

Family Status Discrimination and the Obligation to Self-Accommodate

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ABSTRACT

The authors examine the evolving caselaw on family status discrimination under human rights law, through the lens of a 2013 arbitration decision: Communications, Energy and Paperworkers Union, Local 707 v. SMS Equipment Inc. (Cahill-Saunders Grievance). As arbitration and court decisions have developed an analytical framework for considering requests for accommodation on the basis of family status, they have placed continuing emphasis on the obligation of employees to “self-accommodate” - to fully explore alternatives that might resolve childcare and other parenting challenges - before seeking any accommodation of work schedules or other employer-controlled solutions. The authors examine the evolution of this self-accommodation obligation, and consider whether it can be reconciled with the analytical framework established for assessing whether there is a prima facie case of discrimination for prohibited grounds of discrimination other than family status. Privacy and dignity interests are engaged by requiring parents to justify their parenting, childcare and financial choices in order to address self-accommodation. This aspect of family status cases is inconsistent with the requirement of a broad purposive approach to human rights law. Instead, questions about what reasonable alternatives are available to parents can be considered within the well-established case law on the duty to accommodate to the point of undue hardship.

R.C.S., a single mother of two young children who worked as an apprentice welder in Fort McMurray, Alberta, was working a schedule of seven days on, seven days off, alternating night and day shifts each rotation. R.C.S. had arranged childcare for her children while she was at work, leaving each child at a different care home. However, when she worked nights, she picked her

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children up from their care homes on the way from work and, instead of sleeping during the day, looked after them. This schedule was interfering with her ability to perform her work satisfactorily. She was already living on payday loans to cover her rent, childcare costs, and other debt payments so incurring additional childcare costs did not seem like a viable option. She was also reluctant to leave her children in the care of a stranger for periods of up to twenty hours for seven days in a row. She asked her employer if she could work straight day shifts. Her union found another apprentice welder who was willing to work straight nights.

From a purely practical, human resources perspective, this might seem like an easy case—a win-win situation for all involved. R.C.S. would work straight day shifts, be well rested, and minimize her childcare costs, her co-worker would get to work his preferred night shifts, and the employer would have two happy, productive apprentice welders. Other employees, including some with disabilities, were permitted to work straight day shifts. Nonetheless, without explanation, her employer refused to accommodate her request.

R.C.S. filed a grievance, which her union eventually advanced to arbitration in 2013.¹ The presentation of the case and arguments by counsel for both parties were excellent. Counsel for the employer pointed out the impropriety of simply jumping to the end of the story and usurping the role of management by imposing what seemed like a reasonable solution. The union had to first establish a *prima facie* case of discrimination on the basis of family status and, at a minimum,² prove that R.C.S. had taken sufficient steps on her own to reconcile the conflict between her work and family obligations before turning to her employer for accommodation.³ According to the employer, she had failed to do so. Unlike some of the other reported cases, this was not a case of being unable to find childcare—it was simply about the cost of it, which the employer argued was “an inevitable burden that must be borne by working parents.”⁴ The employer pointed out that R.C.S. had not taken any legal steps to pursue either of the fathers of her children for child support. She had not asked the one father who had been involved with his child to request his employer to alter his schedule so that he could provide some childcare.

¹ One of us, Lyle Kanee, was appointed arbitrator in the case. Some of the analysis that follows is based on the experience of hearing and working through the arguments presented.

² The employer’s primary argument was based upon *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*, 2004 BCCA 260, 240 DLR (4th) 279 [*Campbell River*]. Hence, the employer argued that the union needed to prove an employer-implemented change in the terms and conditions of employment resulting in serious interference with a substantial parental obligation of the grievor.

³ For the purposes of this article, this requirement will be referred to as “self-accommodation.”

⁴ Written Submission of the employer, SMS Equipment, on file with authors.

Nor had R.C.S. pursued all possible government subsidies. She had recently sold her jeep and bought a newer truck that used more gas. She insisted on hiring adult babysitters instead of less expensive teenagers. The employer submitted that, while she was entitled to make these choices, she could not then expect her employer to change her schedule—a schedule that was in place when she applied for the job.

The union argued that a requirement that all employees work a rotating day-and-overnight-shift schedule—an otherwise neutral employer rule—had a discriminatory impact on single parents like R.C.S. It called an expert witness who testified that the burdens on single mothers of preschool children are particularly onerous and are exacerbated when they work evenings or rotating shifts. In part, due to the work schedules of the industry, women are significantly under-represented in the trades, representing just 4 percent of all construction workers in Canada. The union argued there was no justification for adding additional requirements, such as the obligation to self-accommodate, to the test for establishing *prima facie* discrimination on the ground of family status. In any event, R.C.S. had established that there were no reasonable alternatives available to her.

The case was a difficult one. Was the union's success dependent upon a finding that R.C.S. could not reasonably afford additional childcare during the day when she worked nights? If so, was one required to scrutinize all of her financial decisions? Did one need to explore the obligations and capabilities of the children's fathers? Of what relevance was the expert evidence on the additional stress parents experience when they work rotating shifts and night shifts, or evidence on the low number of women working in the building trades? Did it matter that R.C.S. knew about the rotating shift schedule and the challenges it brought when she applied for the job? Must the *prima facie* test for discrimination on other protected grounds be modified when the claim is based on family status?

Ultimately, the award found that the union had established a *prima facie* case of discrimination. Although sceptical about the justification for imposing an obligation to self-accommodate, the award avoided fully resolving the issue and, instead, found that R.C.S. had taken reasonable steps to reconcile her family and work obligations before seeking accommodation from her employer.⁵ At the time the award was issued, the only appellate decision addressing the test to establish *prima facie* discrimination on the ground of family status was the BC Court of Appeal's decision in *Health*

⁵ *Communications, Energy, and Paperworkers Union, Local 707 v SMS Equipment Inc (Cahill-Saunders Grievance)* (2013), 238 LAC (4th) 371, [2013] AWLD 5319 (AB) [SMS Equipment], aff'd 2015 ABQB 162, 254 LAC (4th) 34 [SMS Equipment QB].

Sciences Association of British Columbia v Campbell River and North Island Transition Society.⁶ Although *Campbell River* did not specifically discuss an obligation to self-accommodate, arbitrators, human rights adjudicators, and lower courts increasingly applied such a requirement after the decision of the BC Court of Appeal. While there was some divergence in the jurisprudence, it would be fair to say that the majority required claimants to take all reasonable steps to self-accommodate.

