

---

12-16-2020

## Family Status Discrimination: Caregiving and Prima Facie Case

Melanie Vipond

*Gall Legge Grant Zwack LLP*

Benjamin Oliphant

*Gall Legge Grant Zwack LLP*

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>



Part of the [Law Commons](#)

Article

---

### Citation Information

Vipond, Melanie and Oliphant, Benjamin. "Family Status Discrimination: Caregiving and Prima Facie Case." *Osgoode Hall Law Journal* 56.3 (2019) : 564-605.

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol56/iss3/3>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

---

## Family Status Discrimination: Caregiving and Prima Facie Case

### Abstract

The growing number of dual-income families with young children and ageing parents has led to a corresponding increase in the number of accommodation requests relating to childcare and eldercare. Determining whether an employer's denial of such a request constitutes prima facie discrimination on the basis of family status has bedeviled adjudicators, resulting in various "tests" being enunciated across Canada. While some scholars and adjudicators have suggested that these "tests" are inconsistent with the test set out by the Supreme Court of Canada in *Moore v. British Columbia* and place a uniquely high burden on claimants to establish prima facie discrimination, the authors suggest that is not necessarily correct. The existing tests for family status discrimination can be reconciled with the Moore test, through an acknowledgment that they simply inform the necessary analysis to consider at the third stage of the Moore test. All of these tests recognize that there is always a conflict between spending time with family members and spending time at work, which therefore requires a more nuanced approach to determine whether the third stage of the Moore test is met. The authors propose that these tests boil down to a simple question or issue—whether a claimant has the "meaningful choice," or is "reasonably able," to comply with both family and work obligations, given the claimant's unique circumstances and workplace obligations. Finally, the authors argue that the common objections to considering this issue do not provide persuasive reasons for departing from the overall adjudicative consensus.

### Cover Page Footnote

The authors would like to thank colleagues Peter A. Gall, QC and Donald R. Munroe, QC for their insightful feedback on various drafts of this article or on the issues addressed in this article more generally, and Justina Sebastiampillai for her research assistance. Any errors that the article is found to contain are the sole responsibility of the authors.

# Family Status Discrimination: Caregiving and Prima Facie Case

MELANIE VIPOND AND BENJAMIN J. OLIPHANT\*

---

I.	OVERVIEW OF PRIMA FACIE DISCRIMINATION .....	572
	A. The <i>Moore</i> Test.....	572
	B. Establishing a “Connection” .....	574
II.	FAMILY STATUS DISCRIMINATION .....	574
	A. The <i>Moore</i> Test.....	574
	B. Similarity of Approaches across Canada .....	577
III.	PROPOSED APPROACH: MEANINGFUL CHOICE OR REASONABLE ABILITY.....	585
	A. Similarity to Religion Cases .....	586
	B. Similarity to Disability and Addiction Cases .....	591
IV.	CHALLENGES TO THE PROPOSED APPROACH .....	596
	A. Meaningful Choice and Reasonable Ability.....	597
	B. “Something More” .....	601
V.	CONCLUSION .....	604

---

The growing number of dual-income families with young children and ageing parents has led to a corresponding increase in the number of accommodation requests relating to childcare and eldercare. Determining whether an employer’s denial of such a request constitutes prima facie discrimination on the basis of family status has bedeviled adjudicators, resulting in various “tests” being enunciated across Canada. While some scholars and adjudicators have suggested that these “tests” are inconsistent with the test set out by the Supreme Court

---

\* Melanie Vipond is a partner and Benjamin Oliphant is an associate at Gall Legge Grant Zwack LLP, in Vancouver. The authors would like to thank colleagues Peter A. Gall, QC and Donald R. Munroe, QC for their insightful feedback on various drafts of this article or on the issues addressed in this article more generally, and Justina Sebastianpillai for her research assistance. Any errors that the article is found to contain are the sole responsibility of the authors.

of Canada in *Moore v. British Columbia* and place a uniquely high burden on claimants to establish prima facie discrimination, the authors suggest that is not necessarily correct. The existing tests for family status discrimination can be reconciled with the *Moore* test, through an acknowledgment that they simply inform the necessary analysis to consider at the third stage of the *Moore* test. All of these tests recognize that there is always a conflict between spending time with family members and spending time at work, which therefore requires a more nuanced approach to determine whether the third stage of the *Moore* test is met. The authors propose that these tests boil down to a simple question or issue—whether a claimant has the “meaningful choice,” or is “reasonably able,” to comply with both family and work obligations, given the claimant’s unique circumstances and workplace obligations. Finally, the authors argue that the common objections to considering this issue do not provide persuasive reasons for departing from the overall adjudicative consensus.

**THE DYNAMICS OF THE CANADIAN WORKFORCE** have changed dramatically over the last half-century. On the one hand, we have witnessed a two-fold increase in dual-income parents with children,<sup>1</sup> and on the other, the greatest increase in the proportion of seniors since Confederation.<sup>2</sup> This means that nearly all Canadians will provide care to a young child or ageing parent at some point in their working careers. Additionally, there is no longer the same vast unpaid workforce—the so-called “stay at home” mother—to shoulder these responsibilities.<sup>3</sup>

Family-related duties and obligations, in particular caregiving responsibilities, are often complex, dynamic, and unpredictable, resulting in an inevitable conflict between family and workplace obligations. This is especially true given that Canadians are currently working longer hours with greater workplace

- 
1. From 1975 to 2015, the percentage of dual-income families with at least one child have increased from approximately 40 per cent to 70 per cent. See e.g. Statistics Canada, News Release, 11-630-X “Canadian Megatrends: The Rise of the Dual-Earner Family with Children” (30 May 2016) at 1, online (pdf): <[www.statcan.gc.ca/daily-quotidien/160530/dq160530c-eng.pdf](http://www.statcan.gc.ca/daily-quotidien/160530/dq160530c-eng.pdf)> [perma.cc/8EP5-KZRW] [Statistics Canada, “Megatrends”].
  2. A 2016 census shows that there are 5.9 million Canadian seniors compared to 5.8 million Canadians of 14 years old and younger. See Statistics Canada, News Release, 11-001-X, “Age and Sex, and Type of Dwelling Data: Key Results from the 2016 Census” (3 May 2016) at 3, online (pdf): <[www.statcan.gc.ca/daily-quotidien/170503/dq170503a-eng.pdf](http://www.statcan.gc.ca/daily-quotidien/170503/dq170503a-eng.pdf)> [perma.cc/UM9X-WVDH]. In 2015, 75 per cent of dual-income couples with children are reported to have two full-time working parents. See Statistics Canada, “Megatrends,” *supra* note 1.
  3. There still exists a significant disparity in the distribution of caregiving responsibilities. See e.g. Statistics Canada, *Time Use: Total Work Burden, Unpaid Work, and Leisure*, by Melissa Moyser & Amanda Burlock, in *Women in Canada: A Gender-based Statistical Report*, Catalogue No 89-503-X (Statistics Canada, 30 July 2018). See also Canadian Caregiver Coalition, “Beyond Recognition—Caregiving & Human Rights in Canada: A Policy Brief” (March 2015) at 2, online (pdf): *Careers Canada* <[www.careerscanada.ca/wp-content/uploads/2016/02/CCC\\_Policy\\_brief\\_Human\\_rights\\_EN.pdf](http://www.careerscanada.ca/wp-content/uploads/2016/02/CCC_Policy_brief_Human_rights_EN.pdf)> [perma.cc/8TDQ-VYGS].

expectations.<sup>4</sup> This conflict has led to an increase in workplace accommodation requests,<sup>5</sup> including requests for time off (both short-term and long-term), changes to work schedules (*e.g.*, lesser hours or different work hours), changes to the location of work (*e.g.*, working from home or at a closer location to home), and changes to the nature of the work itself (*e.g.*, less travel or fewer obligations), among others.<sup>6</sup>

In light of these increasingly frequent and inevitable conflicts, many have urged employers and employees to collaborate in reaching a solution.<sup>7</sup> A cooperative, compassionate approach that forestalls the need for litigation is to be commended; and many conflicts between family obligations and workplace requirements can and should be addressed in this way.<sup>8</sup> Unfortunately, other conflicts cannot, which makes it necessary for employers to examine whether there is a legal obligation to accommodate particular requests by employees, and for employees to determine when they are legally entitled to be accommodated.

- 
4. The average total weekly employment hours of Canadian couples has increased from an average of 57.6 hours in 1976 to 64.8 hours in 2008—this is a 13 per cent increase and almost the equivalent of an additional full day of paid work per week (7.2 hours). See Statistics Canada, *The family work week*, by Katherine Marshall, in *Perspectives on Labour and Income*, Catalogue No 75-001-X (Statistics Canada, April 2009) at 6.
  5. In British Columbia, the number of complaints based on family status increased from 95 to 102 in the year 2014-2015 to 2015-2016. See BC Human Rights Tribunal, *Annual Report 2014-2015* (BC Human Rights Tribunal, 2016) at 3; BC Human Rights Tribunal, *Annual Report 2015-2016* (BC Human Rights Tribunal, 2017) at 3. Similarly, in Ontario, complaints based on family status increased from 10 per cent to 13 per cent in the year 2012-2013 to 2013-2014. See “Social Justice Tribunals Ontario 2012-13 Annual Report” online: *Social Justice Tribunals Ontario* <[www.sjto.gov.on.ca/documents/sjto/2012-13%20Annual%20Report.html](http://www.sjto.gov.on.ca/documents/sjto/2012-13%20Annual%20Report.html)> [perma.cc/8SZR-V8LW]; “Social Justice Tribunals Ontario 2013-14 Annual Report” online: *Social Justice Tribunals Ontario* <[www.sjto.gov.on.ca/documents/sjto/2013-14%20Annual%20Report.html](http://www.sjto.gov.on.ca/documents/sjto/2013-14%20Annual%20Report.html)> [perma.cc/PMB3-RMVB].
  6. See “Policy and guidelines on discrimination because of family status” online: *Ontario Human Rights Commission* <[www.ohrc.on.ca/en/policy-and-guidelines-discrimination-because-family-status/vi-duty-accommodate#fn36](http://www.ohrc.on.ca/en/policy-and-guidelines-discrimination-because-family-status/vi-duty-accommodate#fn36)> [perma.cc/GBH4-LZRY].
  7. The former acting Chief Commissioner of the Canadian Human Rights Commission, David Langtry, has commented on this matter. See Canadian Human Rights Commission, Press Release, “CHRC Welcomes Court Rulings on Landmark Family Status Cases” (2 May 2014), online: *Cision* <[www.newswire.ca/news-releases/chrc-welcomes-court-rulings-on-landmark-family-status-cases-514224451.html](http://www.newswire.ca/news-releases/chrc-welcomes-court-rulings-on-landmark-family-status-cases-514224451.html)> [perma.cc/WS5D-PHJR]. See also Sheila Osborne-Brown, “Discrimination and Family Status: The Test, the Continuing Debate, and the Accommodation Conversation” (2018) 14 *JL & Equality* 89.
  8. *Flatt v Treasury Board (Department of Industry)*, 2014 PSLREB 2 at para 99 [*Flatt*], aff’d *Flatt v Canada (AG)*, 2015 FCA 250 [*Flatt FCA*].

