Discrimination and Family Status: The Test, the Continuing Debate, and the Accommodation Conversation

Sheila Osborne-Brown*

ABSTRACT

There has been much uncertainty about the interpretation of “family status” as a prohibited ground of discrimination in the context of parent-to-child caregiving. In Canada (Attorney General) v Johnstone, the Federal Court of Appeal appeared to have eliminated the confusion. However, the test has been criticized for inserting accommodation principles into the determination of a prima facie case. The Ontario Human Rights Tribunal has rejected the idea of a special test for whether an employee has proven family status discrimination. Yet a specific test to establish a prima facie case of family status is consistent with previous decisions relating to other prohibited grounds of discrimination. The Johnstone test assesses whether an employee has a caregiving need that would trigger a request for accommodation in the workplace, and is consistent with determining when an employee’s personal family responsibility ends and an employer’s responsibility begins. However, rather than arguing about legal tests in an adversarial forum, a more satisfactory solution to addressing family status needs is to address them in the workplace. The article highlights the need for constructive communication between employees and managers to respond to work/family conflicts and outlines guidance from human rights commissions as to when a family situation should start an accommodation conversation and how to have it.

* Senior Counsel at the Canadian Human Rights Commission (CHRC) in Ottawa. Although this article is informed by my work as counsel for the CHRC in some family status cases, the views expressed are my own. I extend sincere thanks to Elizabeth Shilton, and to the peer reviewers and editors at the Journal of Law & Equality, especially Léa Brière-Godbout and Stacy Belden, for their help. Thanks also to colleagues at the CHRC with whom I have engaged in discussion and analysis of the issues, including Marcella Daye, Ikram Warsame, Samar Musallam, Daniel Poulin, Valerie Phillips, Fiona Keith, and Patrick O’Rourke. Any errors are my own. I also particularly acknowledge the complainants who go through the long process of adjudication and whose courage and perseverance leads to systemic change.
I. INTRODUCTION

After much uncertainty about the interpretation of “family status” in relation to parent-to-child caregiving, the Federal Court of Appeal appeared to have concluded the debate with its decision in Canada (Attorney General) v Johnstone. The four-step test to determine whether an employee has proven a prima facie case of family status discrimination (Johnstone test) was praised in a Canadian Human Rights Reporter editorial and has been incorporated into the Canadian Human Rights Commission’s guidance on family caregiving accommodation. It has also been criticized, however, for inappropriately inserting accommodation principles—traditionally part of the second step of the evaluation of whether an employer has breached a statutory human rights code (the Meiorin test)—into the first part of that evaluation. The latter concern was expressed by the Ontario Human Rights Tribunal (OHRT) in Misetich v Value Village Stores Inc. The tribunal also held that the Johnstone test should not be applied in the Ontario context, rejecting the idea of a special test for whether an employee has proven family status discrimination.

This article aims to defend the approach set out in Johnstone from these criticisms. I argue that the formulation and application of a specific test to prove a prima facie case of family status is consistent with previous decisions that have set forth special tests relating to other prohibited grounds of discrimination. In adopting its four-step test, the Federal Court of Appeal was aware of the need for flexibility in the tests applied in various human rights contexts. Rather than setting in stone a test for family status discrimination in a caregiving context in Johnstone, the court left

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1 Canada (Attorney General) v Johnstone, 2014 FCA 110 [Johnstone], affirming the Federal Court decision Canada (Attorney General) v Johnstone, 2013 FC 113, upholding the tribunal decision 2010 CHRT 20. Issued at the same time as the decision in the companion case Canadian National Railway Company v Seeley, 2014 FCA 111, affirming 2013 FC 117, upholding 2010 CHRT 23 [Seeley], which was heard by the same panel of the Federal Court of Appeal and relies upon the same analysis to evaluate the prima facie case of family status.


3 British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees’ Union (BCGSEU), [1999] 3 SCR 3 [Meiorin].


5 Misetich, supra note 4.
the door open to adaptations of the test in future cases. This approach is consistent with guidance from the Supreme Court of Canada\(^6\) and from the Federal Court of Appeal\(^7\) regarding the interpretation of human rights legislation and the *prima facie* case test.

Further, I examine concerns about inserting accommodation into the *prima facie* case test and suggest that this part of the *Johnstone* test is about the employee assessing whether he or she has a caregiving need that would cause him or her to approach the employer to seek accommodation. Understood in this light, this element simply reflects the consensus throughout tribunal and arbitral decisions that not all family situations will constitute a need that triggers the duty to accommodate under human rights statutes. This point highlights the need for constructive communication between employees and managers to respond to work/family conflicts. Although tests are useful in the course of litigation to analyze an employee’s *prima facie* case, they often do not adequately respond to real-life workplace situations. “Accommodation conversations” often have to take place both at the beginning and at several points throughout a lengthy accommodation situation depending upon the employee’s caregiving needs. I conclude with guidance to assist employers, employees, and unions in fulfilling their responsibilities in the day-to-day multi-party inquiry that will lead to a more inclusive workplace. To help parties improve the quality of life in the workplace, I address how to know when a family situation should start the accommodation conversation and how to have that conversation. Avoiding a journey to the hearing room would render moot the question of the appropriate test for the *prima facie* case.

II. “FAMILY STATUS” AND PARENT-TO-CHILD CAREGIVING: DEFINING THE GROUND

“Family status” is a prohibited ground of discrimination under most Canadian human rights legislation. Statutory definitions vary. In the *Canadian Human Rights Act* (CHRA),\(^8\) it is undefined, while Ontario defines it as “the status of being in a parent and child relationship.”\(^9\) Any

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\(^7\) Morris v Canada (Canadian Armed Forces), 2005 FCA 154 [Morris].

\(^8\) Canadian Human Rights Act, RSC 1985, c H-6, s 3 [CHRA].

discussion of family situations involves many legal, societal, and cultural questions, and, thus, family status cases inevitably raise the thorny issue of choice versus obligation. Given that accommodation is provided so that an employee will be able to carry out the duties of the job, these cases raise a fundamental question: when does an employee’s personal family responsibility end and an employer’s responsibility begin?

Initially, respondents argued that family status should be limited to the “status” of a person as a family member—for example, wife, mother, father, daughter, either in general (“absolute status”) or in relation to a particular person (“relative status”). Caregiving is not included, they argued. This interpretation is not surprising or devoid of logic. Other prohibited grounds are more intuitively associated with an individual’s characteristics. The person on the street can readily understand what it means to say that an employer cannot treat someone differently because of their race, religion, sex, or disability but would not instinctively associate the term “family status” with the social and legal roles, and emotional ties, that come with family membership or the obligation of an employer not to discriminate because of family responsibilities. At least in the federal context, the legislative history regarding the addition of the term “family status” does not provide much help in settling the question.

However, a consensus has now emerged that parent-child caregiving situations fall within the scope of family status. In 1993, in Brown v Department of National Revenue (Customs and Excise), the Canadian Human Rights Tribunal (CHRT) made the first move in this direction. In light of a purposive interpretation of section 2 of the CHRA, the CHRT concluded that because parents have obligations within the family, employers have a concomitant duty to try to accommodate these obligations. Anything less, the tribunal held, would “render meaningless the concept of ‘family status’ as a ground of discrimination.” The leading appellate authorities in British Columbia and federally have now accepted that adverse effects related to caregiving responsibilities can constitute family status discrimination. However, the debate continues on other

10 The respondent in Johnstone, the federal government, took this position up to the Federal Court of Appeal level. Johnstone, supra note 1 at paras 53-7; see also B v Ontario, supra note 6, regarding absolute versus relative status.
11 See discussion of legislative history in Canada (Attorney General) v Mossop, [1993] 1 SCR 554 at 618-20, in which the main lesson was said to be that the meaning of the term was to be left to the Commission, tribunals, and the courts.
12 [1993] CHRD No 7 at 20 [Brown].
13 Ibid.
14 Health Sciences Association of British Columbia v Campbell River and North Island Transition Society, 2004 BCCA 260 [Campbell River]; Johnstone, supra note 1; see also the cases cited in Johnstone (at para 59); also of note is the analysis of Arbitrator
important issues, including whether there should be a special test for a \textit{prima facie} case of family status discrimination (and, if so, what test); what steps a complainant must have taken to make arrangements for childcare before seeking accommodation from the employer; and whether the caregiving at issue has to be necessary and vital to the obligations of a parent to their child.