Subsequent to the award in *Communications, Energy, and Paperworkers Union, Local 707 v SMS Equipment*, the Federal Court of Appeal decided *Johnstone v Canada (Border Services)*.⁷ This case involved a full-time employee of the Canadian Border Services Agency (CBSA) who worked rotating, unpredictable shifts and asked her employer to accommodate her by providing her with static day shifts after she returned from maternity leave. After a decade of protracted litigation, the Federal Court of Appeal upheld her complaint. The CBSA had an unwritten policy that required employees with childcare obligations to reduce their hours to part-time status and to forego a number of full-time benefits if they sought to work fixed schedules. The court found that this policy discriminated against Ms. Johnstone. In making this finding, the court identified four factors that establish a *prima facie* case of workplace discrimination based on family status, including that the complainant has “made reasonable efforts to meet childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible.”⁸ The court elaborated further on this condition:

A complainant will, therefore, be called upon to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or an alternative arrangement is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a bona fide childcare problem. This is

⁶ *Campbell River*, *supra* note 2. For further discussion of family status discrimination in this context, see Elizabeth Shilton, “Family Status Discrimination: ‘Disruption and Great Mischief’ or Bridge over the Work-Family Divide?” in this issue; Sheila Osborne-Brown, “Discrimination and Family Status: the Test, the Continuing Debate, and the Accommodation Conversation” in this issue.

⁷ 2014 FCA 110, 372 DLR (4th) 730 [*Johnstone CA*].

⁸ *Ibid* at para 93. The other three conditions are: (1) that a child is under his or her care and supervision; (2) that the childcare obligation at issue engages the individual’s legal responsibility for that child, as opposed to a personal choice; and (3) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances.⁹

Most of the decisions issued since *Johnstone* have adopted the obligation to self-accommodate. Some have refined the test, and a few have rejected it outright.¹⁰ The majority of cases have favoured requiring claimants to establish that they have been unable to reconcile their childcare obligations on their own and within their own family before seeking accommodation from their employer. This article re-examines the issue of self-accommodation, exploring the justifications offered by the authorities for including the requirement in the *prima facie* test and the concerns and criticisms that have been raised in response. We examine the challenges that adjudicators face in applying a *prima facie* test that requires claimants to self-accommodate and consider what, if any, practical impacts this requirement has on the outcome of decisions. The current approach is problematic as it is inconsistent with a broad and purposive approach to interpreting human rights obligations; it creates a hierarchy of grounds, with family status claims being treated more onerously than others; and it distorts the analysis of adverse effects. Moreover, it is unnecessary. We finish by arguing that the concerns that underlie the imposition of a self-accommodation requirement can be addressed through the well-established approach to determining whether an employer has reasonably accommodated an employee to the point of undue hardship.

I. THE DEVELOPMENT OF THE OBLIGATION TO SELF-ACCOMMODATE

The self-accommodation requirement confirmed in *Johnstone* gradually took shape over a line of cases that began with *Campbell River*. Before turning to these cases, we outline briefly the foundation for discrimination analysis, including the requirement that a complainant must first establish a case of *prima facie* discrimination before a claim for reasonable accommodation will be considered.

A complainant initially bears the onus of establishing a *prima facie* case of discrimination. In *Moore v British Columbia (Education)*, the Supreme Court of Canada set out a three-step test: “[C]omplainants are required to show that they have a characteristic protected from

⁹ *Ibid* at para 96.

¹⁰ See e.g. *Clark v Bow Valley College*, 2014 AHRC 4 [Clark]; *Wing v Niagara Falls Hydro Holding Corporation*, 2014 HRTO 1472, in which *Johnstone* CA, *supra* note 7, has been applied, and *SMS Equipment QB*, *supra* note 5, and *Misetich v Value Village Stores Inc*, 2016 HRTO 1229 [Misetich], in which it has been rejected.

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.”¹¹ It has often been noted that the requirement to establish a *prima facie* case is a low threshold as it serves only to shift the evidential burden to a respondent to provide an explanation.¹² Indeed, in disability cases, there is usually little dispute that the discrimination relates to the ground, as many workplace standards can pose obstacles for disabled employees, and the *prima facie* case stage is therefore often muted or even assumed.

Once a *prima facie* case of discrimination has been established, the burden of proof shifts to the respondent to establish a statutory defence, if one is available. In most employment cases, this means establishing that the term or condition of employment that has discriminatory effect is a *bona fide* occupational requirement (BFOR).¹³ Many work standards, such as schedules, can easily meet the first two elements of the BFOR test set out in the seminal case of *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (Meiorin)*: (1) that the standard was adopted for a purpose rationally connected to the performance of the job and (2) that it was adopted in an honest and good faith belief that it was necessary to the fulfillment of that purposes.¹⁴ However, the third element of the three-step test set out in *Meiorin* requires that the employer establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose by demonstrating that it is impossible to accommodate the employee without imposing undue hardship upon the employer.¹⁵ Many workplace cases focus on this critical question and, in particular, on whether a particular accommodation causes undue hardship.

The issue before the BC Court of Appeal in *Campbell River* was: “What then needs to be established to prove *prima facie* discrimination on family status?”¹⁶ The court did not specifically consider the grievor’s self-accommodation efforts; however, a number of subsequent decisions rely on *Campbell River* to justify imposing an obligation to self-accommodate. These decisions focus on the court’s comment that “in the vast majority of situations in which there is a conflict between a work requirement and a

¹¹ *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 at para 33 [*Moore*].

¹² *Stewart v Elk Valley*, 2017 SCC 30 at para 106, [2017] 1 SCR 591 [*Stewart*].

¹³ *Ontario (Human Rights Commission) v Etobicoke (Borough)*, [1982] 1 SCR 202, 132 DLR (3d) 14.

¹⁴ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 at para 54, 176 DLR (4th) 1 [*Meiorin*].

¹⁵ *Ibid.*

¹⁶ *Campbell River*, *supra* note 2 at para 36.

family obligation it would be difficult to make out a *prima facie* case.”¹⁷ Some adjudicators took this as a justification to inquire into whether the circumstances facing the claimant were extraordinary or simply comparable to those normally experienced by working parents. Since it is normal for working parents to experience conflicts between their work responsibilities and family obligations, and to solve those conflicts by procuring childcare, the implicit expectation was that all parents would do this. Parents claiming family status discrimination on the basis that work obligations prevented them from providing necessary childcare were therefore required to demonstrate what efforts they had made to secure childcare. Efforts judged to be lacking could halt the analysis before a *prima facie* case was made out.