Such an obligation only exists if a prima facie discrimination case<sup>9</sup> on the basis of family status is first made out.<sup>10</sup>

A clear consensus on what the prima facie “test” consists of in the context of family status discrimination claims has been elusive. Several adjudicators have observed that the law with respect to family status discrimination is “unsettled,”<sup>11</sup> and that “competing” views and approaches<sup>12</sup> have developed across the country which has “resulted in inconsistency and uncertainty in the law”<sup>13</sup> that “requires attention.”<sup>14</sup> This ostensibly “fractious area of law”<sup>15</sup> includes approaches at the federal human rights tribunal (stemming from the *Brown* and *Hoyt* decisions),<sup>16</sup> in the federal courts (recently settled in *Johnstone No. 2*),<sup>17</sup> in British Columbia (in *Campbell River*),<sup>18</sup> in Ontario (as set out in cases like

- 
9. The prima facie discrimination case has also been referred to simply as the “complainant’s case.” See e.g. *Vik v Finamore (No 2)*, 2018 BCHRT 9 at paras 48-50.
  10. “Family status” is a prohibited ground of discrimination under most Canadian human rights legislation, which encapsulates parent-child caregiving situations. However, the precise statutory definitions vary. Some jurisdictions, like Canada and British Columbia, do not define the term family status, while others, such as Ontario, define it as “the status of being in a parent and child relationship.” See *Human Rights Code*, RSO 1990, c H-19, s 10.
  11. See e.g. *Adair v Forensic Psychiatric Services Commission (No 2)*, 2017 BCHRT 147 at paras 119-33 [*Adair*]; *Suen v Envirocon Environmental Services (No 2)*, 2017 BCHRT 226 at para 74 [*Suen*]; *Misetich v Value Village Stores Inc*, 2016 HRTO 1229 [*Misetich*].
  12. *SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162 at para 51 [*SMS Equipment*]; *Suen*, *supra* note 11 at paras 77-78; see generally Melody Jahanzadeh, “Family Status Accommodation: The Road to an Amalgamated Approach” (2012) 2 Western J Leg Stud 1.
  13. *Misetich*, *supra* note 11 at para 44.
  14. *Durikova v BC Ministry of Justice*, 2018 BCHRT 258 at para 58 [*Durikova*].
  15. *United Nurses of Alberta v Alberta Health Services*, 2019 ABQB 255 at para 52 [*United Nurses*].
  16. *Hoyt v Canadian National Railway*, 2006 CHRT 33 [*Hoyt*], affg *Brown v Canada (Department of National Revenue, Customs and Excise)*, 1993 CHR 7 [*Brown*].
  17. The *Johnstone* case has gone through two iterations in the federal sphere. The initial *Johnstone* decision of the Federal Court generally followed the *Brown* and *Hoyt* approach in overturning the Canadian Human Rights Tribunal. See *Johnstone v Canada (AG)*, 2007 FC 36 at para 29 [*Johnstone No 1*]. The subsequent case proceeded through the tribunal and the federal courts, leading to a Federal Court of Appeal judgment which clarified (or modified) the *Hoyt* approach. See *Canada (AG) v Johnstone*, 2014 FCA 110 [*Johnstone No 2*].
  18. *Health Sciences Assoc of BC v Campbell River and North Island Transition Society*, 2004 BCCA 260 at paras 35-39 [*Campbell River*], affd *Envirocon Environmental Services, ULC v Suen*, 2019 BCCA 46 [*Suen BCCA*]; *Stuart v Navigata Communications Ltd*, 2007 BCSC 463 at para 79.

*Misetich*),<sup>19</sup> and in Alberta (stemming from the *SMS Equipment* case).<sup>20</sup> These various standards have been shifting and unpredictable, having been applied differently across jurisdictions, time periods, and adjudicators. In addition, arbitrators, human rights tribunals, and courts have critically engaged with the tests developed by one another in this area, sometimes with a degree of overt criticism not often seen in other contexts. As a result of this confusion, some adjudicators have begun applying multiple tests in order to cover all possible bases.<sup>21</sup>

Our primary objectives in this article are twofold: (1) to propose a solution that seeks to reconcile and encapsulate the various tests that have developed in this context, and respond to potential criticisms of this approach; and (2) to demonstrate that the proposed solution based on existing case law is not, as is often alleged, an outlier in the human rights code context, but rather is consistent with the analysis required in other comparable contexts at the prima facie stage, including in relation to religion, disability, and addictions.

Regarding the first objective, despite the different verbal formulations that have been applied as “tests” at the prima facie stage of family status claims, we suggest that there is a deep commonality in all of the approaches taken to date. In our view, all of these tests can be usefully seen to revolve around the question of whether the claimant has a “meaningful choice” or is “reasonably able” to comply

- 
19. *Misetich*, *supra* note 11 at para 42. This approach, which can be seen as a modification of the *Johnstone No 2* approach, has not been universally followed in Ontario, with some adjudicators preferring the *Johnstone No 2* approach unmodified. See *e.g. Ontario Public Service Employees Union (Bharti) v Ontario (Natural Resources and Forestry)*, 2015 CanLII 19330 (ON GSB). Others have effectively applied both tests. See *e.g. Peternel v Custom Granite & Marble Ltd*, 2018 ONSC 3508 [*Peternel*].
  20. See *e.g. SMS Equipment*, *supra* note 12 at para 51; *United Nurses*, *supra* note 15 at paras 41-59.
  21. See *e.g. Peternel*, *supra* note 19, Sheard J (“Whether the Court follows the *Misetich* approach or applies the *Johnstone* factors, the outcome is the same: the plaintiff has failed to show that Custom’s request that she begin her workday at 8:30 a.m. is discriminatory” at 74). See also *Adair*, *supra* note 11 at para 133; *Durikova*, *supra* note 14 at para 58; *Edmonton (City) Police Service v Edmonton Police Assn (Coughlan Grievance)*, [2019] AGAA No 4 at paras 121-23 (Arbitrator: DC Jones); *Partridge v Botony Dental Corporation*, 2015 ONCA 836 at para 20; *Simpson v Pranajen Group Ltd ola Nimigon Retirement Home*, 2019 HRTO 10 at para 31; *Tolko Industries Ltd v United Steelworkers, Local 1-417 (Anderson Grievance)*, [2018] BCCAAA No 95 at para 32 (Arbitrator: Corinn M Bell).

with both family and workplace obligations given their unique circumstances.<sup>22</sup> On this approach, an employee making no effort to resolve a potential conflict between workplace and family obligations (despite the presence of reasonable alternatives that would avoid the conflict entirely), or making deliberate choices that in fact create an unnecessary conflict with workplace obligations, is insufficient to demonstrate a need for accommodation in the first place.

We anticipate at least two important challenges to the approach we propose: (1) It overtly incorporates the controversial notion of “choice” in the discrimination analysis, which is normally a concept to be carefully avoided in the human rights code context; and (2) it requires the claimant to demonstrate “something more” at the prima facie stage, and in particular, to demonstrate that the claimant has attempted to “self-accommodate.”

With respect to the first concern, we acknowledge that overtly incorporating any notion of “choice” in the context of human rights codes is bound to be controversial, given well-documented abuses of this concept in the past.<sup>23</sup> On this basis, our alternative formulation—that the prima facie case must consider the “reasonable ability” of employees to avoid the asserted conflict between workplace obligations and family life—may appear more palatable. However, the end result is the same: we propose an analysis that depends in part on whether claimants have reasonable options available to them that would allow them to fulfill both workplace and family obligations.

To foreshadow our argument in response to this concern, we think it is helpful to draw a distinction between two types of situations in which the term

---

22. It is the authors’ position that the proposed approach can be applied to all claims of adverse effects discrimination based on family status, not just caregiving cases, as the ultimate issue is the same. As discussed below, however, the proposed approach would not apply to direct discrimination claims, because the difficulty of identifying the necessary “connection” between a claimant’s family status and a negative impact they suffer does not arise in the context of direct discrimination claims.

23. See e.g. Diana Majury, “Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Irwin Law, 2006) 209; Sonia Lawrence, “Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15” in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (LexisNexis Butterworths, 2006) 115; Elizabeth Shilton, “‘Family Status’ Discrimination: New Tool for Transforming Workplaces, or Trojan Horse for Subverting Gender Equality?” (Queen’s University Legal Research Paper Series No 2015-049, 2013), online: <[www.ssrn.com/abstract=2330294](http://www.ssrn.com/abstract=2330294)> [perma.cc/BN4J-C2WR] [Shilton, “Trojan Horse”]; Elizabeth Shilton, “Family Status Discrimination: ‘Disruption and Great Mischief’ or Bridge over the Work–Family Divide?” (2018) 14 JL & Equality 33 at 54-56 [Shilton, “Work–Family Divide”].

“choice” could be used in the discrimination context. The first scenario involves “choices” that are essentially irrelevant to the discrimination analysis, such as the choice to become pregnant or have a family, the choice of whether and who to marry, or the choice to become sexually intimate with a partner of one’s choosing. While these situations may be described as involving “choices” on some level, they are so intertwined with an individual’s protected family status that they should be treated as an integral part of that identity, and hence “off limits” in the discrimination analysis, just like similarly fundamental or unavoidable “choices” are off limits in other discrimination cases.<sup>24</sup> We will call these types of scenarios ones that involve a “problematic use” of the concept of “choice.”

However, there are other situations in which a meaningful range of “choices” or “options” are available to an individual, which we suggest should be considered in the prima facie stage of the analysis. These involve situations where a particular choice, although in some way connected to a protected ground of discrimination, is not central to an individual’s identity or protected characteristic. In the family status context, this may include choices, such as who should pick up or drop off one’s children at school, take them to appointments or extra-curricular activities, or leave work intermittently during the day to perform routine daily childcare obligations when other options are available. In these cases, the particular decision made by a claimant cannot necessarily be considered irrelevant to the discrimination analysis, because doing so would confer upon the employee the unilateral power to create a conflict between workplace and personal obligations that may be reasonably avoided. We will call these types of choices ones that involve the “necessary use” of the concept of “choice.”

This is not to say that every circumstance falling into this “necessary use” of choice category presents a *meaningful* choice between two genuine options, one conflicting with workplace obligations and another not. That will depend on the specific facts of a particular case. What constitutes a genuine and meaningful choice for some persons may be either unavailable or effectively coercive for others. For instance, the range of meaningful childcare options available to a wealthy couple with only one working parent will be significantly greater than for a single parent with limited disposable income. The point of our proposed

---

24. For instance, it is inaccurate to the point of being offensive to suggest that an individual has a “choice” as to their sexual orientation. And while individuals may have a “choice” in *some* sense as to whether to be sexually active, that decision is so closely related to their identity that it amounts to no choice at all. See *Law Society of British Columbia v Trinity Western University*, 2018 SCC 33 at paras 96-97 [*Trinity*] (noting that it is not possible “to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood”).

analysis is to create a meaningful standard that can be applied in all cases, subject to the unique circumstances of the claimant and the meaningful choices available to them.