Two lines of case law took shape in the aftermath of \textit{Brown}. One followed \textit{Brown}, applying the same test at the \textit{prima facie} stage in family responsibility cases as in other discrimination complaints, and the other adopted a narrower, more stringent test first developed by the British Columbia Court of Appeal in \textit{Health Sciences Association of British Columbia v Campbell River and North Island Transition Society}. \footnote{Campbell River, supra note 14.} \textit{Campbell River} expressed concern that interpreting family status too broadly would potentially cause “disruption and great mischief” in the workplace. \footnote{Ibid at para 38.} The court therefore held that the \textit{prima facie} case requires “a change in a term or condition of employment imposed by an employer [that] results in serious interference with a substantial parental or other family duty or obligation of the employee.” \footnote{Ibid at para 39.} The \textit{CHRT}, in \textit{Hoyt v Canadian National Railway}, rejected the floodgates concern, noting that “[h]uman rights codes, because of their status as ‘fundamental law’, must be interpreted liberally so that they may better fulfill their objectives.” \footnote{Hoyt v Canadian National Railway, 2006 CHRT 33 at para 120 [\textit{Hoyt}].} It saw \textit{Campbell River} as improperly singling out “family status” for a more restrictive approach than other grounds of discrimination. \footnote{Ibid at paras 117-18.} It also concluded that the workplace disruption concern is better considered under the undue hardship part of the \textit{Meiorin} test: “Undue hardship is to be proven by the employer on a case by case basis. A mere apprehension that undue hardship would result is not a proper reason, in my respectful opinion, to obviate the analysis.” \footnote{Ibid at paras 119-21.}

The debate framed here has continued within the case law. Tribunal, arbitral, and judicial decision-makers have swung back and forth between the broad and generous approach, generally urged by employees and human rights advocates, and the more narrow and restrictive definition,
advocated by employers and their counsel. As we will see, similar issues were at the front and centre of the OHRT’s criticism of the *Johnstone* test.

**III. JOHNSTONE AND MISETICH: OVERVIEW**

**A. Johnstone**

Fiona Johnstone was a Canada Border Services Agency (CBSA) customs inspector working a variable-shift schedule, as was her husband. The couple had two small children. Johnstone asked for a fixed shift schedule to accommodate childcare needs. The CBSA agreed to a fixed shift schedule but only on less than full-time hours. Part-time status would negatively affect various employment benefits.\(^{21}\) The evidence at the tribunal showed that other people were allowed to work a full-time fixed-shift schedule for religious and medical reasons, but not people who needed it for childcare reasons.\(^{22}\) The *Johnstone* complaint was ultimately decided by the Federal Court of Appeal.\(^{23}\) When formulating the test for a *prima facie* case, the court took into account the two broad lines of jurisprudence sketched above, the *CHRA*, and the necessity for the test to be flexible and contextual. It held that the complainant must demonstrate:

(i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual’s legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.\(^{24}\)

\(^{21}\) *Johnstone*, *supra* note 1 at para 8.

\(^{22}\) *Ibid* at para 28.

\(^{23}\) Initially, the CHRC dismissed the complaint. The Federal Court sent it back to the CHRC on judicial review. The matter was referred to the Canadian Human Rights Tribunal (CHRT) where Johnstone was successful. She was also largely successful before the Federal Court, which did not interfere with the CHRT’s broad test for family status. The Federal Court of Appeal dismissed the respondent’s appeal. See *Johnstone*, *supra* note 1.

\(^{24}\) *Ibid* at para 93. In the companion case, *Seeley*, *supra* note 1, the court analyzed the *prima facie* case using the *Johnstone* test, affirming that Seeley had demonstrated a *prima facie* case of family status discrimination. Denise Seeley was a freight train conductor with Canadian National Railway (CNR) based out of Jasper. Although on layoff, she was able to still work her way up the seniority ladder. Seeley’s husband worked for CNR as a locomotive engineer and was away for extended periods. CNR
B. Misetich

Tonka Misetich worked in a production position at Value Village on straight day shifts. She developed a repetitive strain injury. She was offered temporary, modified duties as an accommodation, working variable shifts including nights. Misetich declined the modified duties because the hours of work would interfere with preparing evening meals for her mother. Over several months, the employer repeatedly asked Misetich for more information about her caregiving obligations, including medical evidence to substantiate them. Misetich resisted these inquiries. She eventually provided a note from her doctor, but this was deemed insufficient by the employer because it came from Misetich’s doctor and not her mother’s. Misetich subsequently provided her own handwritten note advising that she and her mother had the same doctor. Because she refused to provide more medical information including confirmation that she “had done everything reasonable and within her control to find alternate care for her mother … [and that] her mother required care after 5:00 p.m. and on weekends to ensure her mother’s health and safety was not jeopardized,” the employer dismissed Misetich.

The OHRT rejected the Johnstone test on three grounds. First, there should not be a special test for family status—it should be the same as for all other grounds. Second, the tribunal criticized Johnstone for setting too high a standard in holding that the childcare obligation at issue must engage a legal responsibility for the child; in particular, the tribunal thought that this part of the test was difficult to apply in eldercare situations. Finally, the tribunal expressed the view that the third part of the test requires a complainant to “self-accommodate,” which conflates the prima facie case test with the evaluation of whether an employer has accommodated to the point of undue hardship according to the Meiorin analysis. Instead, Misetich adopted a test requiring an applicant “to establish that he or she is

recalled everyone on layoff to work in Vancouver. Seeley and two other female conductors told CNR they could not move to Vancouver because of childcare responsibilities. All three were willing to work out of or near the Jasper terminal. They were terminated when they did not report to Vancouver. The tribunal found for the complainants, accepting a broad interpretation of family status. CNR’s judicial review of Seeley’s case was dismissed. In upholding that decision, the Federal Court of Appeal found it significant that CNR had given no information to Seeley regarding the length of stay in Vancouver nor the childcare options there.

25 Misetich, supra note 4 at para 7.
26 Ibid at paras 27-30.
27 Ibid at para 42.
28 Ibid at para 47.
29 Ibid at para 48.
a member of a protected group, has experienced adverse treatment, and the ground of discrimination was a factor in the adverse treatment.\(^{30}\)

**IV. ADDRESSING THE OHRT’S OBJECTIONS TO THE JOHNSTONE TEST**

The crux of the OHRT’s objections is that the *Johnstone* test, like that in *Campbell River*, is too stringent. Since one of the aims of the Federal Court of Appeal was to formulate a test that would create some cross-jurisdictional consistency,\(^{31}\) it is important to examine the OHRT’s criticisms closely before dismissing the *Johnstone* test outside of the federal context.\(^{32}\)

**A. First Objection: There Should Be No Special Test for Family Status**

The OHRT’s concern about a special test for family status discrimination is misplaced. Such tests are not unusual. As discussed below, courts and tribunals have done this in regard to several different grounds. The traditional starting point for the *prima facie* case analysis is the test from the Supreme Court of Canada’s decision in *O’Malley v Simpsons Sears*: “A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent-employer.”\(^{33}\) This evidentiary burden is not a heavy one. It may be met by “any means of proof—writings, presumptions, testimony, admissions and the production of real evidence” and hearsay evidence may...