An early example is the 2006 decision of *Canada Post Corporation v Canadian Union of Postal Workers (Sommerville)* in which the arbitrator relied on the “vast majority” comment in *Campbell River* to impose an expectation on employees to arrange their own childcare and to turn to their employer only when their difficulties in arranging those obligations were extraordinary.¹⁸ Despite the difficulties many people experience with these obligations, the arbitrator held that the first issue to be determined was “whether or not the Grievor’s difficulties with daycare arrangements lay outside the experience of the vast majority of people.”¹⁹

Over time, the investigation into childcare arrangements has shifted into questioning grievors’ self-accommodation efforts. This shift is apparent in *Power Stream v International Brotherhood of Electrical Workers, Local 636*, one of the first decisions to articulate a requirement of self-accommodation.²⁰ Four workers brought a grievance regarding a change to their work hours from five eight-hour shifts per week to four ten-hour shifts. Each grievor claimed that the schedule interfered with his ability to meet his family obligations. The arbitrator, in determining whether a *prima facie* case of discrimination was made out, set out a list of five questions. One of these questions focused on what efforts the grievors made at self-accommodation and whether the grievors “rejected options ... that they should reasonably be expected to have [taken].”²¹ The arbitrator left open what could be considered reasonable.

¹⁷ *Ibid* at para 39.

¹⁸ *Canada Post Corporation v Canadian Union of Postal Workers (Sommerville Grievance)* (2006), 156 LAC (4th) 109, 87 CLAS 248 [Sommerville].

¹⁹ *Ibid* at para 94.

²⁰ *Power Stream Inc v International Brotherhood of Electrical Workers, Local 636 (Bender Grievance)* (2009), 186 LAC (4th) 180, 99 CLAS 93 (OLRB) [Power Stream].

²¹ *Ibid* at para 63.

The arbitrator did not explain why he imposed an obligation on employees to self-accommodate, beyond noting that family and work obligations “will sometimes be difficult to reconcile [and] parents may have to make difficult choices to reconcile their conflicting obligations.”²² According to the arbitrator, these choices may include having to pay for childcare, choosing more expensive accommodations to live close to work, or accepting lower-paying work.²³ He rejected earlier authorities that held that family status protection should not be interpreted in a more restrictive manner than other grounds of discrimination and specifically rejected the idea that employers should be expected to establish terms and conditions of employment that avoid conflict with “each and every characteristic of family status.”²⁴ He expressed the concern that “[t]o find discrimination in every such circumstance of adverse effect would freeze the employer’s ability to act to meet its economic needs as virtually every action could have some negative effect on the parental duties of one employee or another.”²⁵ Finally, the arbitrator expressed the view that parents are to be expected to “work together ... to split their parental duties so as to be able to accommodate their workplace duties.”²⁶

In a similar vein, the arbitrator in *Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungwirth)* also rejected the union’s submission that family status should be treated in the same manner as other grounds of discrimination, remarking that “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.”²⁷ He held that “[p]art 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.”²⁸

The grievor in *Jungwirth*, the mother of an eleven year old, sought accommodation from having to work some night shifts, a requirement that arose following the reassignment of a co-worker who had been working straight nights. In concluding that the grievor had not established a *prima facie* case of discrimination, the arbitrator drew an analogy between family status claims and the claims of disabled employees:

²² *Ibid* at para 55.

²³ *Ibid*.

²⁴ *Ibid* at para 60.

²⁵ *Ibid* at para 56.

²⁶ *Ibid* at para 64.

²⁷ *Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungwirth Grievance)* (2010), 192 LAC (4th) 97, 101 CLAS 8 (ALRB) at para 64 [*Jungwirth*].

²⁸ *Ibid*.

Given the need to balance work and family, parental responsibilities also involve, in the Board's view, diligently exploring reasonable alternatives to ensure night time coverage. Otherwise, no single parent could ever be assigned to night shifts or late evening shifts. While not covered in detail in the evidence, it can be assumed that the Grievor made appropriate care arrangements for her son when she was assigned to the afternoon shift which runs from 3 pm - 11 pm. Someone had to feed her son, ensure he did his homework, and make sure he went to bed at an appropriate time. The Grievor's mother assisted in this regard although it was not clear what supplementary arrangements, if any, were in place.

With respect to the night shift, in order for the Board to conclude that there was a serious interference with the grievor's parental obligations, the Board needed to be satisfied that reasonable alternatives for caring for her son at night were not available to the grievor. In this sense, we view the evidentiary burden for establishing a *prima facie* case for family status discrimination as being analogous to the burden on employees asking for accommodation on the basis of disability. Such employees have the onus of first establishing, through appropriate evidence, that they have a physical or mental condition that requires accommodation in their work setting. In the case of family status, the an [*sic*] employee also bears the onus of providing sufficient evidence of the absence of reasonable alternatives for care.²⁹

The Court of Appeal in *Johnstone* relied upon both *Power Stream* and *Jungwirth* to support its conclusion that discrimination has not occurred unless "no reasonable childcare alternative is reasonably available to the employee."³⁰ However, as we argue below, requiring a claimant to show self-accommodation efforts in order to establish discrimination on the grounds of family status is problematic in three main ways: it is inconsistent with how human rights legislation should be interpreted; it

²⁹ *Ibid* at paras 68-9.

³⁰ *Johnstone CA*, *supra* note 7 at paras 88-90.

creates a hierarchy among protected grounds; and it distorts the *prima facie* case analysis.

II. SELF-ACCOMMODATION IS INCONSISTENT WITH A BROAD AND PURPOSIVE INTERPRETATION

In *Johnstone*, the Court of Appeal addressed the initial question of whether “family status” simply defines a legal status or includes family obligations. The court embraced the more expansive definition that extends to family obligations such as childcare, acknowledging that human rights legislation is to be given a “broad interpretation to ensure the stated objects and purposes of such legislation are fulfilled.”³¹ In taking this approach, the court relied on well-established precedent.³² When discussing the purpose of legislation protecting against family status discrimination, the court recognized that many parents will be impeded from fully participating in the workforce unless reasonable accommodation of their childcare obligations is provided.³³

Yet, when the court went on to consider what should be required to establish a *prima facie* case of family status discrimination, it failed to return to this overarching principle of interpretation. It did not ask whether imposing a requirement of self-accommodation advances the goal of enabling full participation by parents in the workforce. The Court of Appeal’s decision is not unique in this respect; there is little reference in any of the cases that adopt a self-accommodation requirement to the large body of Supreme Court of Canada jurisprudence discussing the interpretive principles to be applied to human rights legislation and the purposes it seeks to advance.

