim of a discriminatory practice as defined in the Act. Paragraph 7(b) requires only that a person was differentiated adversely on a prohibited ground in the course of employment.

\textsuperscript{44} For simplicity’s sake, the “\textit{Campbell River} test” in this paper refers to a “serious interference with a substantial obligation”, absent the requirement that the change be employer-implemented. The “\textit{Johnstone} test” refers to the demonstration of an “adverse impact” the employee has suffered.

\textsuperscript{45} For cases that have adopted the \textit{Campbell River} approach, see: Comet Transport Ltd v Koops, [2003] BCESRD No 192 (Thornicroft) and Carewest v Health Sciences Association of Alberta (2001), 93 LAC (4th) 129 (Moreau). For cases that have adopted the Johnstone reasoning, see: Canadian Staff Union v Canadian Union of Public Employees, [2006] NSLAA No 15 (Christie) [Canadian Staff Union]; Coast Mountain School District No 82 v British Columbia Teachers’ Federation, [2006] BCCAAA No 184 (Munroe) [BCTF]; Canada Post Corporation v Canadian Union of Postal Workers (2006), 156 LAC (4th) 109 (Lanyon) [Canada Post]; Rennie v Peaches and Cream Skin Care Ltd, (2006), 59 CHRR D/42 (Alta HRP); Evans v University of British Columbia, [2007] BCHRTD No 348 [Evans].

\textsuperscript{46} Whyte v Canadian National Railway, 2010 CHRT 22 [Whyte]; Seeley v Canadian National Railway, 2010 CHRT 23 [Seeley]; Richards v Canadian National Railway, 2010 CHRT 24 [Richards]. It should be noted that the Seeley decision was appealed to the Federal Court, and the judgment was not released as of this article’s publication date.
}
obligations. Each of their requests for accommodation was denied, and the women were subsequently fired from their positions in 2005.

The Canadian Human Rights Tribunal in each case stated that the Campbell River test imposed an extra burden on complainants by incorrectly suggesting that family status required a higher standard of proof than the other enumerated grounds. The correct approach is to treat family status as a ground worthy of equal protection and not subject to a different analysis or standard of proof. Moreover, the test outlined in Hoyt and Johnstone better reflected the purposive interpretation of human rights legislation and was, therefore, the appropriate test to apply. The Tribunal also took issue with CNR’s categorization of the employees’ family obligations as a “choice” and instead held that family status encompasses both the state of being a parent and the obligations that accordingly arise.

However, three seminal cases in recent years demonstrate how our legal system has attempted to knit together the competing approaches outlined in Johnstone and Campbell River to conclusively arrive at a workable, middle ground definition of family status.

Case one: Re Power Stream Inc and International Brotherhood of Electrical Workers (Bender et al)

The first major case to compare the Campbell River and Johnstone tests was Re Power Stream Inc and International Brotherhood of Electrical Workers, Local 636 (Bender et al). Four employees experienced a conflict with their family obligations after a shift schedule change was implemented and their accommodation requests from their employer were denied. They in turn filed grievances claiming discrimination on the basis of family status. In arriving at his decision, Arbitrator Jesin engaged in a thorough analysis of the relevant tests and considered whether there is a threshold of acceptable discrimination that must first be met before an employer is required to accommodate.

Jesin expressed concern with the Campbell River requirement that discrimination can only be established where the employer implemented a change in the workplace. He reasoned that changes within the family often result in workplace conflict and these circumstances still require the employer to accommodate. Jesin

47 Whyte, supra note 46 at paras 173–174; Seeley, supra note 46 at paras 99, 120–122; Richards, supra note 46 at paras 166–168.
48 Whyte, supra note 46 at paras 182–185; Seeley, supra note 46 at para 126; Richards, supra note 46 at paras 174–177.
49 Re Power Stream Inc and International Brotherhood of Electrical Workers, Local 636 (Bender et al), 186 LAC (4th) 180 (Jesin) [Power Stream].
50 Ibid at 182–183.
compared accommodation of new family situations to instances where employers are under a legal obligation to accommodate employees with newly acquired disabilities.\textsuperscript{51}

However, Jesin noted that both \textit{Johnstone} and \textit{Hoyt} rejected the \textit{Campbell River} test but neither ruling suggested an alternative test that examined specifically what types of “adverse impact” would amount to family status discrimination.\textsuperscript{52} He expressed discomfort with the proposition that anything that conflicts with an employee’s family obligations gives rise to a \textit{prima facie} case of discrimination. In his view, while parents certainly need to be there to provide guidance, support and care for their children, they also need to work to ensure that they have the financial means to meet their parental obligations.\textsuperscript{53} These competing interests necessarily entail some sacrifice on the part of parents and require them to be proactive in minimizing the extent to which their parental obligations conflict with their workplace duties.