\(^{30}\) *Ibid* at para 50. The tribunal found Misetich had not produced medical evidence, that her claim of a caregiving need was a bald assertion, and that providing evening meals for her mother was not adversely affected by varying shifts. It found that the “after the fact” evidence given by Misetich about her caregiving situation was not relevant given that she did not provide it to the employer at the time she requested accommodation. *Ibid* at para 72.

\(^{31}\) This is one of the reasons for the court having applied a “correctness” standard of review. *Johnstone*, *supra* note 1 at paras 47-51. (However, recent Supreme Court of Canada jurisprudence interpreting s 5 of the CHRA would arguably result in a reasonableness standard being applied if *Johnstone* were to be heard now. See *Canadian Human Rights Commission v Attorney General of Canada*, 2018 SCC 31 at paras 42-3, 51-2 (majority decision) [*Matson/Andrews*].)

\(^{32}\) The Supreme Court of Canada has also given guidance favouring a consistent interpretation of human rights statutes. See e.g. *Potash*, *supra* note 6 at para 68; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal* (City), 2000 SCC 27 at para 45 [*City of Montreal*], cited in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 31 [*Bombardier*]. See also the reasons of Rowe and Côté JJ in *Matson/Andrews*, *supra* note 31, which concurred with the majority in the result but would have applied a correctness standard of review based in part on the Supreme Court’s guidance that “human rights protections must be interpreted consistently across jurisdictions unless legislative intent clearly indicates otherwise” (at para 84) and referred to the correctness standard applied in *Johnstone* and *Seeley* (at para 81).

\(^{33}\) *O’Malley*, *supra* note 6 at para 28.
be admitted. The complainant needs to put into evidence just enough credible facts that prove discrimination on the normal civil standard of balance of probabilities before the burden of proof shifts to the respondent to offer a defence or justification.

The shifting burden of proof formula is not the only important legacy of O’Malley. It also held that a complainant need not prove intention to discriminate. It is the adverse effect of an employment rule on the complainant that is important. The Court reiterated the importance of interpreting the rights in human rights statutes broadly and in accordance with their special purpose.

In the last few years, the *prima facie* case test in *Moore v British Columbia* has been relied upon frequently. Under that test, complainants must show “that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.” The Supreme Court of Canada has since clarified the third part of the *Moore* test in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*. It is necessary only to show a link between the allegedly

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34 Bombardier, supra note 32 at para 67.
35 In Bombardier, the Supreme Court of Canada rejected the argument of the Quebec Commission des droits de la personne et des droits de la jeunesse that the normal civil standard of proof is relaxed in human rights cases. Ibid paras 55ff.
36 Ibid at paras 59-67.
38 O’Malley, supra note 6 at paras 12-13.
39 Moore v British Columbia (Education), 2012 SCC 61 at para 33. To enter into an in-depth discussion of the *prima facie* case test in the context of statutory human rights, it would be necessary to explore the debate as to whether over the years, the *prima facie* case test has been moving in the direction of analyses for alleged violations of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. Some stakeholders feared the Court would apply a Charter-type analysis in the Moore decision. This article is not the place for exploration of this issue. However, it should be noted that regarding Charter analysis versus statutory human rights analysis, many commentators have urged tribunals and courts to keep the two separate. See e.g. Leslie A Réaume, “Postcards from O’Malley: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the Charter” and Andrea Wright, “Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate” both in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, Making Equality Rights Real: Securing Substantive Equality under the Charter (Toronto: Irwin Law, 2006) 373 and 409; D. Réaume, supra note 37.
discriminatory action or rule and the ground or that the ground was a factor in the discriminatory rule or action; there is no need to show a “causal link.” This finding emphasized the importance of O’Malley’s recognition of the adverse effect and recognized that proof of intent is unnecessary because neutral standards may have a discriminatory effect and that “some discriminatory conduct involves multiple factors or is unconscious.”

The OHRT in Misetich essentially treats Moore as establishing a uniform test to be applied in determining whether a complainant has proven a prima facie case and rejects others for making the test for family status discrimination “higher than for other forms of discrimination.” However, it makes no reference to the principles set out in O’Malley or to the consensus understanding that the evidentiary burden is not a heavy one, no matter the formulation of the test applied in regard to a particular ground of discrimination. Use of the Moore test as an overarching articulation of the prima facie case should not preclude tests that merely clarify the evidentiary framework that guides a decision-maker in assessing the prima facie case.

The reference in O’Malley to “proof which covers the allegations” opens the possibility that different grounds and different contexts require different facts to be proved. Courts have also recognized that the prima facie case must be determined in a flexible and contextual way. Justice Anne Mactavish of the Federal Court recently expanded upon this guidance:

40 Bombardier, supra note 32 at paras 43-52. The Court thus rejected the interpretation of the Quebec Court of Appeal on this issue (although ultimately agreeing with the outcome on the discrimination complaint) and confirmed the Ontario Court of Appeal’s interpretation in Peel Law Association v Pieters, 2013 ONCA 396; see also Stewart v Elk Valley Coal Corp, 2017 SCC 30 [Elk Valley], in which the Supreme Court of Canada confirmed the Moore test (and also confirmed that “arbitrariness or stereotyping is not a stand-alone requirement for proving prima facie discrimination” (at para 45)) but in which the justices came to significantly different determinations as to whether there was a link on the facts between the termination of the employee and the prohibited ground of disability (addiction). The majority (per McLachlin CJ) upheld as reasonable the decision of the Human Rights Tribunal that termination was not because of addiction. In a strong dissent, Gascon J found that the employee’s disability was indeed a factor in his dismissal and that the accommodation provided was inadequate. Two justices (Moldaver and Wagner JJ) agreed with Gascon J about the link to disability but thought the employee had been accommodated.

41 Bombardier, supra note 32 at paras 32, 42.
42 Ibid at paras 40-1.
43 Misetich, supra note 4 at para 45.
44 This is in accordance with the Supreme Court of Canada’s commentary in Bombardier, supra note 32 at para 69.
45 See e.g. the Federal Court of Appeal decision in Morris, supra note 7.
The *O’Malley* test is flexible enough to allow the Tribunal to have regard to all of the factors that may be relevant in a given case. These may include historic disadvantage, stereotyping, prejudice, vulnerability, the purpose or effect of the measure in issue, and any connection between a prohibited ground of discrimination and the alleged adverse differential treatment.\(^{46}\)

Decision-makers have provided examples of evidence that will suffice in certain contexts and depending on the nature of the allegation. These special tests have been described as “illustrations of the application of the guidance” in *O’Malley*.\(^{47}\) For example, cases about discrimination in the hiring process have referred to the tests set forth in *Shakes v Rex Pak Limited*\(^{48}\) and *Israeli v Canadian Human Rights Commission and the Public Service Commission*.\(^{49}\) In the latter, the CHRT modified the *Shakes* test for the *prima facie* case to respond to the different factual situation, despite that fact that it was described as “relatively fixed in the case law.”\(^{50}\)

In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)*, the Supreme Court of Canada clarified the types of evidence that may be considered in a disability discrimination complaint.\(^{51}\) The Court interpreted the term “handicap” under the Quebec *Charter of Human Rights and Freedoms* to encompass both actual and perceived limitations, the cause of which is irrelevant.\(^{52}\) The term must not be defined narrowly, and the definition must be flexible enough to incorporate changing biomedical, social, or technological factors.\(^{53}\)


\(^{47}\) *Lincoln v Bay Ferries Ltd*, 2004 FCA 204 at para 18.

\(^{48}\) Board of Inquiry (Human Rights Tribunal of Ontario), June 1981, 139 [*Shakes*].