In 1987, in *Canadian National v Canada (Canadian Human Rights Commission) (Action Travail)*, Chief Justice Brian Dickson emphasized the importance of giving human rights legislation an interpretation that fully realizes its goals and objectives.³⁴ He described human rights legislation as giving rise to “individual rights of vital importance” that should not be minimized or enfeebled.³⁵ Likewise, *Commission Scolaire*

³¹ *Ibid* at para 61.

³² See *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571 at para 120, 133 DLR (4th) 449; *University of British Columbia v Berg*, [1993] 2 SCR 353 at 370, 102 DLR (4th) 665; *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84, at 89-90, 40 DLR (4th) 577; *Insurance Corp of British Columbia v Heerspink*, [1982] 2 SCR 145 at 157-58, 137 DLR (3d) 219; *B v Ontario (Human Rights Commission)* 2002 SCC 66 at para 44, [2002] 3 SCR 403.

³³ *Johnstone* CA, *supra* note 7 at para 66.

³⁴ *Canadian National v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 40 DLR (4th) 193 [*Action Travail*].

³⁵ *Ibid* at 1134.

Regionale de Chambly v Bergevin (Chambly) grounded the duty to provide reasonable accommodation to those who are adversely affected by a neutral rule in fundamental principles of equity and fairness.³⁶ Perhaps most germane to family status discrimination is the Supreme Court of Canada's discussion in *Brooks v Canada Safeway*, a case about pregnancy exclusions in sick benefits insurance policies. Such exclusions were described as "sanctioning one of the most significant ways in which women have been disadvantaged in our society."³⁷ The Court acknowledged that in order to remove the unfair disadvantage imposed upon working parents, the costs of caring for children may need to be shared by others.

In *Action Travail*, the Supreme Court of Canada highlighted the importance of systemic remedies and endorsed employment equity programs as effective measures to combat "a continuing cycle of systemic discrimination" and "as an attempt to ensure that future applicants and workers from affected groups will not face the same insidious barrier that blocked their forebears."³⁸ The Court returned to this theme in *Meiorin* when, relying on Shelagh Day and Gwen Brodsky, it commented on the shortcomings of simply accommodating individuals who challenge the systems and structures that are designed for the majority, rather than changing those systems so that they are more inclusive.³⁹ As Day and Brodsky argue,

[t]he difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated" ...

Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of

³⁶ *Commission Scolaire Regionale de Chambly v Bergevin*, [1994] 2 SCR 525 at 544, 115 DLR (4th) 609 [*Chambly*].

³⁷ [1989] 1 SCR 1219, 59 DLR (4th) 321 at 1238 [*Brooks*, cited to SCR].

³⁸ *Action Travail*, *supra* note 34 at 1116.

³⁹ Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75:3 Canadian Bar Review 433.

which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply “accommodate” those who do not quite fit. We make some concessions to those who are “different”, rather than abandoning the idea of “normal” and working for genuine inclusiveness.⁴⁰

Agreeing with these observations, Justice Beverley McLachlin used Meiorin’s situation as a good example of how the conventional analysis prevents us “from rigorously assessing a standard which, in the course of regulating entry to a male-dominated occupation, adversely affects women as a group.”⁴¹

The Court challenged employers to design their workplace rules in ways that reflect all members of society and that accommodate the differences among individuals: “They must build conceptions of equality into workplace standards. ... The standard *itself* is required to provide for individual accommodation, if reasonably possible.”⁴² These cases implore us to require employers to design workplace standards that take into account the childcare obligations of working parents rather than simply making exceptions for those parents who have extraordinary difficulties securing satisfactory childcare arrangements. To limit family status protection to those parents who have extraordinary childcare obligations and who, unlike the majority of parents, cannot manage their own childcare obligations without assistance from their employers profoundly undershoots the aspirational goals for anti-discrimination laws endorsed by the Supreme Court of Canada in cases like *Action Travail* and *Meiorin*. It is not possible to reconcile these decisions with a requirement that, before imposing any obligation on an employer, working parents must first prove that they have exhausted all reasonable childcare alternatives. Arguably, it is precisely the fear of disrupting the traditional workplace standards that motivates the imposition of hurdles on family status claimants such as the obligation to self-accommodate.⁴³ However, this approach leaves no room for questioning whether it is discriminatory to design workplace standards such that the vast majority of working parents are required to make difficult choices about the cost of childcare, acquiring more expensive housing to be close to their workplace, accepting lower paying work, or forgoing certain types of work altogether. These are

⁴⁰ *Ibid* at 462.

⁴¹ *Meiorin*, *supra* note 14 at paras 41-2.

⁴² *Ibid* at para 68 [emphasis in original].

⁴³ See Shilton, *supra* note 6.

decisions that workers who do not have childcare responsibilities are not required to make.

The approach of requiring parents to self-accommodate will do little to break down the barriers that inhibit full participation in the workforce by working parents, and particularly by working mothers, which is an explicit goal of human rights legislation. If night shifts, rotating shifts, and other inflexible scheduling rules have historically created barriers to full participation in the workforce for parents and, in particular, for mothers, are the purposes of anti-discrimination laws satisfied if protection is only afforded to parents who have “extraordinary” challenges in securing childcare? Are we sanctioning the imposition of a disproportionate amount of the costs of child rearing upon parents if we require them to first make all reasonable efforts to secure childcare that accommodates their workplace demands before seeking accommodation from their employers?

III. REQUIRING SELF-ACCOMMODATION CREATES A HIERARCHY AMONG PROTECTED GROUNDS

The second basis for criticizing the trend towards self-accommodation is that, despite suggesting otherwise, cases that require family status discrimination claimants to self-accommodate create a hierarchy among protected grounds by setting a more onerous test for family status claims compared to claims under other grounds of discrimination. Furthermore, as argued below, the jurisprudential justification that courts have relied on to create this requirement is both flawed and counter to Supreme Court of Canada jurisprudence. The three-step *prima facie* test in *Moore* has been applied in cases of discrimination based upon race,⁴⁴ religion,⁴⁵ physical and mental disability,⁴⁶ place of origin,⁴⁷ sex,⁴⁸ and sexual orientation.⁴⁹ As a matter of statutory interpretation, when a legislature lists all of the protected grounds of discrimination together and expresses no distinctions among them, it is reasonable to conclude that it intends all of the grounds of discrimination to be governed by the same legal tests.

Recently, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier*, the Supreme Court of Canada

⁴⁴ *Peel Law Association v Pieters*, 2013 ONCA 396, 363 DLR (4th) 598.

⁴⁵ *Amir v Webber Academy Foundation*, 2015 AHRC 8.

⁴⁶ *Vancouver Area Network of Drug Users v British Columbia Human Rights Tribunal*, 2015 BCSC 534, 385 DLR (4th) 530.