We think the second concern—*i.e.*, that this approach places an additional burden on the claimant, or “something more,” beyond what they would otherwise need to establish—is also important to consider, but less persuasive than it appears at first blush. Taken alone, the argument essentially assumes what it is attempting to prove, namely, the point at which a *prima facie* case of discrimination is made out in this context. That is, it assumes that every conflict between workplace and family activities or obligations, even superficial conflicts that are easily avoidable or the sole result of choices by an employee (despite the presence of reasonable alternative options), constitutes discrimination on the basis of family *status* in the first place. Similarly, the view that a consideration of at least some choices made by an employee constitutes a requirement of “self-accommodation” at the *prima facie* stage<sup>25</sup> assumes the same thing: that the factual circumstances presented in all such cases constitutes *prima facie* discrimination in the first place, such that requiring a claimant to undertake reasonable efforts to avoid a conflict between work and family life is a form of “accommodation” that the claimant undertakes. If, instead, the standard is seen as necessary to establish a case of *prima facie* discrimination in the first place—that is, to establish a family-based *need* to be accommodated, rather than a *preference*<sup>26</sup>—suggesting that the standard requires “something more” or “self-accommodation” can be misleading.

This brings us to our second objective in this article. We will attempt to show that, contrary to the criticisms of similar approaches adopted by adjudicators, our proposed solution is not unique to family status claims. Rather, we suggest it is supported by the analysis undertaken by adjudicators in other discrimination cases where the claimant has at least some meaningful control over his or her

---

25. This concern is raised throughout the case law and scholarship. See *e.g.* *SMS Equipment*, *supra* note 12 at paras 54-67, 77; Lyle Kanee & Adam Cembrowski, “Family Status Discrimination and the Obligation to Self-Accommodate” (2018) 14 *JL & Equality* 61.

26. See Osborne-Brown, *supra* note 7 at 104. Osborne-Brown observes that:

[w]hat 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.

circumstances or decisions, and therefore the extent to which those circumstances or decisions present an actual conflict with work-related obligations.

In addition to family status context, similar problems can arise, for instance, in situations involving religion, disability, or addiction, because these scenarios can sometimes involve a range of reasonable options available to an employee, only some of which may conflict with workplace obligations. As in the case of family status claims, however, the proper approach to these types of cases will avoid relying on an alleged “choice” that is really no choice at all (*i.e.*, the “problematic use” scenarios), and will focus on the particular circumstances of the claimant to determine whether it in fact presents reasonable options to the claimant, some of which would avoid a workplace conflict altogether (*i.e.*, the “necessary use” scenarios).

In sum, while other approaches to the *prima facie* case in this context can certainly be imagined, including by suggesting that every workplace obligation is *prima facie* discriminatory as long as it creates a potential conflict with family obligations for anyone,<sup>27</sup> focusing on the options reasonably available to individual employees, and whether those options reasonably allow them to fulfill both family and workplace obligations, is in our view both principled and consistent with the approach commonly employed in other human rights contexts that present scenarios involving similar types of choices.

## I. OVERVIEW OF PRIMA FACIE DISCRIMINATION

### A. THE *MOORE* TEST

Much of the controversy in the area of family status stems from an alleged disconnect between the way the discrimination analysis proceeds in family status claims, particularly those involving caregiving responsibilities, as opposed to other grounds of discrimination, improperly creating a “hierarchy” of grounds of discrimination.<sup>28</sup> Therefore, to put the discussion into context, we must start with a brief overview of first principles that apply to all discrimination claims.

---

27. While it is not entirely clear to us, certain passages of Professor Shilton’s thoughtful work in this area may suggest such a relaxed standard, whereby every workplace obligation is necessarily *prima facie* discriminatory. See *e.g.* Shilton, “Work–Family Divide,” *supra* note 23 at 49 (seeming to suggest that the obligation to attend work is itself generally and necessarily *prima facie* discrimination on the basis of family status).

28. See *e.g.* *Seeley v Canadian National Railway*, 2010 CHRT 23 at para 120. To a similar effect, see *e.g.* *SMS Equipment*, *supra* note 12 at para 77; *Johnstone No 1*, *supra* note 17 at para 29. See generally Kanec & Cembrowski, *supra* note 25.

The approach to identifying substantive discrimination carried out in human rights legislation is well known. The claimant must first demonstrate prima facie discrimination, *i.e.*, a case that “is complete and sufficient to justify a verdict” of discrimination in the absence of a response,<sup>29</sup> only after which the burden falls to the respondent to justify its conduct according to the *Meiorin* analysis.<sup>30</sup> The difficulty with the “complete and sufficient” prima facie case standard is that it does not explain *what* is complete and sufficient to justify a finding of discrimination in the absence of an adequate defence or justification from a respondent.

To address that issue, the Supreme Court of Canada has since developed a three part test for prima facie discrimination, which has been most clearly set out by the Court in *Moore*.<sup>31</sup> The *Moore* test has three elements: (1) whether the claimant has a protected characteristic under the applicable human rights legislation; (2) whether the claimant suffered an adverse effect relating to employment; and (3) whether the protected characteristic was a factor in the adverse treatment.<sup>32</sup>

In many cases, particularly those involving family status, the first two steps are not seriously disputed. Everyone has a “family status,” and rarely do persons bring human rights complaints if they have not been deprived of a benefit or suffered any burden or disadvantage (concepts which tend to be broadly defined).<sup>33</sup> The critical question is nearly always the third: Was the protected characteristic a legally significant or relevant “factor” in the adverse treatment? And what does it mean to be a “factor” in a particular case?

---

29. *Ontario Human Rights Comm v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at 558.

30. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*]. The *Meiorin* analysis itself has three steps. Once the prima facie case is made out, the respondent must show that: (1) the purpose or goal of the measure is rationally connected to the function being performed, (2) it was adopted in good faith, and (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

31. *Moore v British Columbia*, 2012 SCC 61 [*Moore*].

32. *Ibid* at para 33.

33. *Cf Durikova*, *supra* note 14 (upholding the respondent’s application to preliminarily dismiss the case on the second factor, concluding that the respondent’s denial of the complainant’s extended leave application would not “result in a real disadvantage to her relationship with her child or her parental responsibilities” at para 69).

## B. ESTABLISHING A “CONNECTION”

As just described in Part I(A), under the *Moore* test, identifying a meaningful link between the characteristic and adverse treatment is necessarily to establish *discrimination*, as opposed to merely different, adverse, or even unfair treatment.<sup>34</sup> To use an obvious example, an employee may be a woman, and she may be terminated, but if there is no connection between those two facts—for instance, the employee was fired for engaging in abusive or unprofessional conduct—the termination is not *prima facie* discriminatory, and there is no need to determine whether there was a *bona fide* justification for the adverse treatment.

Of course, few cases are that easy. Indeed, determining what constitutes the necessary link or connection between the protected characteristic and the harm suffered has been an enduring problem in discrimination law, both in *Charter* and human rights code jurisprudence. While everyone agrees that there must be *some* link between a protected ground and the adverse impact in order to constitute a “factor,” that is not really the question in contested cases. The question concerns the circumstances in which adjudicators should be willing to find that the ground was truly a “factor” in adverse treatment. While this will present little or no problem in many types of cases, it will be considerably more difficult in others.

## II. FAMILY STATUS DISCRIMINATION

### A. THE *MOORE* TEST

The difficulty of identifying the necessary “connection” between a claimant’s family status and an adverse impact they suffer, for the purpose of the *Moore* analysis, is one that arises primarily in the context of adverse effects or indirect discrimination.<sup>35</sup> Cases involving *direct* discrimination on the basis of family status are relatively easy from a legal or conceptual perspective.<sup>36</sup> If an employee

---

34. See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras 43-52 (clarifying that the third part of the *Moore* test requires a link between the allegedly discriminatory action or rule and the ground, but not a causal link).

35. See *Meiorin*, *supra* note 30. While the Supreme Court eliminated the distinction between direct and adverse effects discrimination cases, it is helpful to consider these categories in understanding the necessary analysis to undertake at the third stage of the *Moore* test.

36. As with other direct discrimination cases, the difficulty is often an *evidentiary* or factual one, *i.e.*, how to prove that family status was among the reasons for adverse treatment, at least where it is not spelled out expressly in a rule or policy (*i.e.*, “we do not hire pregnant women”) but rather based on a discretionary decision. See *e.g.* the analysis in *Peel Law Association v Pieters*, 2013 ONCA 396.

is terminated *because* she has children, is not hired *because* she is unwed, or if a rule or policy expressly incorporates any such characteristics of family status, that is prima facie discriminatory. That is the case even if that family status is only a part of the employer's motivation (*i.e.*, a "factor" among others), and even if an employer can establish that the adverse effects may have been suffered anyway.

The real analytical difficulty tends to arise in indirect discrimination cases, given that every conceivable workplace rule or requirement will interfere with time spent with family, or some caregiving responsibility, to some extent. Indeed, as has been commonly observed, the very fact of holding employment and being required to attend work has a necessarily "differential impact" on persons with dependent family members as compared with individuals without them, as it requires those in the former group to be away from their family.<sup>37</sup> As the British Columbia Human Rights Tribunal explained, "almost every work-related requirement has the potential to interfere, to some degree, with an employee's family obligations."<sup>38</sup>

If the threshold for meeting the third stage of the *Moore* test was as simple as showing a "connection" between family status and adverse treatment (regardless of the strength or proximity of this connection, or the impact on the individual

---

37. See *Siemens Milltronics Process Instruments Inc v Canadian National Federation of Independent Unions (Employees Association of Milltronics) Local 3005*, [2012] OLA No 513 at para 64 (Arbitrator: John Stout) (recognizing that work attendance conflicts with family obligations).

38. *Miller v BCTF (No 2)*, 2009 BCHRT 34 at para 26 [emphasis added]. See also *Adair*, *supra* note 11 ("There is an inevitable tension between going to work and attending to family responsibilities, particularly childcare. *Attending at work on any shift interferes with time with one's family. Work, by its nature, while providing the means to support a family, also interferes with family time.*" *Ibid* at paras 119-20 [emphasis added]). See also *Misetich*, *supra* note 11 at para 42. Vice-Chair Jennifer Scott stated:

In my view, these cases have attempted to narrow the ambit of the ground of family status by developing specific tests for discrimination on that basis. This was done because of the real concern that *not every negative impact on a family obligation, or conflict between a family and work obligation, is discriminatory*. I agree with that concern... [emphasis added].

See also *The Municipal Corporation of the City of Yellowknife v AB and The Northwest Territories Human Rights Commission*, 2018 NWTSC 50 at para 69. Justice Charbonneau stated:

[I]t must also be recognized that the protection against discrimination based on family status in the employment context raises issues that are unique. As the Commission acknowledges, it gives rise to inevitable tension between work obligations and family responsibilities. Work obligations always interfere with family time. Not every such interference should engage human rights protections. These are reasons that may justify the use of a different legal framework when that ground of discrimination is raised.

claimant), then imposing any workplace requirement would meet the third stage of the *Moore* test. This would result in a duty on the employer's part to accommodate the employee's family activities or obligations to the point of undue hardship. Such a duty would arise no matter how easily the employee could avoid the conflict, no matter how insignificant the asserted family "activity" in question, nor how tenuous the link between the accommodation sought and the family status in question. It could even arise in circumstances where an employee deliberately (or perhaps subconsciously) decides to create an otherwise unnecessary conflict between family and workplace obligations, so as to avoid the latter.