While employers are often in an easier position to accommodate employees compared to the employees themselves, Arbitrator Jesin reiterated the point made in \textit{Campbell River} that it would be inefficient to impose a duty to accommodate for every conflict that interferes with an employee’s parental obligations. To do so would “freeze the employer’s ability to meet its economic needs as virtually every action could have some negative effect on the parental duties of one employee or another.”\textsuperscript{54}

Jesin outlined that the duty to accommodate depends largely on the circumstances and the specific obligations that are disrupted.\textsuperscript{55} Being unable to attend all of a child’s extracurricular events, as was the case with one grievor, did not merit accommodation.\textsuperscript{56} However, disrupting the arrangements of a custody agreement did require accommodation.\textsuperscript{57} Moreover, in determining whether a \textit{prima facie} case of discrimination existed, Jesin considered what steps, if any, the employee had taken to self-accommodate before turning to the employer for accommodation. Specifically, he cited the efforts made in \textit{Hoyt} by the grievor to obtain childcare on short notice.\textsuperscript{58}

\textbf{Case two: Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungwirth Grievance)}

The two principles from Power Stream—an employee’s duty to self-accommodate and the importance of taking a contextual approach—were applied a year later in \textit{Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungwirth Grievance)}

\textsuperscript{51} \textit{Ibid} at 201.
\textsuperscript{52} \textit{Ibid} at 198.
\textsuperscript{53} \textit{Ibid} at 199.
\textsuperscript{54} \textit{Ibid} at 200.
\textsuperscript{55} \textit{Ibid} at 203.
\textsuperscript{56} \textit{Ibid}.
\textsuperscript{57} \textit{Ibid}.
\textsuperscript{58} \textit{Ibid} at 202; \textit{Hoyt}, supra note 37 at para 129.
In this case, the employee was a single mother and grieved her shift schedule change. She argued the schedule change conflicted with her ability to care for her eleven-year-old son, and alleged family status discrimination.

Arbitrator Ponak was faced with the question of whether or not the employee had established a *prima facie* case of discrimination and, correspondingly, how narrowly or broadly family status should be interpreted. In analyzing the conflicting jurisprudence, he placed considerable weight on prior cases that considered whether the grievor’s work–family conflict was outside the “experience of the vast majority of people”, as well as cases that underscored the importance of self-accommodation. Ponak synthesized these principles to formulate an amalgamated approach to the *Johnstone* and *Campbell River* tests:

The Board accepts that all work requirements have some degree of interference with parental obligations. Absent express public policy, such as that enacted with respect to maternity leave, family status discrimination cannot possibly be interpreted as arising in any situation in which a work requirement results in some interference, no matter how minimal, with a parental obligation. In order to work, all parents must take some steps on their own to ensure that they can fulfill both their parental obligations and their work commitments. Part of any examination of whether a *prima facie* case has been established for family status discrimination must therefore include an analysis of the steps taken by the employee him or herself to balance their family and worklife responsibilities.

*Alberta* appears to propose that the absence of viable alternatives will strengthen a claim of family status discrimination. This approach embodies the notion that an employer is obligated to accommodate needs and is not so obligated to accommodate employee choices or preferences. The presence of alternatives when faced with a work–family conflict indicates that employees are asking for their preferences to be accommodated, a request that recently has not garnered much sympathy.

In rendering his judgment, Ponak found that the grievor had other alternatives available to her with respect to the after-school care of her son and there appeared to be

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59 *Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungwirth Grievance)*, [2010] AGAA No 5 (Ponak) [Alberta].
60 Ibid at paras 56–60; *Canada Post*, supra note 45 at paras 92–95; *BCTF*, supra note 45 at para 39; *Canadian Staff Union*, supra note 45 at para 140; *Evans*, supra note 45 at paras 30–34.
61 *Alberta*, supra note 59 at para 64.
62 *Canadian Staff Union*, supra note 45 at para 140, where it was held that “a good faith business judgment should not be required by law to give way to individual preferences arising from everyday marital and family commitments.”
no compelling reason as to why these alternatives were unworkable. As such, a *prima facie* case of discrimination was not established and the grievance was dismissed.