⁴⁷ *Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 30 Alta LR (6th) 125.

⁴⁸ *Sones v District of Squamish*, 2016 BCHRT 99.

⁴⁹ *Garneau v Buy-Rite Foods and Others*, 2015 BCHRT 77.

confirmed the test in *Moore* and stated that the same legal test applies regardless of the grounds for discrimination.⁵⁰ In dealing with other grounds of discrimination than family status, courts have refused to add additional elements to the test for *prima facie* discrimination. In *Telecommunications Workers Union v Telus Communications*, the Alberta Court of Appeal specifically rejected the conclusion of the arbitrator and the lower court that it was necessary to demonstrate an employer's knowledge of an employee's disability in order to establish a *prima facie* case of discrimination. It found that "'knowledge' should not be added as a fourth element of the *prima facie* case test."⁵¹

In *Johnstone*, the Court of Appeal accepted that the test for finding *prima facie* discrimination on the basis of family status should be "substantially the same" as other grounds of discrimination and that "[t]here should be no hierarchies of human rights."⁵² However, the court suggested that a "flexible and contextual" approach to application of the test is appropriate to different factual situations and different grounds of discrimination,⁵³ and, on this basis, it justified its imposition of a self-accommodation requirement. The court relied upon two cases in support of this analysis, but neither supported the addition of a more specific requirement to the test for *prima facie* discrimination.⁵⁴ The first case, *Canada (Human Rights Commission) v Canada (Armed Forces) (Morris)*, was used to support the proposition that the test for a *prima facie* case is

⁵⁰ *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 69, [2015] 2 SCR 789 [*Bombardier*]. We wish to be clear that the application of a given legal test must be based on the same elements and the same degree of proof in every case. This is necessary in order to maintain the uniformity, integrity, and predictability of the law. We therefore fail to see how the flexibility that the commission says must characterize the *prima facie* discrimination test can affect the process aside from making it possible to take the circumstances of each case, and, in particular, the ground of discrimination being alleged, into account. Thus, although the nature of the evidence that is presented may vary from case to case, the "legal test" does not change. What can vary are the circumstances that might make it possible to meet the requirements of the various elements of the analysis, and the courts must adopt an approach that takes the context into account.

⁵¹ 2014 ABCA 154 at para 29, 95 Alta LR (5th) 285. Similarly, in *Stewart*, *supra* note 12, the Supreme Court of Canada reiterated that "discriminatory intent" by an employer is not required to make out a *prima facie* case (at para 24) and also rejected adding a different sort of fourth element to the *prima facie* test, namely the requirement of a finding of stereotypical or arbitrary decision-making (at para 45).

⁵² *Johnstone* CA, *supra* note 7 at para 81.

⁵³ *Ibid* at para 83.

⁵⁴ For a contrary argument, see Osborne-Brown, *supra* note 6.

meant to be flexible.⁵⁵ The court in *Morris* rejected the argument of the Attorney General that, in employment cases where the claimant alleges he was not hired because of discrimination, he must adduce comparative evidence about successful candidates in order to establish a *prima facie* case of discrimination. The court forwent more precise tests in favour of the flexibility that was inherent in *Ontario Human Rights Commission v Simpsons-Sears (O'Malley)*,⁵⁶ said:

[T]he legal definition of a *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.⁵⁷

The second case that the Court of Appeal in *Johnstone* referred to was *Syndicat Northcrest v Amselem*, a religious discrimination case in which the Supreme Court of Canada rejected the proposition that religious belief must be objectively grounded and held instead that a claimant must only demonstrate a sincere belief.⁵⁸ The Federal Court of Appeal suggested that *Amselem* was an example of a flexible and contextual approach to assessing when a *prima facie* case of discrimination is established. In *SMS Equipment*, Justice June Ross cautioned against using *Amselem* out of context, noting that it was a case of direct discrimination under Québec's *Charter of Human Rights and Freedoms*⁵⁹ as opposed to a case of adverse effect discrimination under a human rights code.⁶⁰ In any event, *Amselem* expanded the breadth of protection for religious freedom and actually made it easier for claimants to show that their right to religious freedom was triggered. The Court did not further restrict the freedom by applying additional restrictions inapplicable to other protected grounds. In contrast, the Court of Appeal in *Johnstone* applied a more rigid test by setting out

⁵⁵ *Canada (Human Rights Commission) v Canada (Armed Forces)*, 2005 FCA 154, 334 NR 316 [*Morris*].

⁵⁶ *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536, 23 DLR (4th) 321 [*O'Malley*].

⁵⁷ *Morris*, *supra* note 55 at para 27.

⁵⁸ *Syndicat Northcrest v Amselem*, [2004] SCC 47, 241 DLR (4th) 1 [*Amselem*].

⁵⁹ CQLR, c C-12.

⁶⁰ *SMS Equipment QB*, *supra* note 5 at para 75.

specific prerequisites that are not found in Supreme Court of Canada decisions that set out the test.⁶¹

The Court of Appeal in *Johnstone* also justified its imposition of a self-accommodation requirement within the *prima facie* test by suggesting that this imposes no extra burden on complainants. Relying on arbitral jurisprudence,⁶² it compared the requirement to self-accommodate to the ongoing obligation disabled complainants have “to notify the employer of changes in their restriction.”⁶³ The problem with this analogy is that it wrongly equates an element of the accommodation analysis in disability cases with the imposition of a requirement in family status cases at the stage of determining whether *prima facie* discrimination is made out. The Court of Appeal in *Johnstone* confirmed an obligation on employees to take all reasonable steps to resolve conflicts between parental duties and workplace obligations before seeking accommodation. In assessing whether accommodation is required, or whether the accommodation obligation should continue, it seems perfectly reasonable to require disabled employees to notify their employer of changes in their condition. Similarly, it might be reasonable to impose the same obligation on family status claimants to inform their employers if their family obligations change—for example, if their children reach school age. However, this kind of burden is not comparable to requiring employees seeking family status accommodation to exhaust options for self-accommodation in order to even access the accommodation analysis.

No doubt, many employees with disabilities find ways of overcoming the challenges presented by their workplace without seeking accommodation from their employer. However, the fact that an employee could overcome the challenges on their own has not been offered as a reason not to find a case of *prima facie* discrimination when they experience an adverse impact from a workplace rule that relates to their disability. For example, in *Moore*, the parents of Jeffrey, a child with a severe learning disability, enrolled him in private schools when the public school system failed to provide him with adequate educational services. In essence, the parents self-accommodated. However, the Supreme Court of Canada still found that the school board discriminated against Jeffrey and,

⁶¹ See *O'Malley*, *supra* note 56 at para 18: “[W]here an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.”