\(^{49}\) (1983) 4 CHRR D/1616 [*Israeli*].

\(^{50}\) The test for a *prima facie* case in *Shakes*, supra note 48, is: (1) the complainant was qualified for the particular employment; (2) the complainant was not hired; and (3) someone obtained the position who was no better qualified than the complainant but lacked the attribute on which the complainant based their human rights complaint. In *Israeli*, no one had been hired, but the employer continued to seek another applicant after rejecting the complainant, and, therefore, comparative evidence was not available. The CHRT found that this was not an impediment to the complainant’s case and that the complainant could offer other evidence proving discrimination.

\(^{51}\) *City of Montreal*, supra note 32.

\(^{52}\) *Charter of Human Rights and Freedoms*, RSQ 1976, c C-12.

\(^{53}\) *City of Montreal*, supra note 32 at paras 76-7, 80-1. In *Tanzos v AZ Bus Tours Inc*, 2007 CHRT 33, affirmed on other grounds in 2009 FC 1134 [*Tanzos*], the CHRT cited the test from *City of Montreal*, supra note 32, which states that “in order to prove a prima
Similarly, the Court’s decisions in *Syndicat Northcrest v Amselem*\(^{54}\) and *S.L. v Commission scolaire des chênes*\(^{55}\) set forth an analytical approach in the context of allegations of infringement of freedom of religion, encompassing both a subjective and objective component.\(^{56}\) The former requires only a sincere belief that has a nexus with religion.\(^{57}\) The objective component requires more than trivial and insubstantial interference.\(^{58}\) This requires a contextual analysis in each case; the Court noted that “not every action will … receive automatic protection under the banner of freedom of religion,”\(^{59}\) although neither should it be “prematurely narrowly construed.”\(^{60}\)

In *Johnstone*, the Federal Court of Appeal relied on *Amselem* to conclude that “specific types of evidence and information that may be applied to establish a *prima facie* case of discrimination largely depend upon the nature of the prohibited ground of discrimination at issue.”\(^{61}\) The court also directly addressed the guidance in *O’Malley* on the type of evidence necessary to prove a *prima facie* case of discrimination in various contexts. The main point was that the *prima facie* case test is flexible and can be adapted to particular allegations and factual situations. In finding that Johnstone had established a *prima facie* case of discrimination based on the ground of family status, the Federal Court of Appeal started by

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*facie* case a complainant has to (a) prove the existence of a distinction, exclusion or preference in the decision not to employ or continue to employ; (b) that the distinction is based on a real or perceived disability; and (c) that the distinction, exclusion or preference had the effect of nullifying or impairing the complainant’s right to the full and equal exercise of human rights and freedoms’ (Tanzos, para 32).

\(^{54}\) [2004] 2 SCR 551 [*Amselem*].


\(^{56}\) The test has been applied by human rights tribunals. See e.g. *Barker v St Elizabeth Health Care*, 2016 HRTO 94. But see the comments of the Alberta Court of Queen’s Bench in *SMS Equipment*, supra note 4 at para 75, which urges caution in applying *Amselem* given that it was a case interpreting freedom of religion and not a claim of adverse effect discrimination.

\(^{57}\) The subjective part of the analysis requires the complainant to show that “(1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct … irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and 2) he or she is sincere in his or her belief.” *Amselem*, supra note 54 at para 56.

\(^{58}\) This component requires the claimant to “show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial and insubstantial.” *Ibid* at para 59.

\(^{59}\) *Ibid* at para 61.

\(^{60}\) *Ibid* at para 62.

\(^{61}\) *Johnstone*, supra note 1 at para 86. I will argue below that the reference to “trivial and insubstantial,” while appropriate in the context of the two-part test in *Amselem*, is superfluous and possibly not in accordance with recent Supreme Court of Canada guidance regarding the *prima facie* case.
applying the *O'Malley* test.\textsuperscript{62} Then, based on the importance of flexibility and context and taking account of cases involving other grounds of discrimination, the court formulated a special test to provide an evidentiary framework for the ground of family status in the childcare context. The court was careful to point out that the test applies to proving “a *prima facie* case where workplace discrimination on the ground of family status resulting from childcare obligations is alleged.”\textsuperscript{63} The *Johnstone* test does not replace the *O'Malley* test or a more general test for adverse effect discrimination, such as *Moore*, but, instead, provides a useful guide for assessing whether a complainant has met the *prima facie* case test in the context, and on the specific facts, of alleged discrimination linked to family status.

Further, despite its criticism of a special test for family status, the OHRT in *Misetich* effectively did something strikingly similar.\textsuperscript{64} It first set forth the *Moore*-like test for discrimination. However, it then created what is in essence a test specific to the context of alleged family status discrimination in employment. The tribunal noted that “the employee will have to do more than simply establish a negative impact on a family need”;\textsuperscript{65} rather, “the negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee’s work.”\textsuperscript{66} Finally, the tribunal remarked that “assessing the impact of the impugned rule is done contextually and may include consideration of the other supports available to the applicant. These supports are relevant to assessing both the family-related need and the impact of the impugned rule on that need.”\textsuperscript{67}

In setting forth what is effectively a special test for family status, the OHRT is simply doing what many other courts and tribunals have done: assessing the evidence offered to demonstrate a *prima facie* case in a way that is appropriate given the nature of the allegations. This lessens the impact of its criticism of *Johnstone*. Further, in saying that one generic test (and nothing but that test) must be used for every ground of discrimination and for every situation, the OHRT may be minimizing the importance of the flexibility that a complainant could benefit from when a decision-maker is analyzing whether there is *prima facie* discrimination. For all of

\textsuperscript{62} *Johnstone*, supra note 1 at para 82.

\textsuperscript{63} *Ibid* at para 93 [emphasis added].

\textsuperscript{64} *Misetich*, supra note 4 at para 43. Elizabeth Shilton makes a similar point in Elizabeth Shilton, “Family Status Discrimination: ‘Disruption and Great Mischief’ or Bridge over the Work-Family Divide?” in this issue.

\textsuperscript{65} *Misetich*, supra note 4 at para 54.

\textsuperscript{66} *Ibid*.

\textsuperscript{67} *Ibid* at para 55.
these reasons, I do not see that establishing a test for a prima facie case of family status is either contrary to O’Malley or Moore or inappropriately sets out specific ground-related criteria.

B. Second Objection: The “Legal Responsibility” Standard is Too High

The second factor of the Johnstone test requires that the childcare obligation “engages the individual’s legal responsibility for that child, as opposed to a personal choice.”68 Having rejected the appellant’s submission that family status does not include parent-to-child caregiving,69 the court nevertheless acknowledged that not all childcare responsibilities are contemplated by the ground of family status.70 To distinguish those that are, the court seized on the idea that childcare obligations should bear the traditional hallmark of immutable or constructively immutable characteristics to be in line with other grounds of discrimination.71 The court found that protected caregiving responsibilities must “form an integral component of the legal relationship between a parent and a child.”72 Examples include not leaving a young child at home without supervision in order to go to work (which, at its extreme, could bring criminal liability) or other legal standards such as those in child welfare legislation.73 The court distinguished family trips and extracurricular sports events, which “do not have this immutable characteristic since they result from parental choices rather than parental obligations.”74

Although the court went into significant detail about how to draw the line between childcare activities that fall, or do not fall, within the ground of family status, its application of the legal obligation factor reveals a broad and pragmatic approach. The court did not enter into a detailed discussion of Johnstone’s situation or whether she had demonstrated obligations pursuant to criminal or child welfare legislation. The determination that both of her children were toddlers and, therefore, could not be left on their own without breaching legal obligations was sufficient to meet the second factor.75 Anyone with young children could satisfy this leg of the test.