To use an extreme example, an employee may choose to schedule a child's sporting activity during his or her regular shift, despite the ability to schedule the activity before or after the shift, thus manufacturing an entirely avoidable conflict. Were it not for the employee's family status, there would have been no conflicting sporting activity. Hence, there is at least a superficial "connection" between family status and an adverse impact (*i.e.*, the requirement to attend work, or the risk of discipline for failing to do so), that could (on some theories) impose an obligation to accommodate the employee's desire to support his or her child's sporting activity, unless it was "impossible" to do so without undue hardship. However, few would suggest that an employee's deliberate choice to create an unnecessary workplace conflict in this way should be treated as *prima facie* discrimination by the employer, or that a desire to participate in every conceivable family-related activity on the schedule of an employee's choosing is sufficient to establish a need for accommodation to the point of undue hardship.<sup>39</sup>

The problem is the same whether the conflict is created deliberately to avoid workplace obligations, or whether the employee's decision unnecessarily or avoidably achieves the same result. Whether an employee's decision to create an avoidable conflict between work and family obligations is deliberate, due to inattention, or inadvertence, it is still avoidable.

Moreover, while direct discrimination on the basis of family status covers a relatively limited range of circumstances, adverse effects discrimination based on a conflict with family activities, responsibilities, and obligations creates an enormous range of *potential* conflicts that will have to be addressed. It is the ubiquity of *potential* conflicts between workplace and family obligations that

---

39. See *Johnstone No 2*, *supra* note 17 (where the Federal Court of Appeal noted that "[i]t is also important not to trivialize human rights legislation by extending human rights protection to personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities" at para 69).

raises the concern over the “threshold” in family status cases, due to the sheer breadth of family-related activities and obligations that can interfere with work obligations, and the employee’s ability to impact the extent to which those obligations create a conflict.

In this way, family status claims are different from many other types of protected grounds. For instance, very rarely will an individual’s race, ethnicity, or place of origin, create a fundamental conflict with attending work, such that the personal characteristic in question needs to be “accommodated.” For the most part, individuals simply need to be not discriminated against on the basis of their race, ethnicity, or place of origin. Similarly, while sex or religion claims may require accommodation in certain cases, due to biological differences or unique religious obligations, these protected characteristics rarely create the same type of necessary and fundamental “conflict” with workplace obligations as many family status claims, in the sense that the mere obligation to come to work at all may conflict with one’s ability to care for a child or loved one. It is this unique aspect of family status claims that has created a need for a nuanced approach to the third “connection” step of the *Moore* test in the family status context.<sup>40</sup>

## B. SIMILARITY OF APPROACHES ACROSS CANADA

This unique difficulty in adverse effects family status cases has been noted by a wide range of adjudicators, leading to a consensus that a mere superficial “connection” between family-related activities and obligations and not fulfilling workplace obligations is insufficient to demonstrate a *prima facie* case of discrimination. As noted above, the ultimate question is: When does this interference connected to family obligations, activities, or circumstances become *discrimination* on the basis of family status?

To answer this question, adjudicators have almost uniformly acknowledged that adverse effects family status claims require adjudicators to develop a nuanced appreciation of the circumstances of a particular claimant, in order to distinguish between those family and workplace obligations that create a genuine conflict

---

40. See *Johnstone No 2*, *supra* note 17 (noting that this does not necessarily involve creating a wholly different “test” for *prima facie* discrimination, but rather the recognition that the test for *prima facie* discrimination “is necessarily flexible and contextual because it is applied in cases with many different factual situations involving various grounds of discrimination” at para 83). See also *Flatt FCA*, *supra* note 8 at paras 26-27; *Regina School Division No 4 of Saskatchewan v Canadian Union of Public Employees, Local 3766 (Smith Grievance)*, [2018] SLAA No 13 (Arbitrator: William FJ Hood) (noting that the factors articulated in *Johnstone No. 2* “do not alter the *Moore* test for *prima facie* discrimination but rather adds some guiding contextual considerations” at para 62).

which cannot easily or reasonably be avoided, and those that can be avoided or otherwise do not rise to the level of harm that would constitute discrimination.<sup>41</sup> Only in the former case can we meaningfully say that an employee has been discriminated against on the basis of their family status, rather than being disadvantaged due to a choice or preference that is, in a meaningful sense, independent from the status itself.

While different ways of addressing this fundamental concern have developed, there seems to be a consensus among adjudicators that where it is reasonably possible for the individual to fulfill both family and workplace obligations—that is, where there is a meaningful choice available to the claimant that would allow him or her to fulfill both—it is not discriminatory to expect them to do so. In our view, this is the golden thread running through these cases.

A useful starting point is the Federal Court of Appeal's decision in *Johnstone No. 2*, where the Court recognized, through a four criteria test, that a claimant must be unable to reasonably perform both childcare and work obligations before a prima facie discrimination case can be established. This is the essence of the standard proposed, and is captured in the third and fourth aspects of the *Johnstone No. 2* test: that the claimant must “demonstrate that reasonable efforts have been expended to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible”; and that the workplace rule must interfere with a family obligation in a non-trivial way.<sup>42</sup> Thus, while some aspects of the *Johnstone No. 2* test seem to us to be unnecessary,<sup>43</sup> the essence of the test is simply a more elaborate way of setting out the basic principle that a prima facie case of discrimination will not be established

41. See *International Brotherhood of Electrical Workers, Local 636 v Power Stream Inc (Bender Grievance)*, [2009] OLAA No 447 at paras 54-56 (Arbitrator: Norm Jesin); *Coast Mountains School District 82 v British Columbia Teachers' Federation (Sutherland Grievance)*, [2006] BCCAAA No 184 at para 39 (Arbitrator: DR Munroe).

42. *Johnstone No 2*, *supra* note 17 at paras 93, 96-97.

43. For instance, in our respectful view, the requirement for a claimant to establish a “legal” responsibility for the caregiving in question, which is the essence of the first two steps of the *Johnstone No. 2* test, is problematic. It departs from the approach taken by other adjudicators in family status cases and other discrimination cases. While an individual may not have a legal obligation to provide care to a parent, a spouse, a sibling, or other family member in the sense that they could be held criminally or otherwise liable for a failure to provide that care, there is no question that providing such care may be a personal or moral imperative in particular circumstances. The requirement that a claimant establish a legal obligation would risk effectively converting protection for family status into protection for “parental status,” which would be an unwarranted narrowing of the scope of the protection. In addition, requiring a claimant to establish a “legal” responsibility could sidetrack reasonably expeditious labour arbitrations or human rights hearings into detailed examinations of

where an employee has the meaningful choice, or the reasonable ability, to fulfill both sets of obligations.<sup>44</sup>

While *Johnstone No. 2* has been criticized on a number of bases,<sup>45</sup> the essence of that decision just indicated is compatible with the decisions often said to offer a more enlightened approach.<sup>46</sup> For instance, while the Federal Court's 1993 decision in *Brown* is often applauded for offering a more generous approach to family status discrimination claims, it does not suggest that every *potential* or *avoidable* conflict between family and workplace obligations constitutes prima facie discrimination. Rather, *Brown* also recognizes that in order to constitute prima facie discrimination, the reasonable *ability* of the claimant to meet both workplace and family obligations must be abridged by the workplace obligation in question:<sup>47</sup>

[T]he evidence must demonstrate that family status includes the status of being a parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, *the Complainant was unable to participate equally and fully in employment with her employer.*

On this standard, if an individual is able to take reasonable steps to avoid a conflict between work and family obligations, it cannot be said that they were "unable" to participate fully in employment with the employer. They were able to do so, and unreasonably chose not to.

The same can be said about *Hoyt*, another Canadian Human Rights Tribunal decision which followed the approach in *Brown*. While criticizing other decisions for placing an undue burden on the claimant, the tribunal there held that a prima facie case was made out because a careful review of the evidence demonstrated that the claimant "made an attempt to secure, in a very short period of time, good

---

criminal and tort law, to determine whether the responsibility in question is one otherwise imposed by law, which is a development that should be avoided.

44. See *Flatt*, *supra* note 8 at para 170, per Richardson:

What this is to say is that despite the difference in the formulations of the test for discrimination on the basis of family status, the approach of the CHRT in *Brown* and *Johnstone* is and was the same as that in *Campbell River*. *Both sides of the apparent debate were dealing with the same types of fact scenario. The scenarios all involved work obligations or rules that had serious impacts on substantial family obligation which the parents in question had made concerted efforts to solve – but to no avail.* [emphasis added]

45. We share some of these concerns. See *supra* note 43.

46. This has been observed by Osborne-Brown, *supra* note 7 at 103.

47. *Brown*, *supra* note 16 at 13 [emphasis added].

quality child care that would not cause undue distress to her young daughter,” after which she still needed some accommodation.<sup>48</sup> In other words, despite reasonable efforts, the complainant was not reasonably able to avoid the conflict between her family and workplace obligations. This captures the essence of the test in *Johnstone No. 2*, as well as our proposed approach.

The same observation can be made about the Ontario Human Rights Tribunal’s decision in *Misetich*, where, despite criticizing the *Johnstone No. 2* approach, the Tribunal went on to require the claimant to demonstrate facts that “result[ed] in real disadvantage to the parent/child relationship and the responsibilities that flow[ed] from that relationship, and/or to the employee’s work.”<sup>49</sup> It justified this standard on grounds similar to those proposed here. First, the Tribunal recognized that “not every negative impact on a family obligation, or conflict between a family and work obligation, is discriminatory.”<sup>50</sup> Second, the Tribunal recognized that a factual scenario will constitute prima facie discrimination where it “puts the employee in the position of having to choose between working and caregiving or if it negatively impacts the parent/child relationship and the responsibilities that flow from that relationship in a significant way.”<sup>51</sup> Presumably, where an individual has a *third* choice that allows them to fulfill *both* workplace and caregiving obligations, the claimant need not choose between them nor suffer any negative impact on the parent/child relationship, and the test is not made out. Moreover, in making this determination, the Tribunal in *Misetich* held that:<sup>52</sup>

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.

In other words, as Sheila Osborne-Brown points out, “despite its criticism of a special test for family status, the OHRT in *Misetich* effectively did something strikingly similar.”<sup>53</sup> The Tribunal in *Misetich* was alert to, and attempted to resist, this conclusion by suggesting that there is a “fundamental distinction” between considering the reasonable options available to an employee as part of “the overall

---

48. *Hoyt*, *supra* note 16 at para 129.

49. *Misetich*, *supra* note 11 at para 54; see also Osborne-Brown, *supra* note 7 at 103.

50. *Misetich*, *supra* note 11 at para 42.

51. *Ibid* at para 54.