⁶² *Alliance Employees Union, Unit 15 v Customs and Immigration Union* (2011), 205 LAC (4th) 343, 105 CLAS 150 (OLRB).

⁶³ *Johnstone CA*, *supra* note 7 at para 91.

among other relief provided, ordered the school board to reimburse his family for the costs of private school. The Court did not ask if Jeffrey's parents could afford private school. It did not ask if Jeffrey's parents had sought financial assistance from other sources, familial or public. The Court simply asked if Jeffrey had a disability (dyslexia); whether he experienced an adverse impact with respect to a service (denied meaningful access to public education); and whether his dyslexia was a factor in the adverse impact.⁶⁴ Having established these three factors, the Court found a *prima facie* case of discrimination and proceeded to consider whether the school board had accommodated him to the point of undue hardship.⁶⁵

Most importantly, persons making a claim of discrimination on the basis of other prohibited grounds do not need to establish that they face extraordinary challenges within their protected group. To require this of claimants is to tacitly acknowledge that individuals are expected to tolerate some discrimination before they can seek legal protection. Disabled employees do not have to prove that the obstacles they experience are more serious than the vast majority of employees with similar disabilities.⁶⁶ Those seeking alterations of workplace standards that respect their religious practices are not required to prove that the adverse impact of the workplace standards on their religious practices is greater than the majority of employees practising their religion. The Supreme Court of Canada in *Moore* expressly rejected the idea of comparing the

⁶⁴ *Moore*, *supra* note 11 at para 34.

⁶⁵ Similarly, in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577, a case of adverse discrimination under section 15 of the *Canadian Charter of Rights and Freedoms* (Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]), the Court did not require the appellants to prove that they could not afford to pay for their own sign language interpreters before finding that the government had breached section 15 of the *Charter* when it failed to provide sign language interpreters when deaf persons accessed medical care.

⁶⁶ One might argue this is the implication of rejecting the comparator-group analysis in finding discrimination in *Moore*, *supra* note 11. See Gwen Brodsky, "Moore v. British Columbia: Supreme Court of Canada Keeps the Duty to Accommodate Strong" (2013) 10 *Journal of Law & Equality* 85, who argues that it strengthens the duty to accommodate to put the focus on identifying the positive obligations on service providers to accommodate rather than asking whether a claimant is worse off than others like her. However, *Moore* has also been criticized for rejecting a systemic approach. See Joanna Birenbaum & Kelly Gallagher-MacKay, "From Equal Access to Individual Exit: The Invisibility of Systemic Discrimination in *Moore*" (2013) 10 *Journal of Law & Equality* 93, who see the decision to set aside the systemic remedies ordered against the provincial government as restricting the potential to address systemic barriers to inclusion. While this may be particularly negative for disabled individuals, it may also undermine the struggles of other protected groups.

claimant to others within his affected group. The Court described the risk of comparing Jeffrey only to other special needs students as “perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy.”⁶⁷

IV. EXPLORING SELF-ACCOMMODATION AT THE *PRIMA FACIE* STAGE DISTORTS THE ANALYSIS

Finally, the imposition of an obligation to self-accommodate before seeking accommodation by an employer has led to a number of problems in the discussion and analysis of adverse effect in family status cases. Below, we discuss and expand on the concerns and criticisms that have been identified in the jurisprudence regarding the self-accommodation requirement. We also highlight problems this approach poses for adjudicators, including that it necessitates intrusive inquiries into the claimant’s personal life and requires adjudicators to decide whether the costs of childcare are “unreasonable,” which is a largely undefined limit.

In *SMS Equipment*, the Alberta Court of Queen’s Bench expressed concern about the “one-sided and intrusive inquiries on complainants in family status discrimination cases” that result when a self-accommodation test is applied at this stage:

Complainants are not only required to prove that a workplace rule has a discriminatory impact on them, but that they were unable to avoid that impact. Thus the Grievor was subjected to an examination regarding her relationship or lack thereof with the biological fathers of her children, her choice of caregivers for her children and her personal financial circumstances. She had to undergo this examination before the Employer would even consider a request for an accommodation in the form of a shift exchange that she had arranged with another willing employee. The search for accommodation is intended to be “a multi-party inquiry,” involving the employer, the union and the complainant: [citations omitted]. Converting this multi-party inquiry into a one-sided investigation could certainly deter complainants from pursuing claims for discrimination based on family status, and thus detract from

⁶⁷ *Moore, supra* note 11 at para 31.

the policy goal of removing discriminatory barriers to full participation in the workforce.⁶⁸

There are multiple examples of this kind of intrusive inquiry in family status discrimination cases. In *Miraka v ACD Wholesale Meats*, the employer queried why the applicant had not attempted to obtain a babysitter on Craigslist or Kijiji to care for his young children during a brief and unexpected situation.⁶⁹ In *Clark v Bow Valley College*, the complainant was seeking a three-week extension of her maternity leave beyond the date the employer was demanding her return.⁷⁰ In addressing this complaint, the complainant's financial circumstances were reviewed in great detail, including multiple years of tax returns. The employer questioned why she did not obtain a line of credit using the equity in her home. When questioned about her husband's ability to care for the child, the complainant had to reveal details about his medical condition and his degree of compliance with treatment. She was also challenged about why she did not trade in her car. In *Fanshawe College of Applied Arts and Technology v Ontario Public Service Employees Union*, the employer asked the grievor in cross-examination whether her husband, who owned and operated a restaurant and was unavailable to provide childcare, viewed his business as a greater priority than his children.⁷¹

Such inquiries are not only intrusive but often demonstrate a judgmental attitude towards underlying family choices. For example, in many cases of family status discrimination, money is a key element of the adverse effect or disadvantage claimed by the employee. In *SMS Equipment*, it was estimated that it would cost R.C.S. an additional \$5,000 annually to arrange childcare during the days when she worked nights. In *Flatt v Treasury Board*, the grievor was seeking to work from home full-time for a year following her maternity leave to permit her to breastfeed her child.⁷² On the question of self-accommodation, the Federal Public Service Labour Relations and Employment Board focused on the grievor's evidence that she had located a daycare close to her office that would have permitted her to breastfeed her child while she worked out of the office, but she rejected this option because she "would be working just to cover the costs of daycare."⁷³ The Board concluded this level of expense was not

⁶⁸ *SMS Equipment QB*, *supra* note 5 at para 77.

⁶⁹ 2016 HRTO 41 at para 54.

⁷⁰ *Clark*, *supra* note 10 at paras 16-19, 22-3.

⁷¹ (2015), 257 LAC (4th) 311, 123 CLAS 245 [*Fanshawe*].