68 Johnstone, supra note 1 at para 95.
69 Ibid at paras 53-67.
70 Ibid at paras 68-9.
71 Ibid at para 70.
72 Ibid.
73 Ibid at paras 70-1.
74 Ibid at para 72.
75 Ibid at para 102. Similarly, in Seeley, the court stated: “There is no fundamental dispute that Ms. Seeley meets the two first factors of the test for a prima facie case of discrimination. She was the mother of two young children at the time she was called to Vancouver, and these children were under her care and supervision and that of her husband. She and her
This application of the legal obligation factor is part of the rationale for rejecting the appellant’s argument that childcare obligations do not fall within family status. The court had already found that “without reasonable accommodation for parents’ childcare obligations, many parents will be impeded from fully participating in the work force so as to make for themselves the lives they are able and wish to have.” It is those workplace rules that conflict with core parental responsibilities that stand to impede participation. The OHRT’s concern was that “[t]here may be many obligations that caregivers have that may not emanate from their legal responsibilities, but are still essential to the parent/child relationship.” However, the OHRT did not acknowledge the broad interpretation applied on the facts of both Johnstone’s and Denise Seeley’s situations, the way that the Federal Court of Appeal was careful to leave the door open to modifications to the test depending on the context, and the court’s recognition that the type of evidence needed will vary on a “case-by-case basis.”

Indeed, decision-makers dealing with family status cases should take the Federal Court of Appeal at its word and apply the Johnstone test contextually and flexibly. In some situations, childcare responsibilities that may not be considered “legal responsibilities” under a strict legal definition could still constitute a prima facie case of family status. For example, if a child has an opportunity to travel to an important sports event and for some reason (for example, age, mental health, physical disability) needs the parent to accompany him or her, this could constitute the type of obligation within the scope of the second factor.

The OHRT also expressed concern that “the test of legal responsibility is difficult to apply in the context of eldercare.” The Federal Court of Appeal specifically limited its analysis to childcare obligations. It did not present the Johnstone test as being equally applicable to eldercare. However, the court signalled that the prima facie case test may have to be adapted to other caregiving situations that will be different.

husband had a legal responsibility to ensure that their children would be cared for and supervised while they were away at work.” Seeley, supra note 1 at para 44.

The court went on to say that “[t]he broad and liberal interpretation of human rights legislation requires an approach that favours a broad participation and inclusion in employment opportunities for those parents who wish or need to pursue such opportunities.” Johnstone, supra note 1 at para 66.

Misetich, supra note 4 at para 46. The tribunal agreed with the Ontario Human Rights Commission (OHRC) that “limit[ing] human rights protections to legal responsibilities imposes an unduly onerous burden on applicants.”

Johnstone, supra note 1 at para 99.

Misetich, supra note 4 at para 47.
maker could easily adapt the *Johnstone* test to an eldercare situation as was done in *Canada (Attorney General) v Hicks*, in which the Federal Court, relying on *Johnstone*, found that a “similar rationale can be applied for the analysis of eldercare obligations,” the non-fulfillment of which can attract liability under provincial statutes and criminal responsibility. The court treated eldercare obligations as being entrenched in Canadian societal values and thus deserving of protection.

In general, when deciding a family status case on the basis of the *Johnstone* test, the decision-maker must be aware of the reasoning behind the legal responsibility part of the test. It is not sufficient to simply extract the four-part test from the case and apply it without understanding why the court crafted the test as it did, what the factors represent, and the court’s broad and pragmatic approach. Further, the test is necessarily flexible in order to advance the principle of equality of opportunity. For all of these reasons, I am of the view that the legal obligation requirement is not as stringent as the criticism developed in *Misetich* portrays it to be.

C. Third Objection: Requiring “Self-Accommodation,” Conflates the Prima Facie Case Test with the Accommodation Analysis

Another factor at issue in the *Johnstone* test is that “the individual advancing the claim must show … that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible.” In including this factor in the test, the Federal Court of Appeal reviewed several labour

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80 2015 FC 599, upholding 2013 CHRT 20 [*Hicks*]; see also a recent case from the Federal Court of Appeal, *Attorney General of Canada v Bodnar et al*, 2017 FCA 171 at para 37, in which the court suggests in obiter that the “four criteria” in *Johnstone* may “need to be nuanced in the case of elder care responsibilities as there might be a practical and moral need to provide urgently needed care for a disabled parent or to take them to medical appointments as opposed to a legal requirement to do so as would exist in the case of a child.”

81 *Hicks*, supra note 80 at paras 70-1.

82 In the recent case *Guilbault v Treasury Board (Department of National Defence)*, 2017 PSLREB 1, the complainant asked to take his unpaid lunch break at the end of the day to arrive home earlier to help with the care of his four children. Instead of dealing with the second and third factors of the *Johnstone* test separately, the Public Sector Labour Relations and Employment Board’s adjudicator blended the analysis, which appears to have led to a misapplication of the second factor and a finding that the grievor did not have a “legal responsibility” (at para 80). However, I believe that applying the interpretation in *Johnstone*, the grievor (and his spouse) did indeed have a legal responsibility to care for the young children. There was no choice involved in that obligation. Melding the two factors would probably have made no difference to the outcome in this particular case, but it demonstrates the importance of looking at the court’s interpretation of the factors in *Johnstone* before applying the test.

83 *Johnstone*, supra note 1 at para 98.
arbitration cases as well as the CHRT’s decision in Hoyt, noting that the latter “rested on the claimant having made considerable efforts.” And, in commenting specifically on the third factor in the test, the court stated: “[T]he complainant must demonstrate that he or she is facing a bona fide childcare problem. This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances.”

In Misetich, the OHRT found fault with the third factor for requiring an applicant to “establish that he or she could not self-accommodate the adverse impact caused by a workplace rule.” Given this, one would have expected a prima facie case test that does not require the complainant to demonstrate that they have sought solutions to their caregiving situation; rather, this type of balancing of family and work responsibilities should take place in the Meiorin analysis once the complainant has proven a prima facie case. However, that was not the approach taken. Indeed, Misetich also included this type of balancing in its formulation of the prima facie case analysis, calling it a “consideration of the other supports available to the applicant.” Although the tribunal insisted that this requirement is “different in a fundamental way” from self-accommodation, the two ideas are more similar than they are different. Further, this search for alternative solutions as part of an employee’s initial responsibility has been something that many decision-makers have incorporated into the determination of proof of a prima facie case of discrimination under the ground of family status. This initial responsibility is part of what the CHRT had in mind in Brown when it spoke of “a parent’s rights and duty to strike a balance coupled with a clear duty on the part of an employer to facilitate and accommodate that balance.”

Moreover, the court in Johnstone, although it referred to International Brotherhood of Electrical Workers, Local 636 v Power Stream Inc., where the phrase “self-accommodation” originated, did not use that term to describe

84 Johnstone, supra note 1 at paras 89-91. These included Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungwirth Grievance), [2010] AGAA No 5 (QL); Ontario Public Service Employees Union v Ontario (Liquor Control Board of Ontario) (Thompson Grievance), [2012] OGSBA No 155 (QL); Wright v Ontario (Office of the Legislative Assembly), [1998] OHRBID No13 (QL); International Brotherhood of Electrical Workers, Local 636 v Power Stream Inc (Bender Grievance), [2009] OLAA No 447, 186 LAC (4th) 180 [Power Stream].
85 Ibid at para 92, citing Hoyt, supra note 18 at paras 123-4.
86 Ibid at para 96.
87 Misetich, supra note 4 at para 48.
88 This is what has been suggested as the proper approach in SMS Equipment, supra note 4.
89 Misetich, supra note 4 at paras 56-7.
90 See Brown, supra note 12.
the employee’s obligation to canvass reasonable alternatives to resolving their childcare issues. I believe the word itself may actually be misleading and could cause confusion. Using the word takes an established term of art from the anti-discrimination lexicon and applies it in a way that departs from the accepted principle that accommodation is something the employer does in the workplace to enable the employee to carry out their job. Although the process of finding appropriate accommodation is a “multi-party inquiry,” that is not what the court means when it refers to the employee seeking reasonable alternative solutions for caregiving situations.