52. *Ibid* at para 55. For an application of this consideration, see *e.g. Thapa v Suisha Gardens Limited Les Jardins Suisha Limitée*, 2016 HRTO 1316 at para 70.

53. Osborne-Brown, *supra* note 7 at 99.

assessment” at the prima facie stage, and considering them as an aspect of the test for prima facie discrimination. As the Tribunal made the point:<sup>54</sup>

Considering the supports available to an applicant may appear to some to be akin to considering whether an applicant can self-accommodate. It is different in a fundamental way. Requiring an applicant to self-accommodate as part of the discrimination test means the applicant bears the onus of 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.

Whether or not the distinction is as fundamental as the Tribunal suggested, in our view, either approach is consistent with the standard we advocate. The fundamental point is that, prior to finding that prima facie discrimination is made out, sufficient to justify imposing a duty to accommodate, a distinction must be drawn between reasonably avoidable and unavoidable conflicts between workplace and family obligations. It is only where the “other supports” or options available to an applicant to avoid the conflict either do not exist, or are not in fact *reasonably* available, that a need for accommodation will arise. In this respect, the concept of “self-accommodation” may simply be an unhelpful way of describing the approach that nearly all adjudicators appear to accept, *i.e.*, that a duty to accommodate will not arise where an employee is reasonably able to arrange his or her affairs in a manner which avoids any conflict between work and family obligations.

The closest to an outlier from this approach may be the *SMS Equipment* case, which is another decision that is often cited for taking a more generous approach to family status discrimination.<sup>55</sup> In that case, the Alberta Queen’s Bench expressly rejected the notion that an employee was under an obligation to “self-accommodate,” which the court understood to involve requiring a claimant to not only “prove that a workplace rule has a discriminatory impact on them, but that they were unable to avoid that impact.”<sup>56</sup> Leaving aside the concern expressed above—that this analysis depends on the assumption that any *potential* conflict between workplace and family obligations automatically constitutes prima facie discrimination on the basis of family status—the *SMS Equipment* case may be less of an outlier than it appears at first blush.

---

54. *Misetich*, *supra* note 11 at para 56.

55. See *e.g. Adair*, *supra* note 11 at para 132; *United Nurses*, *supra* note 15 at paras 39, 41-47. See generally Kanee & Cembrowski, *supra* note 25 at 50-51.

56. *SMS Equipment*, *supra* note 12 at para 77.

In this respect, it is notable that the court in *SMS Equipment* relied on *Johnstone No. 2* for the proposition that claimants must establish that a child is under the claimant's care and supervision, and that the childcare obligation at issue engages the individual's legal responsibility for that child as opposed to a personal choice.<sup>57</sup> According to the court, this flows necessarily from the fact that "family status includes childcare obligations, not personal choices."<sup>58</sup> This recognition is the essence of the standard we advocate, the point of which is to determine whether a particular conflict between work and family obligations is the result of the individual's family status, or rather is the result of a personal choice between viable options.

Indeed, it might be speculated that the court's analysis in *SMS Equipment* may have been influenced by the fact that the arbitrator had clearly found that the claimant had made reasonable attempts to find alternative arrangements, but that there was simply no reasonable option available to her that would have avoided the conflict. The arbitrator found, in essence, that the employee was left without any reasonable options: She could either use her modest salary to pay for childcare *both* while she was at work *and* while she was sleeping, "or she [could] care for them herself and not be properly rested to fulfill either her work or parenting responsibilities," which the Arbitrator held "clearly was not a viable choice."<sup>59</sup> Had the evidentiary record shown that the claimant had a perfectly viable choice that would have avoided any workplace conflict, one wonders if the court would have rejected any consideration of this fact until after the employer had undertaken accommodation to the point of undue hardship. Moreover, as long as a sensitive and flexible approach to the question of whether the conflict was reasonably unavoidable is adopted, rather than asking whether all potential alternative arrangements—however fanciful, difficult, unreasonable, or practically unavailable to the claimant—have been exhausted, there would have been no need to reject any consideration of this factor entirely.<sup>60</sup>

We also think that some of the more heavily-criticized decisions in this area have adopted analyses that are consistent, at least in essence, with the approach we advocate in this article. This can be seen, most notably, in the 2004 decision

---

57. *Ibid* at para 76.

58. *Ibid*.

59. *SMS Equipment*, *supra* note 12 at paras 57, 83; see also *Communications, Energy, and Paperworkers Union, Local 707 v SMS Equipment Inc (Cabill-Saunders Grievance)*, [2013] AGAA No 41 at paras 62-63, 70-72 (Arbitrator: Lyle Kanee).

60. The *SMS Equipment* case has recently been interpreted as attempting to establish a bright line separation in which all such "self-accommodation" efforts are only considered at the accommodation stage of the analysis. See *United Nurses*, *supra* note 15.

by the British Columbia Court of Appeal in *Campbell River*, which was recently re-affirmed by the court in the 2019 decision of *Suen*.<sup>61</sup> In *Campbell River*, the Court of Appeal held that prima facie discrimination would be established if a change in a term or condition of employment imposed by an employer results in a “serious interference with a substantial parental or other family duty or obligation of the employee.”<sup>62</sup> Whether or not this is made out “will depend on the circumstances of each case.”<sup>63</sup>

There is little doubt that the court in *Campbell River* took a more restrictive view of family status discrimination than in other cases, noting that in its view, the “vast majority” of cases would not pass the prima facie threshold.<sup>64</sup> However, read generously, we think the essence of the *Campbell River* approach seeks to achieve the same result on the same logic as in the other cases canvassed above, albeit through a different verbal formulation. Under *Campbell River*, where an individual has an important family obligation, and there is a significant interference imposed by workplace obligations, that will demonstrate a prima facie case. This can be recast in more palatable or familiar terms, by pointing out that a *trivial* interference with an *insignificant* family obligation—for instance, to cheer for a child at a particular sporting event—will not rise to the level of a prima facie case. In other words, while the specific language used in *Campbell River* may not be ideal,<sup>65</sup> and the requirement for a “change” in circumstances

---

61. *Suen* BCCA, *supra* note 18. The Court of Appeal in *Suen* did not in fact address the concerns with the *Campbell River* test, but rather found that it was bound by it in the absence of a five judge panel to decide whether it should be overturned, and the request for a five-judge panel in that case had been denied. The Supreme Court of Canada dismissed the application for leave to appeal. See *Suen v Envirocon Environmental Services, ULC*, 2019 SCCA 108.

62. *Campbell River*, *supra* note 18 at para 39.

63. *Ibid.*

64. *Ibid.*

65. With respect, it seems to us that adding qualifiers—such as a “substantial” family obligation or a “serious” interference—is neither helpful nor necessary. The point is simply that a trivial burden or insignificant interference will not constitute a discriminatory impact, as is normally the case. This recognition reunites the cases under the simple standard we propose: that a workplace rule or decision will constitute prima facie discrimination on the basis of family status where an employee suffers a non-trivial disadvantage that could not have been avoided by taking other reasonable steps to fulfill both their workplace and family obligations.

is unhelpful,<sup>66</sup> the essence of the standard proposed seems similar to the cases reviewed above. It seeks to distinguish between family obligations that truly make an employee “unable” to fulfill both family and workplace obligations, as the term was used in *Hoyt* and *Brown*,<sup>67</sup> from circumstances where it is perfectly viable to fulfill both sets of obligations.

Thus, leaving aside what we consider to be marginal and unnecessary hurdles found in the *Campbell River* and *Johnstone No. 2* tests,<sup>68</sup> a close review of the leading decisions demonstrate a broad consensus. Adjudicators have agreed that not every asserted conflict between family and workplace obligations constitutes prima facie discrimination on the basis of family status, and the vast majority of adjudicators have accepted it is appropriate to consider whether reasonable steps were or could have been taken that would eliminate the conflict as a key part of that analysis.

Ultimately, in our view, all of these cases are fundamentally compatible with the approach proposed here. Family status will only be a “factor” in adverse treatment, for the purposes of the *Moore* test, where the claimant does not have a meaningful choice or reasonable ability to fulfill both family and workplace obligations. That is the point when an impact on *family-related activities or obligations* constitutes an adverse impact on the basis of *family status* sufficient to make out a prima facie case. Although there are various ways of seeking to identify the point at which a claimant’s circumstances demonstrate that a meaningful choice remained available to him or her, we suggest that the approach proposed

---

66. While the essence of the *Campbell River* approach is consistent with the adjudicative consensus, our view is that other aspects of that decision are not. In particular, the “change” requirement essentially creates a presumption that all workplace rules are non-discriminatory on the basis of family status as long as the rule was in place from the outset of employment. With respect, we think that this is a departure from the orthodox standard of prima facie discrimination. If an employer could avoid a claim of discrimination merely by stating that the employee was aware of a discriminatory rule at the point of hire, the value of human rights codes as a means of testing the discriminatory impact of workplace rules or requirements would be significantly undermined.

67. It is perhaps worth emphasizing that the claimant in *Campbell River*—who was not reasonably able to arrange for childcare within the period required by her employer, and thus had no meaningful choice available to her to fulfill both sets of obligations—was successful in her claim before the British Columbia Court of Appeal, as she would have been under either the *Hoyt* or *Johnstone* tests. Indeed, a number of cases since then have been found to be discriminatory on either the *Campbell River* or other tests, suggesting that the essence of the *Campbell River* approach is generally within the consensus that has developed. Alternatively, the Tribunal has simply applied each of the tests in rendering its decision. See e.g. *Adair*, *supra* note 11; *Durikova*, *supra* note 14.

68. *Campbell River*, *supra* note 18 at para 39. See also the discussion in notes 43, 64.

here generally unites the essence of the various approaches that have been taken to date in the context of family status claims.

We do not mean to suggest that the various approaches adopted by adjudicators in this context are identical, particularly in relation to certain auxiliary (and in our view, unnecessary and unhelpful) requirements that have been imposed under some of the tests.<sup>69</sup> However, despite the clear rhetorical divide between these cases, the substantive distinctions between them appear to us to be largely a mirage. While it can be disputed what verbal formulation is the best way to describe the applicable standard, in our view, nearly all of these approaches turn on whether an employee in a particular factual situation has a meaningful choice or reasonable ability to fulfill both family and workplace obligations.<sup>70</sup>

### III. PROPOSED APPROACH: MEANINGFUL CHOICE OR REASONABLE ABILITY

So far, we have proposed that, in applying the third stage of the *Moore* analysis in the family status context, the essential consensus in this area requires adjudicators to focus on whether the claimant has a meaningful choice or reasonable ability to fulfill both family and workplace obligations. If the claimant does not, the third stage of the *Moore* test will be met, shifting the onus to the employer to show why it was impossible to accommodate the claimant without suffering undue hardship.

Given that this approach is based on what we consider to be the adjudicative consensus, it is necessary to address the underlying concern with the decisions that adopt that consensus. The most notable concern is that a consideration of whether an employee can reasonably avoid a workplace conflict effectively creates a uniquely onerous prima facie test in the family status context, as it amounts to an obligation of “self-accommodation.” We believe that, to the contrary, our proposed approach is consistent with the general approach taken in prima facie discrimination cases, where discrimination will be established if a claimant is in a meaningful sense unable to meet certain workplace criteria or requirements as a result of the protected characteristic.