⁷² 2014 PSLREB 2, 248 LAC (4th) 1.

⁷³ *Ibid* at para 183.

“in and of itself sufficient to make the choice unreasonable.”⁷⁴ The Board acknowledged that if the costs of the daycare had affected the grievor’s ability to “provide the other necessities of life” for her child, the situation may have been different.⁷⁵ This analysis often reflects a criticism of the choices that families make to balance their financial needs with their childcare obligations.

The adjudicators and judges who have considered claims of financial hardship in the context of family status have not made it clear why cost is not a reasonable foundation for a claim of adverse effect or what costs are “unreasonable.” As noted above, the Court of Appeal in *Johnstone* concluded that a family status complainant must show that neither they nor their spouse can meet their enforceable child care obligations while continuing to work and that available childcare services or alternative arrangements are not “reasonably accessible” to them so as to meet their work needs.⁷⁶ While the court does not say specifically whether cost factors into the equation of reasonable accessibility, it seems that the court expects that working parents will bear reasonable costs of childcare before seeking accommodation from their employer, implying that only “unreasonable” childcare costs will trigger the protection of human rights codes.⁷⁷

This expectation is inconsistent with the approach to financial adverse effects taken in cases dealing with other prohibited grounds. In *Chambly*, three Jewish teachers employed by the respondent school board took a day off to celebrate Yom Kippur. The school board granted them a leave of absence but without pay, and the union grieved on their behalf seeking reimbursement for one day’s pay. The Supreme Court of Canada concluded that the school board’s calendar, which was neutral on its face, had the effect of adversely discriminating against Jewish teachers. The Court specifically rejected the application of a *de minimis* test to the evaluation of the existence of *prima facie* discrimination. In responding to the school board’s argument that the adverse effect (loss of one day’s pay) was so minimal that it did not constitute discrimination, the Court said:

With regard to accommodation it must be remembered that the entire annual salary of the teachers in this case was based upon 200 working days. It is of course impossible for Jewish teachers to make up for a lost day by working for example, on Saturday, Sunday, Christmas

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Johnstone CA*, *supra* note 7 at para 93.

⁷⁷ See *Fanshawe*, *supra* note 71 at para 65.

or Easter. A teacher can only teach when the school is open and the pupils are in attendance. If five days or a week's work was missed, there is no doubt that it would constitute a significant loss to the teacher. There is no difference in principle in the loss of one day's pay. Family budgets and financial commitments are based upon the total annual salary. The loss of a whole day's pay when that cannot be made up, is of very real significance to teachers and their families.

Further, the idea that because the effect of the discrimination is not great no steps need be taken in order to make a reasonable accommodation is unacceptable. The whole aim and purpose of human rights legislation is to prevent discrimination. If there can be discrimination without any consequences, then the very purpose of the legislation is defeated.⁷⁸

Working parents seeking accommodation are not asking to be paid for not working because their childcare obligations conflict with their work obligations. Typically, they are asking that their schedule of work or place of work be altered so as to minimize their costs of childcare. It is not clear why this has been seen as inappropriate by so many decision-makers considering family status cases. Some may argue that if a *prima facie* case of family status discrimination is established every time a work obligation requires working parents to expend money for childcare, then virtually every working parent would be a victim of family status discrimination and entitled to be accommodated by their employer. That may be the logical conclusion of applying a strict *Moore prima facie* test to family status claims. However, that does not mean that all working parents will ask that their work schedule or place of work be altered. Unless they perceive that there is some way to organize their work that will reduce their childcare costs, or other particular burdens, there will be no point in seeking accommodation, and this will likely be the case for most working parents. On the other hand, if only cases of unreasonable costs get over the *prima facie* hurdle, it has a great impact on the outcome of the decision; opportunities to reduce the overall cost of childcare will remain unexplored, even where no cost or hardship would be imposed on the employer. And we share Ross J's concern that intrusive and judgmental inquiries into childcare choices—along with a reluctance to consider costs

⁷⁸ *Chambly*, *supra* note 36 at paras 26-7.

as evidence of adverse effect—are likely to deter working parents from pursuing claims for discrimination.

V. ARE FLOODGATE CONCERNS JUSTIFIED?

As is clear in the earlier discussion of financial impact, it appears from the cases studied that courts and adjudicators that have imposed an obligation on working parents to self-accommodate before they ask their employers to accommodate their parental obligations fear that, without this extra limitation, every conflict between family and working responsibilities will give rise to a finding of discrimination. They speculate that there would be a dramatic negative impact on employers and workplaces if discrimination could be established so readily. Thus, there is something of a “sky is falling” tone to their comments and little specificity regarding the predicted disasters. For example, in *Jungwirth*, there was no evidence as to what the impact might be if all single parents of young children were exempt from working night shifts, yet the arbitrator was clearly alarmed by the proposition.

The nature of the accommodation that working parents generally seek is an alteration to either their work schedule or the location of their work. Working parents are not asking their employers to pay them for caring for their children. In reality, employers regularly make adjustments of employee schedules and work locations for a variety of reasons without incurring serious hardship. In any event, a finding of *prima facie* discrimination is only the first step in the inquiry. The second step is to consider whether the employer can accommodate the working parents’ need without undue hardship. Some adjudicators see this as being too heavy a burden. The concern of adjudicators appears to be that, once a *prima facie* case is established, the entire onus to accommodate is placed on the employer, and the employee would have no responsibility to search for childcare options themselves. Requiring the employee to exhaust childcare options beforehand lessens the onus placed on the employer under the accommodation analysis.

However, this depiction of the employer’s burden to accommodate is not accurate, and adjudicators considering discrimination on the basis of other prohibited grounds have long interpreted the accommodation obligation so as to ensure that employees shoulder some of the burden. A number of decisions reference *Central Okanagan School District No 23 v Renaud*,⁷⁹ where the Supreme Court of Canada described the search for accommodation as a “multi-party inquiry” and indicated that complainants

⁷⁹ See e.g. *SMS Equipment QB*, *supra* note 5 at para 77; *Sayoran v Deco Automotive*, 2011 HRTO 236 at para 44.

have a duty to “assist in securing appropriate accommodation.”⁸⁰ In disability cases, employees bear the following obligations: to advise the employer of the need for accommodation; to provide medical evidence to support the need for accommodation and the nature of restrictions; to participate in the process of determining appropriate accommodations; to accept reasonable accommodation, which prevents an employee from insisting on the “perfect” accommodation; to participate in treatment that might mitigate restrictions; and to advise the employer of any change in restrictions.⁸¹ When employees fail to meet these duties, adjudicators have found that the employer’s duty to accommodate is at an end.