What both the court and the OHRT seem to have had in mind is the process of the employee determining whether they have a need for accommodation “consistent with their duties and obligations as a member of society,” a concept that, along with non-discrimination and accommodation of needs, is embedded in the purpose section of the CHRA. It is reasonable to say that an employee would not know whether she has a need until she knows whether she can solve the caregiving issue within her own family. If she can, she does not have a need. The question of accommodation does not even arise. This brings us full circle to the key issue: how do employees, unions, and employers know when, and in what situations, purely personal responsibility for family caregiving becomes a situation in which the employer has a role to play in enabling the employee to carry out the job?

The court in Johnstone drew an analogy with the requirements faced by complainants in disability cases who “must first establish that they have a disability and have an ongoing obligation to notify the employer of change in their restrictions.” An employee with a disability would not need accommodation if their disability does not impede their ability to do their work. They would not ask for accommodation because they would not need it. However, in disability cases, there are third party professionals who can provide an objective viewpoint on the alleged need. This generally will not be the case in family status cases unless the caregiving need involves a family member’s medical issue.

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91 Power Stream, supra note 84.
93 CHRA, supra note 8, s 2; s 15 also refers to the “accommodation of the needs of an individual or class of individuals.”
94 Johnstone, supra note 1 at para 91, referring to Alliance Employees Union, Unit 15 v Customs and Immigration Union (Loranger Grievance), [2011] OLAA No 24 at para 45.
95 Decision-makers have found in some cases that an existing medical condition of the child or elder is relevant in the prima facie case analysis. E.g., Whyte v Canadian National Railway, 2010 CHRT 22 at para 177 [Whyte]; AB v City of Yellowknife et al, 2016 CanLII 19718 (NT HRAP) at paras 26-7 [AB]; Devaney v ZRV Holdings Limited et al, 2012 HRTO 1590 at paras 118, 131, 140ff [Devaney]; Rawleigh v Canada Safeway Limited,
In most cases, there is no easy way to determine if an employee’s family caregiving situation is a need or a choice: whether the employee has exhausted his or her obligation to make “reasonable efforts to meet [his or her] childcare obligations through reasonable alternative solutions.”

The third part of the Johnstone test might be seen as an attempt at an objective criterion to test need in the context of care responsibilities. This difficult task of determining and accommodating need would be better accomplished by employees, unions and employers working together in the discussion of the relevant issues. I return to the discussion of this process in the final section of the article.

Finally, family status cases often involve societal issues that affect the family, including situations involving the intersection of childcare and gender roles, the unavailability of affordable childcare and housing, child custody and support arrangements or lack thereof, the inaccessibility of childcare when working shifts or unusual hours, the mobility of the workforce, and the responsibility of adult children to care for aging parents. The threads of these contextual societal issues are woven throughout family status decisions. Decision-makers have also specifically referred to them in assessing whether a complainant has

2009 AHRC 6 at para 113ff [Rawleigh]. Medical evidence is appropriate in some circumstances. However, I would argue that there is a danger in over-emphasizing the need for medical information as it may not be appropriate in many family status cases. Requiring medical evidence when there is no medical issue at play could indeed result in a heavier evidentiary burden for complainants, contrary to O’Malley, supra note 6; Bombardier, supra note 32; Elk Valley, supra note 40. See Flatt v Attorney General of Canada, 2015 FCA 250, affirming 2014 PSLREB 02, leave to appeal to the Supreme Court of Canada denied 5 May 2016, in which the Federal Court of Appeal discussed the possibility of the necessity of medical evidence in some situations of alleged discrimination on the basis of sex or family status related to breastfeeding (at para 33). In this case, the court made the finding based on the evidence in the record that, inter alia, Ms Flatt’s situation did not meet the second factor of Johnstone (at para 35).

96 Johnstone, supra note 1 at para 93.
97 SMS Equipment, supra note 4; Seeley, supra note 1; Whyte, supra note 95; Richards v Canadian National Railway, 2010 CHRT 24 [Richards].
98 Johnstone, supra note 1; Seeley, supra note 1; SMS Equipment, supra note 4.
99 Power Stream, supra note 84; Whyte, supra note 95; Richards, supra note 97.
100 Johnstone, supra note 1; Seeley, supra note 1; Hoyt, supra note 18; Whyte, supra note 95; Richards, supra note 97; Partridge v Botony Dental Corporation, 2015 ONSC 343, affirmed at 2015 ONCA 836 [Partridge]; Rawleigh, supra note 95; SMS Equipment, supra note 4.
101 Seeley, supra note 1; Whyte, supra note 95; Richards, supra note 97; Reynolds, supra note 14; Ontario Public Service Employees Union v Crown in Right of Ontario (Ministry of Natural Resources and Forestry), 253 LAC (4th) 79 [Bharti].
102 Misetich, supra note 4; Devaney, supra note 95; Hicks, supra note 80; Bharti, supra note 101.
demonstrated a *prima facie* case. The societal context is particularly relevant to the analysis of need versus choice.

And, although each case must be looked at individually, the case law gives us some guidance on arguable outside limits of the employee obligation to find reasonable solutions. Employees need not move to be closer to an employer or move from a rural or suburban setting to an urban setting with more childcare options. They will not have to engage a nanny or enter into childcare arrangements that are not affordable or are simply unsustainable given their employment and family situations. They will not have to change child custody or support arrangements. They will not have to relocate on short notice or for an unknown period unless the employer gives them realistic assistance and information with new childcare arrangements.

At the other end of the spectrum, a trend could be emerging that, if an employee enters into an employment arrangement with full knowledge that it will involve a certain shift or place of work and then asks for accommodation on the basis of family status, he or she will not be able to make out a *prima facie* case. This may be less related to the obligation to make reasonable alternative solutions and more to an expectation that an employee, acting in good faith, should have raised the issue before taking on the employment.

I therefore suggest that the problem with “self-accommodation” is more a problem of vocabulary than of substance. Johnstone and Misetich both agreed with the concept of balancing family obligations with work and considering other supports that may be available to help an employee address a caregiving situation as part of the *prima facie* case. Other jurisdictions have also required that employees demonstrate that they have looked for alternative caregiving options. My proposal is to stop using the term “self-accommodation.” Finding other language for this process that

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103 E.g. Johnstone, *supra* note 1 at paras 131-2, 140-2 (FC), 193, 231-3 (CHRT); Hoyt, *supra* note 18 at paras 60-7, 122-9; Hicks, *supra* note 80 at paras 70 (FC), 39-57 (CHRT); Bharti, *supra* note 101 at 19ff, 45ff; AB, *supra* note 95 at paras 31-4; Partridge, *supra* note 100 at paras 21-4, 27 (OCA), 91, 98 (OSC); see also Suen v Envirocon Environmental Services ULC, 2017 BCHRT 226 at paras 9-3 [Suen], in the context of an application to dismiss under s 27(1) of the *British Columbia Human Rights Code*, RSBC 1996, c 210.


does not cross the analytical divide between the first stage (*prima facie* case) and the second stage (justification/accommodation) of the overall discrimination analysis would be a step towards clarity. Possible alternative terms include the “reasonable efforts” or “reasonable alternative solutions” factor or simply “identifying the need.”