**Case three: Alliance Employees Union, Unit 15 v Customs and Immigration Union (Loranger Grievance)**

Most recently, *Alliance Employees Union, Unit 15 v Customs and Immigration Union (Loranger Grievance)* followed the trend of amalgamating the two dominant tests regarding family status. The grievor, Mr Loranger, was a Labour Relations Officer for the Customs and Immigration Union whose job required he remain available for travel when necessary. During the relevant period, his five-year-old son was diagnosed with Attention Deficit Hyperactive Disorder and his wife was considered to have a high-risk pregnancy. These two factors led Loranger to request an exemption from all travel so that he would be able to care for his son for the duration of his wife’s pregnancy. Loranger’s request supported his request with two medical notes confirming that an exemption from travel would allow him to simultaneously care for his son and to reduce the stress on his wife during her pregnancy.

Loranger’s employer responded to his request by agreeing to accommodate him on a case-by-case basis, and offering to incur extra costs to allow him to travel back home to be with his family each day when Loranger would need to travel. This accommodation would alleviate the difficulties that both his wife and son would encounter if Loranger were away for multiple days at a time. Loranger deemed this arrangement unacceptable and filed a grievance alleging discrimination on the basis of family status.

Arbitrator Allen relied on the amalgamated approach developed in *Power Stream* and *Alberta* to determine whether a *prima facie* case of discrimination was established. Allen agreed with the assertions made by Arbitrators Ponak and Jesin that it would be inappropriate if every work–family conflict established *prima facie* family status discrimination. Allen ruled it was prudent to also consider whether the grievor took any action to minimize the extent to which his or her workplace obligations interfered with family commitments. Allen noted that successful cases of family status discrimination in the past typically involved efforts made by the grievor to investigate

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63 *Alberta,* supra note 59 at paras 69–73.
64 *Alliance Employees Union, Unit 15 v Customs and Immigration Union (Loranger Grievance),* [2011] OLAA No 24 (Allen) [Alliance].
other options, even those cases that appeared to implement a broad test for family status discrimination.69

All things taken together, Allen was of the opinion that to establish a *prima facie* case of family status discrimination, it is necessary for the employee to prove he was proactive in attempting to balance his or her work and family obligations. Allen held that, despite the requisite broad interpretation of human rights legislation, such an interpretation should not be “so broad as to eliminate the need for an evidentiary basis for the *prima facie* case.”70 In applying this view to Loranger’s grievance, Allen found that Loranger had made no efforts to arrange for childcare prior to requesting accommodation, despite evidence confirming that he had two sisters-in-law who resided in the area.71 Moreover, there was no testimony given by the doctors or Loranger’s wife to substantiate the claims about either the wife’s or son’s respective medical conditions.72

Allen also considered that the employer had offered some accommodation that would have rendered the interference with Loranger’s family obligations minimal. The evidence indicated that Loranger would have needed to travel during the relevant time for a maximum of three days and that he would have been outside of his regular work hours for a maximum of two and a half hours.73 There is well-established case law that employees requesting accommodation are expected to compromise and cannot expect a perfect solution.74 Allen noted that Loranger failed to demonstrate that he was worse off than his colleagues in a similar situation, lending support to Alberta’s point that the “experience of the vast majority” was a criterion in the *prima facie* analysis.75 In the end, Arbitrator Allen was not satisfied that the interference imposed on Loranger was so onerous that it rendered him unable to balance his family obligations. As such, a *prima facie* case of family status discrimination was not established and the grievance was dismissed.

Interestingly, Arbitrator Allen ended her analysis by making note of the fact that the grievor was a “white, able-bodied male who… is entitled to a bilingual bonus because of his superior language skills. He is in no way part of a disadvantaged group.”76 These facts were used to demonstrate that the grievor did not experience an absence of resources and there was no systemic barrier to Loranger’s ability to earn a

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69 Ibid at paras 47–49, 54–56; Hoyt, supra note 37 at paras 123–124, 129; Rawleigh and Canada Safeway Limited, [2009] HRPA 52005/02/0372 at paras 113–166 (Chomney); and McDonald v Mid-Huron Roofing, [2009] OHRTD No 1277 at paras 5–9, 16 (Keene).

70 Alliance, supra note 64 at para 49.

71 Ibid at para 53.

72 Ibid at para 31.

73 Ibid at para 52.

74 Central Okanagan School District No 23 v Renaud [1992] 2 SCR 970 at para 44 [Renaud].

75 Alberta, supra note 59 at paras 56–60.

76 Alliance, supra note 64 at para 58.
living, as there was in *Johnstone*. These comments indicate that perhaps the socio-economic status of a grievor may become a factor in deciding how a workplace obligation affects a grievor, and it remains to be seen how future decisions will weigh this consideration.