In some circumstances, the burden on the claimant may be met by demonstrating what the requirement is (*e.g.*, mobility or aerobic capacity), and by

---

69. *Ibid.*

70. Again, *SMS Equipment* may fairly be considered to be outside of this consensus, although we think that the findings of the arbitrator are fully consistent with the approach we advocate, and that the distinction between the cases is not as significant as it may appear, for the reasons above. See *SMS Equipment*, *supra* note 12.

establishing that persons with a certain protected characteristic (*e.g.*, a particular disability or gender), including the claimant, have substantially greater difficulty than others in meeting that requirement because of the characteristic.<sup>71</sup> However, in other cases, adverse treatment cannot be directly attributable to the protected ground in the same way. That is, despite the protected ground being in some way “connected” to the adverse treatment, it cannot be said that it was a legally significant “factor” in the adverse treatment (*i.e.*, sufficient to meet the third stage of the *Moore* test). This will often be the case where an individual, notwithstanding a certain particular characteristic, has “meaningful choice” over whether or not to comply with a workplace rule or standard, or is “reasonably able” to fulfill the workplace-related obligations, notwithstanding the protected characteristic. Whether that is the case will necessarily depend on the specific facts of the case and the protected characteristic at issue.

Where adverse treatment is more properly attributed to the choice of the individual, rather than to the protected characteristic, the underlying purpose of human rights law—to protect people from unfair or arbitrary treatment based on characteristics beyond their control—is not engaged. This flows from the common sense proposition that individuals cannot and should not be disadvantaged because of their innate personal characteristics, over which they have no control, but they can be subject to differential treatment based on their deliberate conduct and choices, where the conduct or choices are in a meaningful sense independent from the protected characteristic.

The application of this principle is seen in case law dealing with alleged discrimination on the basis of religion and disability, including addiction. These cases can often present similar difficulties as adverse effects family status cases, namely, distinguishing between a negative impact resulting from the possession of a protected characteristic and an impact resulting from an individual’s independent choices or decisions.

#### A. SIMILARITY TO RELIGION CASES

Of course, any adverse treatment based *directly* on religion clearly triggers the purposes and objects of human rights laws.<sup>72</sup> There is no difference in these types of cases between religion, disability, family status, or any other protected ground.

---

71. See *e.g.* *Meiorin*, *supra* note 30 (regarding a test based on aerobic capacity; women on average have lower aerobic capacity than men).

72. See *e.g.* *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 at para 53; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868.

Any rule or decision which is “based on,” or directly takes into account, a person’s religion as a reason for adverse treatment, will be *prima facie* discriminatory. Further, the fact that individuals on some level “choose” to follow certain religious beliefs or precepts does not enter into the equation. As noted above, that would be considered a “problematic use” of choice scenario, and irrelevant for the purposes of applying the human rights legislation. To deprive an individual of human rights code protection on the basis of that kind of “choice” would entirely defeat the basis for the protection.

However, indirect discrimination cases involving religious belief can raise the difficult question of whether or not a sincere religious belief actually precludes adherence to workplace rules or requirements in a manner that is more than trivial or insubstantial.<sup>73</sup> Because certain religious obligations may leave individuals with a meaningful choice or a range of options as to how to fulfill the religious precept, adjudicators must sometimes determine whether a particular workplace rule is compatible with the religious belief in question, or whether the person is effectively precluded by their religious beliefs from compliance with the workplace requirement.

Of course, as in other contexts, some adverse effects cases based on religion are easy on their facts, at least as far as the *prima facie* case is concerned. For instance, where a person has a sincere religious belief that they are not permitted to work on Sunday, and their job requires that they work on Sunday, the connection between the ground and the adverse treatment is self-evident and unavoidable. The individual does not have a “meaningful choice” or “reasonable ability” to fulfill both workplace and religious obligations—they must choose one or the other. Other cases, however, will be more difficult, because the nature of the workplace requirement and the person’s religious obligations may allow the individual to comply with the workplace requirement without undermining their sincere religious commitments.<sup>74</sup>

Consider the case of *Seneca College*, where the employer school board implemented a course scheduling program that did not include exemptions from the schedule for conflicts with religious beliefs.<sup>75</sup> The claimant had a sincere religious belief that he had to “give back” to the community, which was accepted by the arbitrator. However, the claimant chose to exercise this religious

---

73. *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 59.

74. For the same approach in the services context, see *Nijjar v Canada 3000 Airlines*, 1999 CHRD 3.

75. *Ontario Public Service Employees Union, Local 560 v Seneca College*, [2014] OLAA No 263 (Arbitrator: Norm Jesin).

belief by teaching a course on Monday mornings at a Jewish high school (for wages), which conflicted with his obligation to work on Mondays. The arbitrator found that a prima facie case of discrimination had not been made out, for the following reasons:<sup>76</sup>

We cannot see from the statement of particulars how the scheduling process at issue, applied to all employees by the College can objectively be considered as an infringement of the grievor's requirement to give back to his community. *That would in essence require the College to accommodate the grievor's simple and understandable desire to hold a second job. But given that it is not asserted that the grievor is prevented from pursuing other avenues from giving back to his community, and given that the scheduling process is designed to apply to all teachers, we cannot see how a case can be made on the particulars alleged that the grievor is being discriminated against because of his creed. ... In this case it is not the requirement to give back that is being infringed but the particular choice of how to fulfill it.* This does not constitute an infringement of a religious requirement in our view and therefore the particulars, even if accepted, do not constitute discrimination on the basis of creed. For these reasons it is our conclusion that the College's preliminary motion should be allowed and that the grievance must be dismissed.

In that case, there was no question that there was a sincere religious belief, adverse treatment, and that religion was "related" or "connected" to the adverse treatment. Indeed, the link was likely causal: but-for the claimant's religious belief, there would have been no religious-based requirement to "give back," and hence no potential work conflict. However, as the arbitrator recognized, "it is not the requirement to give back that is being infringed but the particular choice of how to fulfill it."<sup>77</sup> In other words, it was not prima facie discriminatory because it was not unequal treatment "based on" a religious belief, but rather a personal choice that did not flow necessarily or directly from that religious belief.

A similar approach was adopted in the case of *Ontario Public Service Employees Union*, in which the employee claimed that his employer's refusal to transfer him back to his home in Ottawa from his job in Peterborough constituted discrimination on the basis of religion because it prevented him from praying with his wife at home in the morning and afternoon.<sup>78</sup> In allowing the employer's non-suit motion, the arbitrator implicitly recognized that the employee had a

---

76. *Ibid* at paras 12, 14 [emphasis added].

77. *Ibid*.

78. *Ontario Public Service Employees Union v Ontario (Ministry of Natural Resources and Forestry) (Bharti Grievance)*, [2015] OGSBA No 40 (Arbitrator: Ian Anderson).

meaningful choice in complying with the employer's rule to attend work at the Peterborough office:<sup>79</sup>

The Employer's rules do not require the Grievor to live far away from his workplace in Peterborough and the Grievor's religious beliefs do not require that he and his wife continue to live in Ottawa. Accepting for the purposes of this decision that the Grievor's religious beliefs require him to pray daily with his wife in both the morning and the evening, the Grievor and his wife can do so anywhere. The interference which the Grievor experiences with practicing Sandhya on a daily basis arises not from any conflict between the impugned rule and his religious beliefs, but from the fact that he lives in Ottawa notwithstanding that his job is in Peterborough. Unless one were to conclude that it is unreasonable to expect the Grievor to move from Ottawa to Peterborough, there is no basis for concluding that the Employer's rule interferes with the Grievor's religious beliefs. For reasons stated above, it is my view there is insufficient evidence to demonstrate that it is unreasonable to expect the Grievor to move to Peterborough.

Other similar scenarios could be imagined in the context of adverse effects discrimination claims on the basis of religion. For instance, an employee at a busy restaurant may have a sincere religious belief that he or she needs to pray for an hour each day, but no particular religious belief as to when that must occur. The employee in this scenario requests an hour off work every day during rush hour to pray. In that context, the request for accommodation for an additional hour off work during rush hour is, at least in a superficial sense, "connected" to the claimant's religious belief. Were it not for the religious belief, there would have been no request for an hour off during rush hour to pray. However, the request to take the time off *during rush hour* is not a *product* of the religious belief, it is the product of the employee's (non-religious) preference or choice as to when to pray, and hence no case of prima facie discrimination would be made out.

By contrast, some adherents of Islam may have a sincere religious belief that they must pray multiple times a day, and moreover, a sincere religious belief as to *when* those prayers must occur (*e.g.*, dawn, midday, late afternoon, before sunset, and between sunset and midnight). This will tend to create a *necessary* conflict between any workplace obligation that corresponds with a necessary time for prayer, such that the employee cannot choose to both work on their regular schedule and fulfill the religious precept in question. Although the religious precepts in both of these scenarios create the *possibility* of a workplace conflict, in the former case the conflict is easily avoidable by the employee, and hence

---

79. *Ibid* at para 80 [emphasis added].

more of a product of individual choice than religious belief; in the latter, there is a necessary conflict that flows from the belief itself.

As another example, an employee may have a sincere religious belief in a particular religion but not in one of the values or commandments espoused by it. For instance, an employee may have a sincere religious belief in the Roman Catholic denomination but not in the belief that there needs to be a weekly day of rest or time of worship (*i.e.*, the Sabbath). In that context, a request for accommodation for a shift off work on a particular Sunday may not necessarily be a product of the religious belief, but rather the employee's preference. As in family status cases, the key point is that the adjudicator must consider the unique circumstances of that particular case in determining whether the claimant had a meaningful choice or reasonable ability to comply with the workplace obligation.

These cases and scenarios closely resemble the findings in the family status cases reviewed above. There is no question that an employee had suffered an adverse impact, had a protected characteristic, and that there is some sort of superficial factual connection between the two. Nevertheless, where the employee could reasonably fulfill both workplace and religious obligations, because there was no necessary conflict between the protected characteristic and the workplace obligation, a *prima facie* case would not be made out. We would not consider a consideration of the "alternatives" available to the claimant—for instance, an ability to pray during non-work hours—in this context an impermissible obligation to "self-accommodate"; it is simply a sensible requirement necessary to determine whether the *prima facie* case has been made out in the first place.

Failing to consider the "alternatives" available to the claimant at the *prima facie* stage would result in an obligation on the employer to accommodate circumstances in which the conflict was entirely avoidable, or where another choice was available that was equally compatible with maintaining and fostering the beliefs in question. This would require the accommodation of choices, not personal characteristics. Put into the language of *Brown*, where an employee can reasonably fulfill his or her religious precepts without creating a conflict with workplace obligations, it cannot be said that he or she "was unable to participate equally and fully in employment with her employer" as a result of a workplace obligation.<sup>80</sup>

---

80. *Brown*, *supra* note 16 at 15.