As well, the duty to accommodate is only to the point of undue hardship. There is well-developed law on the scope of this duty, which balances the impact on the employee of the failure to accommodate against the burden placed on the employer. Setting a higher bar for proving a *prima facie* case in family status cases halts the analysis before any consideration of accommodation, thus precluding any consideration of reducing or minimizing the burden of childcare on working parents, no matter how minimal the impact on the employer might be.

The existing law on reasonable accommodation could certainly ensure that the concern of adjudicators that employees are required to play a role in balancing work and childcare obligations is addressed, without creating a unique test for family status discrimination. In family status cases, this could easily include placing obligations on employees to participate in the search for accommodation by searching out and paying for childcare. When the accommodation being sought imposes some hardship on the employer, adjudicators will need to make difficult decisions about the extent of the costs of childcare that employers are reasonably expected to bear, but this is a primary role of adjudicators in discrimination claims and fits comfortably inside the reasonable accommodation analysis. Over time, courts and adjudicators are likely to develop guidelines for accommodation in cases of family status discrimination that respond to the concerns that have driven the imposition of the self-accommodation requirement but in a manner that furthers the goal of human rights legislation.

VI. CONCLUSION

Serious problems are created by imposing a requirement to self-accommodate on employees and considering it to be a prerequisite to

⁸⁰ [1992] 2 SCR 970 at 994, 95 DLR (4th) 577.

⁸¹ Donald JM Brown & David M Beatty, *Canadian Labour Arbitration*, 4th ed, vol 7 (Aurora: Canada Law Book, 2006) at 6130.

establishing a *prima facie* case of discrimination. This approach is inconsistent with the broad and purposive approach to interpreting human rights obligations and will do little to break down the barriers that inhibit full participation in the workforce by working parents—particularly working mothers and single parents—which is an explicit goal of human rights legislation. And despite the claim in *Johnstone* that adding the requirement to self-accommodate to the test for *prima facie* discrimination for family status cases does not create a hierarchy of grounds, or impose additional burdens on family status claimants, we conclude that it does just that.

In addition, imposing this requirement, and treating family status claims more onerously than others, has distorted the analysis of adverse effects. The enquiries made of employees about their childcare arrangements and personal choices in the cases under study have been intrusive and often judgmental. And there has been a general unwillingness to consider cost as an adverse effect to be taken into account, despite it being a relevant consideration in cases dealing with other prohibited grounds. While similar enquiries and arguments might be made if the issue of self-accommodation was dealt with as an element of the accommodation analysis, the inquiry would be less one-sided since it would be balanced by considerations of whether the workplace accommodation sought by the employee caused undue hardship to the employer. Indeed, there will likely be cases where there will be no need to challenge employees about their family's choices at all, such as where accommodation can be provided with little or no hardship.

SMS Equipment is an example of just this kind of case. While the employer chose to call no evidence on undue hardship, the evidence seemed to show that permitting R.C.S. to work straight days created no hardship whatsoever for the employer; another employee was happy to work straight nights in order for her to work straight days. Despite the availability of this simple solution, the employer's argument that she had failed to self-accommodate led to extensive inquiries about her childcare arrangements and how much time she spent with her children, the details of her financial situation, her relationship with the fathers of her children, and all of the choices she had made around these aspects of her personal life. She clearly found these inquiries humiliating, and it puts arbitrators in a difficult position to be called upon to judge them. We all make choices about how to parent, how to manage our finances, and how to balance work and family, and few of us find this kind of scrutiny welcome.

Of course, if considering such facts is necessary in order to determine whether a particular accommodation sought by an employee is reasonable, then some invasion of the privacy and dignity of employees may be required. Disability accommodation cases—and cases involving other

prohibited grounds—sometimes require such inquiries, but, over many years of developing approaches in these cases, adjudicators, courts, and human rights commissions have emphasized the importance of respecting dignity, privacy, and self-determination. For the reasons discussed above, we conclude that adjudicators in family status cases should take an approach consistent with developed human rights law, including respect for these considerations, by dealing with considerations of self-accommodation, including the financial costs relating to childcare within the analysis of reasonable accommodation, after the well-established test for *prima facie* discrimination has been met. The concern that treating family status in the same way as other protected grounds will result in runaway costs for employers is reminiscent of when disability claims began to be adjudicated. The experience with accommodation on the basis of disability was that demands were imposed on employers incrementally as adjudicators and employers became more creative about ways in which disabled employees could be accommodated. It is likely that adjudicators will similarly adopt a cautious, incremental approach to reasonable accommodation for working parents.

While many adjudicators continue to assess self-accommodation as a requirement for making out a *prima facie* case of discrimination, there are some indications that the concerns we have set out are troubling to others. In the judicial review decision of *SMS Equipment*, Ross J found that the flexibility of the *Moore* test does not justify the addition of another element in family status cases.⁸² And in *Misetich v Value Village Stores*, the recent Ontario Human Rights Tribunal decision, the adjudicator disagreed with the inclusion of an obligation to self-accommodate as part of the *prima facie* test for family status discrimination. In her opinion, cases that imposed a self-accommodation requirement “conflated the test for discrimination and accommodation.”⁸³ She did go on to state that not every negative impact on a family need would amount to discrimination, suggesting that assessing the negative impacts of an impugned rule as part of the test for *prima facie* discrimination “may include consideration of the other supports available to the applicant.”⁸⁴ However, the adjudicator saw this as being different from requiring applicants to self-accommodate:

Requiring an applicant to self-accommodate as part of the
discrimination test means the applicant bears the onus of

⁸² *SMS Equipment QB*, *supra* note 5 at para 77.

⁸³ *Misetich*, *supra* note 10 at paras 48.

⁸⁴ *Ibid* at para 55.

finding a solution to the family/work conflict; it is only when he/she cannot that discrimination is established. This is different than considering the extent to which other supports for family-related needs are available in the overall assessment of whether an applicant has met his/her burden of proving discrimination.⁸⁵

Because the case before the adjudicator was dismissed on other grounds entirely, this decision does not provide an illustration of what this distinction might mean in practice, and there is no way to assess whether there is some benefit to this approach, as opposed to the one we have outlined.

It now seems likely that the question of whether and how self-accommodation should form part of the enquiry in family status discrimination cases involving childcare obligations will only be resolved when it attracts further attention from appellate courts and perhaps the Supreme Court of Canada. Hopefully, such further consideration will provide needed guidance about how to align these cases with established human rights law and ensure that the broad and expansive purposes of the law are met.

⁸⁵ *Ibid* at para 56.