Decisions made in the aftermath of *Johnstone* and *Campbell River* have illustrated an observable shift in incorporating two factors into family status analysis: (1) the efforts of the employee to self accommodate, and (2) the situation of the grievor relative to other co-workers who have similar parental obligations. Arbitrators have also increasingly emphasized the importance of taking a contextual approach in determining whether a *prima facie* case of discrimination has been established; as a result, a synthesized, amalgamated test has emerged. The final section of this paper will examine the various considerations in formulating a conclusive definition of family status discrimination to demonstrate that this amalgamated approach is the appropriate one.

**IV. A BALANCING ACT: WHY THE AMALGAMATED APPROACH SHOULD BE ADOPTED**

Defining what constitutes discrimination on the grounds of family status poses a unique set of challenges, given the various competing interests at stake. This section will examine the various policy considerations and consequences of having a test that is too broad, as well as having one that is too narrow. These considerations will illustrate that the recently-adopted middle ground approach is the correct one that should be applied in future cases of family status discrimination.

**Implications of a broad definition**

There are four commonly-cited criticisms of interpreting family status in an overly broad manner. Each criticism is discussed below.

The first criticism of a broad test such as the one declared in *Johnstone* is the considerable extent to which it would disrupt the ability of an employer to run an organization.\(^{77}\) Workplace policies and standards are bound to interfere with a family obligation of some sort and a broad definition of family status would significantly reduce productivity. A broad definition could also open the door to frivolous accommodation requests. The employer might be obligated to approve these requests due to the high threshold the employer must meet to prove undue hardship in the second stage of the accommodation analysis.\(^{78}\)

The second reason to refrain from imposing a broad definition takes into account that, while family status is listed along with the other enumerated grounds of

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\(^{77}\) *Power Stream*, supra note 49 at 199–200.

\(^{78}\) For more on the high threshold with respect to undue hardship, see Lynk, “Duty to Accommodate”, *supra* note 19 at 2; *Renaud*, supra note 74 at para 16.
Discrimination in s 5(1) of the OHRC, it is distinguishable from some of the immutable grounds, notably race or gender. Thus, an argument can be made that the family status ground is different, warranting a different threshold in the _prima facie_ analysis. Cases involving family status discrimination engage some measure of choice on the part of the grievor, whereas some other grounds of discrimination do not. This does not simply refer to the choice to have a child, as this is not always necessarily the case. Rather, there is an element of choice in arranging for adequate childcare and the option to use or refrain from using various external resources such as daycares. A broad definition of family status discrimination would risk accommodation of employee preferences, as opposed to employee needs.

If an employee can independently resolve a conflict, then it would be unfair to use a broad interpretation of family status discrimination and require an employer to accommodate. Implications would also arise with respect to the morale of other employees in the workplace and their perceptions that a co-worker might be receiving preferential treatment as a result of a “choice”, as opposed to a legitimate need for accommodation.

Family status is further distinguishable from other protected grounds of discrimination due to its applicability to nearly all employees. Family status discrimination is not limited to employees who have parental obligations; rather, it encompasses any familial responsibility. Most employees will have some responsibilities towards their family members, including parents, siblings, and grandparents. As such, an overly broad definition would allow nearly any employee at any time to make a family status claim. This would dilute and trivialize the purpose of human rights protection in the workplace, resulting in endless requests for accommodation. Allowing for such a vast array of accommodation requests would also significantly impede the efficiency of a workplace.

Thirdly, a broad interpretation would result in an unbalanced test for discrimination that unduly favours the employee in both the first and second stages. As the test for undue hardship currently stands, employers are under an onerous burden to accommodate employees once a _prima facie_ case of discrimination is established. To additionally ease the burden on employees in proving a _prima facie_ case leaves little leeway for employers to implement any policies, as employers will be inundated by requests for accommodation from employees who experience minor work–life conflicts.

In situations where there are legitimate competing interests, it would be unjust to formulate a test that takes such an imbalanced approach. Given there are often situations where employees can assist in minimizing the conflicts they are experiencing, 

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79 Elizabeth J McIntyre & Jo-Anne Pickel, “Accommodating Family Responsibilities in the Workplace” (Paper delivered at the NAA Conference, 2008) at 15, 18 [McIntyre & Pickel].
80 For instance, the interest of the employer in efficiently managing its organization balanced by an employee’s interest in providing care and guidance to his or her family.
an overly broad test would unfairly relieve the employee of the appropriate role they
should have in investigating alternative, feasible arrangements.