Finally, a discussion of the third factor in *Johnstone* would not be complete without a mention of the fourth factor: the interference of a workplace rule “in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.”[^109] This language appears to come from *Amselem* and reflects the view that no right is absolute.[^110] There are only two parts to the *Amselem* test: a sincerely held belief and the requirement that the interference with that belief not be trivial or insubstantial. One criterion balances the other, with the second expressing an objective criterion for need in the context of the prohibited ground of religion. However, in the caregiving context, the third part of the *Johnstone* test reflects the idea that not every caregiving issue is a need to be accommodated, and, thus, it provides sufficient control on the scope of *prima facie* family status discrimination. The fourth factor seems redundant.

Then why include the fourth factor in the test? The most straightforward answer would be that it is a way to ensure that human rights protection will not be extended to what the court saw as “personal family choices,” with the examples cited being the participation of children in dance classes, sport events, and “similar voluntary activities” including family trips.[^111] However, the court had been at pains to point out that the “underlying context of each case in which the childcare needs conflict with the work schedule must be examined so as to ascertain whether the interference is more than trivial or insubstantial.”[^112] On the facts, the court noted that Johnstone’s work schedule interfered with her childcare obligations in a manner that was more than trivial and insubstantial.[^113] The court also referred to expert evidence about “unpredictability in work hours being the most difficult factor in accommodating childcare.”[^114]

What are the implications of this part of the analysis for the day-to-day working life of an employee with childcare issues? Does it mean that an employee who needs accommodation for only two shifts (as opposed

[^109]: *Johnstone*, supra note 1 at para 93.
[^110]: *Amselem*, supra note 54 at para 61, referred to in *Johnstone*, supra note 1 at para 85.
[^111]: *Johnstone*, supra note 1 at paras 69, 72.
[^112]: *Ibid* at para 97.
[^113]: *Ibid* at para 106.
to ten shifts or on a permanent basis) will not make out a *prima facie* case despite the fact that she meets the first, second, and third *Johnstone* factors? What if the two shift changes in question are necessary because the daycare is closed and there is no one else to take care of her child on those days? Would the latter situation qualify as an interference with the childcare obligation in a way that is not trivial or insubstantial or would its time-limited nature lead to the opposite conclusion? Would the answer be different depending on whether the employee is a single parent and has no family in town?^{115}

There are many other possible hypotheticals one could come up with that would raise questions about the application of the terms “trivial or insubstantial.” However, the overall concern is that the first three parts of the test appear to be adequate to assess whether there is a *prima facie* case of discrimination on the basis of family status. The addition of the fourth factor to the first three parts of the test threatens to take us back to the *Campbell River* requirement of “serious interference.”^{116} This could indeed result in a greater evidentiary burden for complainants alleging family status discrimination in contrast with other grounds. This argument is bolstered by the majority decision in *Stewart v Elk Valley Coal Corp.*, which confirmed that there is no need to add adjectives such as “significant” or “material” to a ground being a “factor” in the adverse treatment: “If a protected ground contributed to the adverse treatment, then it must be material.”^{117} A need is a need. The last part of the *Johnstone* test should therefore be abandoned. If this is so, the *prima facie* case analysis would end with the third factor. If the employee succeeds in proving that they had a need that triggered the accommodation process, the burden would then be shifted to the employer to try to justify its actions or workplace rule.

^{115} The fourth factor of the test may actually be a disincentive to employees to find partial solutions to their caregiving challenges. The worse their situation is (that is, the fewer alternative solutions that they have identified on their own before approaching the employer), the more likely that they would be able to demonstrate that the interference of the workplace rule with the fulfillment of the childcare obligation is not trivial or insubstantial.

^{116} *Campbell River*, supra note 14.

^{117} *Elk Valley*, supra note 40 at para 46 (per McLachlin CJ). Interestingly, in a recent decision of the British Columbia Human Rights Tribunal, *Adair v Forensic Psychiatric Services Commission (No 2)*, 2017 BCHRT 147, Member Rilkoff discusses the *Campbell River* test (still applied in British Columbia) in light of other jurisprudence, including *Elk Valley* (at paras 119-33). However, the member concludes that “[i]t is not the case to decide whether *Campbell River* has been overtaken by *Moore* and *Elk Valley*” (at para 123). See also the discussion in *Suen*, supra note 103 at paras 30ff, which raises similar issues, including whether the *Moore* test should be applied.
V. STEPPING BACK FROM THE HEARING ROOM: FROM TESTS TO THE “ACCOMMODATION CONVERSATION”

Tests are useful legal tools when analyzing the strengths and weaknesses of a case both in and outside the hearing room. The prima facie case test provides a framework for the presentation of evidence by the person alleging the violation and for the decision-maker in applying the facts and the law. But these analyses are often used to deal with something after the situation has already led to negative consequences such as hurt feelings, the breakdown of work relationships, the termination of employment, and loss of income.

While the debate about whether caregiving alternatives that are available to the employee should be examined as part of the prima facie case or as part of the Meiorin analysis is front-page news for lawyers, what truly matters for workplace participants is whether employees can do their job while simultaneously being able to fulfill their caregiving responsibilities. A legal test used in hindsight in the adversarial process often does not reflect the necessary accommodation conversation that should take place not only at the beginning when the employee realizes that he or she has a family status-related need, but also throughout the period of accommodation. To make family-caregiving accommodation work, employers and employees (and unions) have to receive clear guidance on dealing with the issues cooperatively and collaboratively.

In Misetich, the fact that the complainant did not provide details to the employer about her eldercare needs at the time she was requesting accommodation was fatal to her prima facie case. To avoid situations in which accommodation is refused because an employee did not understand the necessity to provide more information, or felt uncomfortable doing so, all workplace participants should be trained in how to have the “accommodation conversation.” Guidance found outside the case law, such as policies provided by human rights commissions, can inform this process. Indeed, human rights commissions have thoroughly tackled

119 The OHRT noted that although Misetich provided evidence at the hearing regarding her eldercare responsibilities, this was after-the-fact evidence and was not provided to the respondent at the time of the events leading to the complaint. Misetich, supra note 4 at paras 63, 64, 68.
this issue. The following are important points that can be extracted from their work.

A. Employees should expect to have to provide information about their caregiving situation and (efforts to make) arrangements

It is not enough for an employee to simply state “I have a family status situation” to trigger the process of accommodation. This puts the ground of family status squarely on a par with other prohibited grounds. For example, not every disability-related need of an employee will cause them to seek accommodation. A physical condition may require medication that causes drowsiness, but if an employee can take the medication after their shift ends, they will not need accommodation. On the other hand, if their medication time falls within their shift, they may need a different shift or modified job duties. The same reasoning applies for family caregiving situations. The employee bears the onus to make reasonable attempts within their own sphere of influence, whether with family, friends, or paid caregivers, to find a solution to the caregiving challenge. They will then know whether they have a need that will require accommodation in order for the work to be accomplished. As part of the accommodation conversation, the employee should be “willing to participate in discussions, consider alternatives and agree to reasonable arrangements in the workplace that accommodate his or her needs, even where the arrangement is not his or her preferred solution.”

121 OHRC, supra note 120, provides an overview of duties and responsibilities of employees (as well as employers and unions) during the accommodation process. Employees are expected to:

- request accommodation;
- explain why accommodation is required, so that needs are known;
- make his or her needs known to the best of his or her ability, preferably in writing;
- answer questions or provide information about relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed;
- take part in discussions on possible accommodation solutions;
- co-operate with any experts whose assistance is required;
- meet agreed-upon performance and job standards once accommodation is provided;
- work with the employer on an ongoing basis to manage the accommodation process; and
- discuss his or her accommodation needs only with persons who need to know.

This may include the supervisor, a union representative or human rights staff.