## B. SIMILARITY TO DISABILITY AND ADDICTION CASES

Adjudicating indirect discrimination claims is similarly difficult in the context of disabilities and addictions, which also requires a nuanced understanding of the particular factual scenarios. It is important in adverse effect disability cases, as it is in religion or family status cases, for the adjudicator to engage in a contextual, case-by-case analysis. This includes an individualized assessment of the disability and its impact on the claimant in relation to the specific workplace requirement or standard which is in issue. The mere existence of a “connection” between a disability and the adverse treatment is not always sufficient to render the rule discriminatory. Often, the question is whether the claimant’s disability, in all of the circumstances, effectively prevents him or her from meeting the workplace requirement. Only then can the disability be considered a “factor” in any resulting adverse treatment, for the purposes of the prima facie discrimination test. The corollary is that if, despite the existence of a disability, an individual engages in behaviour or makes a decision that is reasonably within their control, it would not be “discriminatory” for an employer to take action in response to that behaviour.<sup>81</sup>

The recent Supreme Court of Canada decision in *Stewart* provides a common illustration of this issue, in the context of addictions.<sup>82</sup> The claimant in that case was involved in an accident while driving a loader at a mine. He tested positive for drugs and later said he thought he was addicted to cocaine. His employer terminated his employment because he breached the company’s drug policy, and a subsequent human rights complaint was filed. The Alberta Human Rights Tribunal dismissed the complaint, finding that the claimant’s termination did not amount to prima facie discrimination because the claimant had the capacity to comply with the terms of the drug policy, and thus he would have been terminated whether he was an addict or a casual user.

Chief Justice McLachlin, writing for the majority, upheld the Tribunal’s decision as reasonable. In doing so, she noted that the case involved the

---

81. It is likely for this reason that some jurisdictions, such as the United States and United Kingdom, have excluded addiction from the definition of disability by legislation, or stipulated that those with an addiction may be held to the same employment requirements as those without addiction. See e.g. *Americans with Disabilities Act*, 42 USC § 12114(a) (1990); *The Equality Act 2010* (UK), s 3.

82. *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 [*Stewart*]. In the interest of disclosure, it should be noted that the authors’ law firm represented the respondent in the *Stewart* case. The views expressed herein are solely those of the authors themselves.

“application of settled principles on workplace disability discrimination,”<sup>83</sup> and relied on the fact that the claimant had a meaningful choice as to whether he complied with the employer’s drug policy.<sup>84</sup>

[The Tribunal] concluded that ... Mr. Stewart ... “*had the capacity to come forward and disclose his drug use*” ... and “*did make rational choices in terms of his drug use*” ... . While Mr. Stewart may have been in denial about his addiction, he knew he should not take drugs before working, and he had the ability to decide not to take them as well as the capacity to disclose his drug use to his employer. Denial about his addiction was thus irrelevant in this case. It cannot be assumed that Mr. Stewart’s addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence ... .

Thus, while portions of the majority judgement in *Stewart* might be read as effectively treating an adverse discrimination case as one involving direct discrimination or improperly requiring an element of “intent,”<sup>85</sup> we think the essence of the majority decision was that the facts of the case did not demonstrate that the employee was, as a result of his disability, without a meaningful choice as to whether to comply with the workplace obligations, on the facts as found by the Tribunal. That is not only, or even primarily, because the Tribunal found that his addiction was such that he could in fact control his drug use. Rather, it was because even if his addiction diminished his capacity to resist using drugs entirely, it did not preclude him from coming forward and disclosing his drug use under the circumstances, in order to obtain treatment and avoid placing others at risk. Assuming those facts to be established, the claimant was reasonably able to abide by the workplace rule or policy, and merely decided not to.

In this way, the case of addiction provides a helpful illustration of the distinction between “problematic” and “necessary” use of choice situations. On the one hand, addiction is properly recognized as a disability, and to say that a person “chooses” to become addicted, and hence is disentitled to human rights code protection as a result, would be entirely improper, as it would defeat the entire purpose of the protection. In this respect, the “choices” leading to

---

83. *Ibid* at para 22.

84. *Ibid* at paras 38-39 [emphases added].

85. *Ibid* at paras 86-94, Gascon J, dissenting.

an addiction are irrelevant for the purposes of the application of the human rights codes. However, *how* or *whether* to treat, manage, address, or care for that addiction may, in particular contexts, be within the control of claimant. In that case, a decision to ignore reasonable treatment options, and hence create an unnecessary conflict with workplace obligations, should not necessarily result in a finding that the employer has discriminated.

In the context of addictions especially, many choices made by a person who is an addict may or may not be within the “reasonable control” of a particular claimant, in light of their particular circumstances. Where the necessary degree of control is present with respect to a particular individual in relation to a particular choice—*i.e.*, they were reasonably able to decide not to engage in the prohibited conduct—an act of discipline would not normally raise discriminatory implications, even if the illegal act is somehow superficially “connected” to the addiction. By contrast, where the evidence with respect to the particular individual shows that he or she was not reasonably able to comply due to the effect of his or her disability, the *prima facie* stage will be made out.

This approach is no different for “addiction-related misconduct” cases, which involve situations where it could be claimed that an addiction in some way contributed to a willingness or propensity to engage in that conduct, or make it more difficult for the individual to comply with workplace standards.<sup>86</sup> Individuals may have various types of addictions, which drive them to engage in certain conduct, including drug use, smoking, accessing pornography, or gambling. However, that alone does not necessarily mean the individual is not reasonably able to refrain from conduct that, while being related to their addiction, negatively affects the workplace. The question in all such cases is whether the claimant was not reasonably able, as result of the addiction (or any other disability), to meet the relevant standard, or instead, whether he or she had a meaningful choice in being able to meet it.<sup>87</sup>

---

86. See *Ryan v Canada Safeway and Ramponi (No 2)*, 2008 BCHRT 12 (where LM Lyster noted, “[a]ny poor decision by a person suffering from a substance abuse problem could, in some sense, be said to be potentially related to that problem” at para 45).

87. See *e.g. British Columbia (Public Service Agency) v British Columbia Government and Services Employees’ Union*, 2008 BCCA 357. See also *Bellehumeur v Windsor Factory Supply Ltd*, 2015 ONCA 473 at paras 3-4; *BC Public Service Agency v BCGEU (Ramdharee Grievance)*, [2003] BCCAAA No 165 at para 41 (Arbitrator: KF Nordlinger); *British Columbia v BCGEU (Demelt Grievance)*, [2001] BCCAAA No 373 at paras 34-38 (Arbitrator: KF Nordlinger); *Durham Catholic District School Board v Canadian Union of Public Employees, Local 218 (Pantalleresco Grievance)*, [1998] OLAA No 664 (Arbitrator: RJ Roberts).

For instance, an addiction to smoking may prevent someone from avoiding smoking entirely, such that a requirement to refrain from smoking as a condition of employment, or even avoiding smoking entirely during a long shift, would constitute prima facie discrimination. However, the addiction does not prevent someone from taking reasonable steps to avoid harming other employees, such as going outside to have a cigarette, or avoiding smoking near flammable liquids. Again, as in the disability or alcohol addiction context, these scenarios present a superficial factual connection between the adverse impact and the protected ground; an individual who is not addicted to nicotine will have an easier time not smoking near flammable liquids than an individual who is addicted. However, the mere existence of an addiction to nicotine does not establish that a rule against smoking cigarettes inside or near flammable liquids, or the imposition of discipline for breaking such rules, are prima facie discriminatory. That is because an addicted individual will normally be reasonably able to comply with the workplace-related rule, notwithstanding his or her addiction. It would trivialize human rights legislation to suggest that a prima facie case of discrimination is made out in response to a workplace rule prohibiting smoking indoors or near flammable liquids, on the bases that there is a “connection” between the conduct and the addiction, and that it will be (marginally) more difficult for individuals with an addiction to nicotine than for others.

This analysis can apply to forms of disabilities outside of the addiction context as well. For instance, in *Brekelmans*, the arbitrator found that prima facie discrimination had not been made out, because the grievor had failed to establish a “causal nexus” between her tardiness and her various ailments.<sup>88</sup> These included sleep apnea, depression, and a personality disorder, which she claimed contributed to her chronic inability to attend work on time. While there was no doubt that the grievor’s “various medical and personal circumstances make it a challenge for her” to correct her chronic inability to arrive to work on time, the arbitrator found that “it is a behavioural problem nonetheless and the grievor’s [*sic*] medical conditions are not the cause of her tardiness in reporting for work.”<sup>89</sup> As such, despite the “connection between her ailments and her tardiness,” prima facie discrimination was not established because she was reasonably able to arrive at work on time.<sup>90</sup>

---

88. *British Columbia (Ministry of Housing and Social Development) v British Columbia Government and Services Employees Union (Brekelmans Grievance)*, [2010] BCCA No 86 at paras 59-69 (Arbitrator: Judi Korbin).

89. *Ibid* at para 68.

90. See also *Martin v Carter Chev Olds*, 2001 BCHRT 37. In that case, the Tribunal cautioned employers against assuming that a disability necessarily impairs an employee’s ability to comply with workplace rules or standards.

Other similar scenarios can be imagined, in which an individual's choices or preferences are the cause of a conflict with workplace obligations, rather than their protected characteristics. For instance, a claimant with a back condition may have various ways to treat it, all of which are equally effective, but only some of which create a potential conflict with workplace obligations. The treatment options for this particular individual might include mood or capacity-altering medications, such as medical cannabis, which would impact the claimant's ability to safely perform his or her job, as well as an equally effective and viable non-pharmaceutical treatment option that would not impact the claimant's ability to safely perform his or her job. In this scenario, the claimant's decision to treat his or her back condition with medical cannabis should not automatically lead to a conclusion that the employer has discriminated against the employee, because the individual had other reasonable options that would have completely avoided any conflict with workplace obligations. Again, we would not normally call the expectation that employees attend work in an unimpaired state, if that option is reasonably avoidable, an obligation on the employee to "self-accommodate" their disability. Rather, it is simply an aspect of determining whether any adverse impact is a result of a disability or a personal choice.<sup>91</sup>

Thus, as with religion and family status cases, some disability cases raise the same type of "necessary use" of choice scenarios that are properly taken into account by adjudicators prior to finding that *prima facie* discrimination is established sufficient to impose an obligation on an employer to accommodate to the point of undue hardship. This is the equivalent of the circumstances in family status cases. As Sheila Brown-Osborne illustrates the point:<sup>92</sup>

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

---

91. We acknowledge that some adjudicators may believe that an individual's choice of medical treatment should be treated as a "problematic use" of choice situation, and hence irrelevant to the discrimination analysis. This issue will need to be carefully considered by future adjudicators and cannot be addressed in detail here. However, in our view, it is appropriate and consistent with the approach suggested here to consider alternative treatment options at the *prima facie* stage, at least in some circumstances, where there is reason to believe a particular treatment option creates a perfectly avoidable and unnecessary conflict with a workplace obligation, and hence is more a product of individual choice rather than the individual's disability as such

92. Osborne-Brown, *supra* note 7 at 110.

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.