While it could be argued that other grounds of discrimination, such as race or
gender, are similarly “pro-employee” and have a low threshold in the *prima facie*
analysis, it must be reiterated that those grounds are immutable, unlike family status.
Similarly, constructively immutable grounds, such as religion, prevent an employee
from being able to self-accommodate. The ability of an employee to make alternative
arrangements should appropriately be a factor in the first stage of the discrimination
analysis to ensure a balanced, equitable approach.

Lastly, consideration should be given as to who exactly would be encompassed
under family status; an overly broad definition could conceivably extend to the
obligations an employee has to a close friend whom the employee subjectively views as
“family.” Such expansions, though unlikely, would further interfere with the operations
and productivity of the workplace and impose additional limits on the employer’s
ability to implement workable policies.

**Implications of an overly-stringent definition**

Adopting a definition of family status that is unduly restrictive carries major
considerations of its own. Firstly, the importance of human rights laws cannot be
discounted. Human rights legislation enjoys quasi-constitutional status, lending support
to the argument that a narrow interpretation of family status would be inconsistent with
the purpose of human rights legislation. A restrictive definition of family status would
set a dangerous message that only exceptional circumstances merit protection under s 5(1), such as the situation of the grievor in *Campbell River*.  

Secondly, human rights case law has considerably expanded what constitutes a
disability for the purposes of s 5(1) of the OHRC. Currently, a disability encompasses,
among other things, alcoholism, stress, sensitivity to cigarette smoke, and a fear of flying.
This non-traditional approach to defining disability serves as a strong indicator
that adjudicators are adopting a more comprehensive approach in defining grounds of
discrimination as a whole. Given that family status is relatively new as a ground of

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81 The employee is not in a position, for example, to alter the days of religious events.
82 See also *Canada Post*, supra note 45 for a further example of the extreme work–family conflict that
would be necessary to establish family status discrimination under the *Campbell River* approach.
83 Lynk, “Disability and Work”, *supra* note 4 at 222.
84 *Ontario Liquor Boards Employees’ Union v Ontario (Liquor Control Board of Ontario) (McNaughton*
Grievance), [2006] OGSBA No 25 (Dissanayake).
85 *Sault Area Hospitals and Service Employees International Union, Local 268* (2001), 94 LAC (4th) 230
(Whittaker).
86 *Ontario Public Service Employees Union v Ontario (Ministry of Public Safety and Security) (Hyland*
Grievance), [2004] OGSBA No 1 (Petryshen).
87 *NAV Canada and International Brotherhood of Electrical Workers (Tomkins) (Re)* (2001), 101 LAC
(4th) 158 (Chertkow).
discrimination, it is reasonable to expect that principles from similar grounds of discrimination will be applied in formulating the appropriate definition. Disability case law appears to be particularly useful in analyzing family status matters, as it is the most developed area where accommodation is concerned.\textsuperscript{88}

Thus, to impose a high threshold solely for family status would appear inconsistent with the otherwise broad approach taken in other human rights matters. It is not reasonable to relegate family status to a less compelling ground for human rights protection. There is also no authority for why a “serious interference” must be established to prove a \textit{prima facie} case of discrimination.\textsuperscript{89}

The third consideration takes into account public policy and the importance of encouraging the retention of qualified workers, particularly females in the paid labour force. There is extensive evidence that increasing numbers of working females and over 70\% of mothers with dependent children are currently in the paid labour force, which is a significant increase from 1981’s reported 53.5\%.\textsuperscript{90} A related finding in recent years is the increased stress that working parents are experiencing and the reported lack of work–life balance.\textsuperscript{91} Taken together, these considerations lend strong support to the argument that our legal system should strive to minimize the conflicts that working parents are facing and to facilitate their ability to meet both family and workplace obligations. A stringent definition of family status discrimination would conversely run the risk of driving working parents out of the workforce because of their inability to meet the dual obligations to their employers and families, and would perpetuate the stereotype that single, unmarried employees are more efficient and adept at performing their jobs.

**Arriving at the appropriate, balanced definition**

As outlined above, there are many competing interests that ought to be considered when formulating the appropriate definition of family status. An approach that unduly benefits one party at the expense of another would create undesirable results. As such, the recently adopted amalgamated approach is the preferable solution.