122 CHRC, supra note 2; see also Anne-Marie Slaughter, Unfinished Business: Women, Men, Work, Family (Toronto: Random House Canada, 2015), ch 10.
B. Employers should build flexible work arrangements into the workplace if at all possible

Flexible work arrangements such as different or shifting hours of work, compressed schedules, and telework can address caregiving needs and reduce the need for employees to seek accommodation.\(^{123}\) Such arrangements “have been shown to reduce absenteeism, foster employee loyalty, improve morale and retention, and increase productivity.”\(^{124}\) Employers and employees should also be aware that the accommodation arrangements may change as the family situation changes, and they may also end when it is no longer needed.

C. Managers must not jump to conclusions about what is important for a child or other family member

One of the inherent problems when dealing with family caregiving situations is that what is acceptable or expected in one family may not be in another. Traditions, expectations, cultural and geographic backgrounds, health needs, and personalities all impact on how people view family situations and obligations. It is easy for managers to react in knee-jerk fashion based on their own experiences and expectations or because of biases they may not even know they have. It is important to give a thoughtful and considered response when an employee seeks accommodation, whatever the ground of discrimination. As David Lepofsky argues,

> [a]n open-minded and creative deliberative process significantly increases the prospects for finding a feasible accommodation to the needs of a disabled employee, or other worker with needs whose accommodation is endorsed under human rights legislation. … The wider the

\(^{123}\) Other flexible work arrangements include extended maternity or parental leave, compassionate or other leave to care for sick family members, leave to provide childcare or eldercare in unanticipated or emergency situations, shift changes, job sharing, part-time work with pro-rated benefits, and shifting or sharing work duties or tasks. Indeed, recent federal legislative changes include the right to request certain flexible work arrangements: Bill C-63, A second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures, 1st Sess, 42nd Parl, 2017 s 199 (Royal Assent, 14 December 2017), SC 2017, c 33, inserting s 177.1(1)-(9) into the Canada Labour Code, RSC 1985, c L-2. These provisions will come into force on a day to be fixed by the Governor in Council. See also Sara MacNaull, Flex: From a Privilege to a Right (Ottawa: Vanier Institute of the Family, 2016).

\(^{124}\) CHRC, supra note 2.
range of discussions and inquiry, the greater the chance that a workable accommodation will be discovered. As well, such deliberations can produce a more thoughtful and critical reflection on alleged adverse consequences which initially were feared if the worker were to be accommodated. Such deliberations and inquiries do not just make sense from the perspective of effective enforcement of anti-discrimination statutes. They also make good business sense.125

D. Managers need guidance, which should be shared with employees, on what they can ask for during the accommodation conversation

Often employers do not know how far they can go in seeking information from the employee, and employees may feel that an employer is asking for too much, or the wrong kind of, information. When does the conversation cross the line from legitimate collaborative attempts to find meaningful accommodation to unwarranted intrusion into an employee’s personal life? In the hiring context, employers have been told to not ask questions about family, about employees’ plans to have children, and about a person’s marital status. It is not surprising that they are reluctant to engage in a search for more details about a person’s family situation and caregiving arrangements when the accommodation conversation arises. However, some questions are appropriate on condition that the employer respect the employee’s privacy and ask only those questions that are relevant to, and necessary for, the accommodation situation.126 Practical questions to ask in assessing a request for accommodation include:

- what is the relationship of the employee to the person receiving care;
- what are the specifics of the care that the recipient needs (for example, what is needed, why, how often, when);
- how long will the person need care (for example, short term, long term, indefinite);
- why should the employee be the one to provide the care required;
- why is providing the care an obligation and not just a personal choice;
- what are the available realistic alternatives (for example, friends and family, daycare, home care, community supports);
- what efforts have been made to reconcile work and caregiving obligations;

126 CHRC, supra note 2 at 6.
• why were these efforts unsuccessful; and
• what accommodation is needed from the employer?\(^{127}\)

As in any meaningful conversation, it is important to approach it in good faith (unless there are legitimate reasons to have concerns about the truthfulness of the request) in a sincere attempt to find a solution.\(^{128}\) The employer has the duty to offer reasonable and dignified solutions to accommodate the employee, up to the point of undue hardship; remove discriminatory barriers that may limit an employee’s ability to do his or her job; and remain open to adjusting a previous agreement if circumstances change.\(^{129}\)

E. Employees and employers must be aware that collective agreement provisions do not provide an excuse for refusing to accommodate

Case law has stated that human rights legislation is paramount to other legislation and is read into all collective agreements.\(^{130}\) Accommodation to the point of undue hardship is an integral part of extending the principles of human rights and non-discrimination to employees. Provisions of a collective agreement cannot serve as an impediment to the search for appropriate accommodation. The employer is in a better position to formulate accommodations, but the union “shares a joint responsibility with the employer to seek to accommodate the employee.”\(^{131}\)

F. A workplace that reconciles caregiving and work obligations makes for a happier and more productive environment

Some of the most important reasons employers have given for providing flexibility and work-life initiatives were to keep valuable employees, to promote employees’ health and wellness and/or quality of life, to increase employee engagement and morale, and to fulfill their belief that it is the right thing to do.\(^{132}\) However, other reasons have included complying with

\(^{127}\) CHRC, *supra* note 2 at 6; see also suggestions for better communication processes between the employer and employees when intersecting grounds of discrimination are involved in an accommodation situation. *Mr X v Canadian Pacific Railway*, 2018 CHRT 11 at paras 304-20 (per Member Luftig).

\(^{128}\) OHRC, *supra* note 120, ch 8; CHRC, *supra* note 2 at 5-6.

\(^{129}\) CHRC, *supra* note 2 at 5.

\(^{130}\) *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324 (OPSEU)*, [2003] SCJ No 42 (per Iacobucci J).

\(^{131}\) Renaud, *supra* note 92 at para 39.

\(^{132}\) Donna S Lero et al, *The Availability, Accessibility and Effectiveness of Workplace Supports for Canadian Caregivers*, Final Report (31 December 2012) at 78, Table 12, online:
legislative requirements, demonstrating corporate social responsibility and maintaining a corporate reputation, remaining competitive in the marketplace, attracting potential employees due to skills shortages, and expanding the workforce. It appears that a workplace that promotes flexibility and meets caregiving needs is good for both employees and employers. An open-minded, deliberate, and creative accommodation process “make[s] good business sense.”

VI. CONCLUSION

Although there is still some confusion about the test for a prima facie case of family status discrimination, those of us who work in this area can at least take comfort in the fact that we are no longer arguing over whether childcare or eldercare responsibilities fall within the ground of family status. And, as we strive towards a better understanding of the criteria for a prima facie case, it is good that decision-makers across jurisdictions are discussing and debating the issues and seeking to recognize the day-to-day family and work obligations of employees as well as the necessity for cooperation and communication in the accommodation process.

In Johnstone, the Federal Court of Appeal proposed a principled test, building on previous case law, that balances the accommodation of employees’ needs with their responsibilities to balance their caregiving and work obligations. Not every caregiving situation is a need that must be accommodated under human rights legislation. Although the Johnstone test may have one criterion too many, the court affirmed the flexible nature of the prima facie case test. The door is open for other decision-makers to adapt the test depending on the context of the case and, as always, in response to jurisprudence of the Supreme Court of Canada.

Tests and evidentiary frameworks aside, and taking into account that the interaction of family caregiving with workplace rules and obligations is commonplace, the goal should be to find ways to simplify and streamline the accommodation process. Informed participants will help avoid an escalation of matters that could lead from the workplace to the hearing room. Collaboration and a respectful “accommodation conversation” should be encouraged for everyone involved: employers who offer accommodation, unions who facilitate it, and employees who need it to “make the lives they are able and wish to have.”


133 Ibid.
134 Lepofsky, supra note 125.
135 CHRA, supra note 8, s 2.