It is important to uphold the importance of human rights legislation and adopt a broad enough approach to complement the progress made in other areas of human rights. Moreover, defining family status broadly would legitimize future discrimination claims and spur the formulation of policies that facilitate work–life balance for working parents. Further, a broad definition would encourage the retention of more women and

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\begin{footnotesize}
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\item 88 McIntyre & Pickel, \textit{supra} note 79 at 18.
\item 89 Johnstone, \textit{supra} note 28 at para 30.
\item 91 \textit{Ibid} at 3.
\end{itemize}
\end{footnotesize}
parents in the workforce. It is not sufficient to merely pass legislation that allows for equal opportunity in employment; it is necessary to establish resources and policies that facilitate meaningful participation in the workforce. For many, this entails flexible work hours that allow them to meet their family responsibilities.

However, it is important to refrain from adopting an overly broad approach, keeping in mind that family status can be distinguished from other grounds of discrimination and correspondingly warrants a slightly higher threshold. The ability of an employee to examine alternative options and external resources appropriately imposes an extra obligation to be proactive before requesting accommodation from an employer.

In making out a *prima facie* case of family status discrimination, it is therefore justified to consider what steps the employee has taken to self-accommodate. This is the most recently adopted approach and, in weighing all the interests involved, it appears to be the most appropriate one. While it would certainly be excessive to insist that an employee must first exhaust all options before requesting accommodation, it is not onerous to require that the employee take reasonable steps to investigate existing alternatives. What is considered “reasonable” will vary with the individual circumstances of each case, in accordance with the contextual approach that has been promoted numerous times.

In March 2007, the Ontario Human Rights Commission published a report entitled *Policy and Guidelines on Discrimination Because of Family Status* and provided further support for a contextual approach that takes into account the employee’s efforts in the *prima facie* analysis of family status. Their recommended considerations are:

1. The nature of the caregiving responsibility, and of the conflict between that responsibility and the organization’s rules, requirements, standards, processes or other factors;
2. The systemic barriers faced by caregivers, including intersectional impacts based on disability, age, gender, sexual orientation, race and race-related grounds, and marital status; and
3. The availability and adequacy of social supports for caregiving needs.

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92 *Ibid* at 29.
93 *Ibid* at 16.
94 *Campbell River*, *supra* note 27 at para 39; *Alberta*, *supra* note 59 at para 63; *Canadian Human Rights Act*, RSC 1985, c H-6 s 53(2).
Those who oppose this contextual approach at the first stage argue that the two-step analysis will become blurred as a result. However, that is not necessarily true. The considerations in the BFOR analysis focus primarily on the employer’s actions and whether the employer will incur undue hardship if it were to accommodate the employee in question; there is little regard to the steps the employee has taken. Therefore, requiring an employee to first attempt to self-accommodate will not yield the feared result of a muddled and conflated discrimination analysis. Rather, an additional consideration would be incorporated into the first stage, producing a more balanced and equitable test.

Moreover, it is well-established that the accommodation analysis as a whole is a multi-party exercise that requires cooperation and compromise from all affected parties. The efforts required of all parties in finding appropriate accommodation is not limited to the second stage of the analysis; this obligation should very much be a part of the prima facie test as well. There appears to be no compelling reason to absolve an employee from having to take any steps in resolving their work–family conflict if such steps are, in fact, available.

CONCLUSION

Canadian jurisprudence has struggled with the question of how to best frame the issue of family status discrimination. The initial period of broad interpretation was followed by a rash of decisions that adopted a constricted definition of family status. This was then followed a few short years later by a reversion to a broad interpretation. Recent decisions have opted to fuse these two approaches to strike the appropriate balance between an employer’s and employee’s needs and, thus far, this method appears to be the most workable.

The amalgamated approach considers the steps the employee initially took in attempting to minimize the interference that workplace obligations imposed on family responsibilities. Further considerations are the individual circumstances of the grievor, the nature of the conflicting responsibilities, and systematic barriers that might be in place. Given that family status is indeed distinct from the other grounds of s 5(1) discrimination under the OHRC, imposing an extra step in this analysis is appropriate and justified.

This balanced approach respects the importance of human rights while not unfairly saddling the employer with the duty to accommodate any and all minor conflicts. This approach further promotes the notion that having a family and having a

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97 See e.g. Campbell River, supra note 27 at para 35.
job are not mutually exclusive aspirations and facilitates the ability for citizens to simultaneously be nurturing parents and valued members of the workforce.