A similar point was acknowledged in a recent Ontario arbitration ruling involving a disability claim. The arbitrator in that case noted that “[n]otwithstanding the differences between family status and disability, a claim that a commute discriminates against an employee and must be accommodated because of disability raises similar issues of employee choice,” providing the following example:<sup>93</sup>

As a simple example of the impact of employee choice, suppose an employee with an injured leg will only travel to work on a bicycle and it is established that the distance the employee could travel by bicycle is limited to one kilometer because traveling any further than that by bicycle would cause further injury to their leg. If they claimed that they required accommodation in their commute by limiting their commute to one kilometer from home, how could that claim be assessed without taking into account the employee’s choice to only travel by bicycle?

After quoting at length from the *Misetich* analysis in the family status context, the Arbitrator noted that in the above example, “unless some reason exists why the employee must travel by bicycle, the disadvantage caused by the commute is related entirely to the chosen mode of travel,” rather than the employee’s disability.<sup>94</sup>

Thus, where a disadvantage or burden is the result of an employee’s choices, rather than their disability or addiction—for instance, the unreasonable choice to refuse medication or treatment, or the unreasonable choice to engage in prohibited conduct over which the individual has meaningful control—no obligation to accommodate arises. The employee had the reasonable ability to comply with those workplace obligations, but simply chose not to. Therefore, as in family status cases, it is only when the employee is without the reasonable ability to fulfill their workplace obligations as a result of their protected characteristic that the duty to accommodate arises.

#### IV. CHALLENGES TO THE PROPOSED APPROACH

As noted in the introduction, there are at least two fundamental challenges that could be offered to the approach we suggest in this article: it improperly incorporates a notion of “choice” into the analysis, which should be avoided in the human rights code context; and it improperly imposes an additional burden on

---

93. *Ontario Secondary School Teachers’ Federation v Toronto District School Board (Grievance 13-50, Accommodation)*, [2020] OLAA No 24 at para 280 (Arbitrator: Jesse M Nyman).

94. *Ibid* at para 285.

the claimant, effectively requiring them to “self-accommodate” at the prima facie stage of the analysis. We address each potential objection in more detail below.

#### A. MEANINGFUL CHOICE AND REASONABLE ABILITY

As noted above, our use of the term “meaningful choice” in this context does not involve choice to *have* a particular family status—whether to be single or married, to live with a partner or cease to do so, to have children and how many, or similarly fundamentally personal life “choices.” While all of these may involve some element of agency or “choice,” they are properly treated as choices that do not factor into the human rights equation. The statuses resulting from these types of “choices” are properly treated as constructively immutable characteristics that cannot provide a justification for unequal or disproportionate treatment. Simply put, they are so integrally connected to the protected characteristic or status itself that they form part of the identity regarding which human rights codes are intended to protect.<sup>95</sup>

Indeed, much of the criticism of the use of the concept of “choice” in the context of human rights adjudication highlights these “problematic use” scenarios.<sup>96</sup> Most commonly, adjudicators are criticized for treating the choice to marry as one that should disentitle individuals to a discrimination claim,<sup>97</sup> and for framing the decision to become sexually intimate with a same sex partner as a “choice.”<sup>98</sup> Relying on such choices as disentitling an individual to protection is entirely improper, as Justice Gascon explained in *Stewart*:<sup>99</sup>

Likewise, a choice threshold generally contradicts this Court’s rejection—albeit in the context of other sections of the *Canadian Charter of Rights and Freedoms*—of drawing superficial distinctions between protected grounds, like drug dependence or sexual orientation, *and conduct inextricably linked to those grounds, like drug use or sexual activity* (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 ... at paras. 121-24), a concern noted by the Tribunal here (para. 122). Further,

95. The most obvious example is discrimination on the basis of pregnancy, that, while often resulting from a choice to become pregnant or maintain a pregnancy, is nevertheless properly treated as a choice that does not impact the degree of protection or accommodation to which an individual is entitled.

96. See e.g. *Quebec (AG) v A*, 2013 SCC 5 at paras 335-37 [*Quebec v A*] (where Justice Abella lists the types of “choices” which in our view are properly considered “off-limits” for the purposes of a human rights code analysis).

97. Most often criticized in this respect is *Nova Scotia (AG) v Walsh*, 2002 SCC 83 rev’g *Quebec v A*, *supra* note 95. See e.g. Lawrence, *supra* note 23 at 118-25; Majury, *supra* note 23 at 220-26.

98. See *Trinity*, *supra* note 24.

99. See *Stewart*, *supra* note 82 at para 100.

it specifically contradicts this Court's rejection—albeit in the context of s. 7 of the *Charter*—of the view that “choice” makes drug users responsible for the harms of their drug use, rather than Charter-infringing laws or discriminatory employers.

In our view, these criticisms of the use of the concept of “choice” are entirely correct, to the extent that the choice in question is inextricable from or otherwise fundamental to the protected ground.<sup>100</sup> These types of “choices” should, in our view, be presumed at the outset of the analysis, given their close connection to the protected characteristic itself. By contrast, where the conduct in question is in a meaningful sense *independent* of the protected characteristic itself, consideration of those choices would not only be acceptable, but often necessary.

In this way, the approach advanced here avoids the criticism that invoking the notion of “choice,” in any respect, will lead adjudicators to deny family status protection on the basis of the decision “to be a single parent, to have children (and how many), to use professional daycare instead of *ad hoc* arrangements with family, friends, and neighbours.”<sup>101</sup> All of these choices, in our view, are the types

---

100. As noted above, we believe the essence of the dispute in *Stewart* was less about whether the individual in question had the choice to abstain from drugs entirely, and more about whether his use of drugs deprived him of the meaningful ability to refrain from attending work after using drugs or to obtain treatment, which was specifically offered as an option by the employer. Thus, while a drug addiction will often be inextricably tied to drug use, it does not automatically follow that drug addiction is inextricably tied to every decision in some way related that drug use that an individual may make. For instance, the decision to commit a violent act in order to obtain drugs, to use drugs in the restroom at work, to refrain from seeking treatment made available by the employer, or any other number of decisions factually linked to drug use, may remain in the control of particular claimants, even if their ability to refrain entirely from using drugs is significantly diminished as a result of the addiction.

101. Shilton, “Work–Family Divide,” *supra* note 23 at 55. Careful readers will notice that of Professor Shilton’s list, we have left out the choices “to refuse the nanny option” and “to live in a small town rather than a big city.” With respect to the first type of choice, it is not clear to us why this should be categorically off the table, in the same way as other decisions that are more fundamental to the family status itself. In other words, most parents may well *prefer* to avoid the “nanny option,” but may have jobs that require them to be at work. If the “nanny option” or other daycare options are reasonably available, albeit perhaps not the ideal arrangement from the parents’ perspective, it is not clear to us why the employer should necessarily be required to accommodate that preference. By contrast, where a professional daycare option is not reasonable or feasible in the context of the particular claimant, then a *prima facie* case would be made out. For instance, some employees may hypothetically be able to afford day care, but may live in areas where, with reasonable diligence, such care is not available, in which case the claimant will not have had the “reasonable ability” to fulfill both workplace and family obligations. With respect to the second type of choice relating to where to live, we suggest that this consideration is at least not obviously a “problematic use” of choice. For instance, if living in a “small town” makes it so that a claimant is unable to attend work regularly, or at all, because the small town is hundreds of kilometers away from

that are fundamental to the protected characteristic itself and should remain immune from scrutiny, in the same way as the supposed “choice” to follow one’s religion or engage in sexual intimacy with a partner of one’s choosing is effectively no choice at all.<sup>102</sup>

However, just as certain types of choices are relevant to whether a prima facie case of discrimination is established in the context of disability, addiction, and religion cases, the choice of how to deal with the inevitable conflicts that can arise between workplace and family life, which are ubiquitous and factually complex, cannot be necessarily immune from consideration in this context. Indeed, as suggested above, our view is that a consideration of these types of choices have permeated the different approaches to prima facie discrimination in the family status accommodations offered to-date. That is because, unlike in other contexts,<sup>103</sup> there is a meaningful distinction between an individual’s family status and the various shifting and variable obligations or activities that may be more or less associated with or dictated by that status.

Moreover, at least some accounting for the reasonable options available to an employee would seem to be clearly unavoidable. To modify an example used above, an employee may have numerous options available in terms of arranging a doctor’s appointment for a child, including one appointment time that conflicts with workplace obligations and another that does not. Should the employee choose the arrangement that unnecessarily conflicts with workplace

the city-based employment opportunity, it is not obvious to us that the choice to live so far away from work would or should constitute a prima facie case of discrimination.

102. This may or may not apply to the choice between using professional day care as opposed to family and friends for childcare. That is, assuming both options are reasonably available and equally capable of resulting in the level of necessary care, it should not matter to the employer which option is chosen. However, if the employee’s decision is to, for instance, use available family members instead of day care in a way that creates a workplace conflict (that would be avoided by the alternative and reasonably available decision), such a decision may be questioned to see whether it was the only reasonable option available under the circumstances, and hence whether the employee actually required accommodation or simply preferred it.
103. For instance, it is properly acknowledged that the distinction between sexual orientation and engaging in same-sex intimacy is often legally irrelevant, as “certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person.” See *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 123. By contrast, the choice to have children can often be meaningfully separated from the choice of how to address childcare obligations, even if, in light of a particular individual’s circumstances, there was no *reasonable* choice available to them that would have avoided a conflict between workplace and family obligations, and therefore a prima facie case is made out.

obligations, it seems wrong to describe the avoidable conflict with workplace obligations as amounting to “discrimination” on the employer’s part, and to place a legal obligation on the employer to accommodate that employee’s choice.<sup>104</sup> Indeed, to take the hypothetical a step further, imagine that the employee did not schedule the doctor’s appointment during off hours, because the only other available time for the appointment conflicted with the employee’s plan to attend a movie. In that case, the employer is not being asked to accommodate the individual’s family status at all—they are being required, as a legal imperative under the human rights code, to accommodate an employee’s *desire to attend a movie at a particular time*. Clearly, that alone is insufficient to establish a prima facie case of discrimination.

However, the conclusion that such scenarios constitute prima facie discrimination, sufficient to shift an obligation to accommodate onto the employer, would be the necessary consequence of an approach in which a consideration of an employee’s choices or decisions were irrelevant to the prima facie case. In that case, any workplace and family conflict, no matter how avoidable or how directly it is tied to a voluntary choice on the part of a claimant rather than an individual’s family status, results in a finding of prima facie discrimination. It is for this reason that adjudicators have found that it is appropriate to take certain types of “choices” into account in this context, as long as the analysis is suitably flexible and responsive to the real life circumstances of individuals and the challenges they face.

Thus, while adjudicators should continue to treat as irrelevant the supposed “choices” that lead to a particular family status—*i.e.*, the choice to marry or divorce, the choice to have one child or three, the choice to share custody, and so on—they should not completely ignore more everyday choices connected to family obligations that directly impact whether an employee is or is not able to fulfill workplace obligations. If the reader will excuse an unfortunate pun, it is not necessary to throw the baby out with the bathwater, and render every decision made by an employee irrelevant to the analysis. It may not always be easy to tell on what side of the line a particular case falls, but that does not mean that there is no line at all. Human rights adjudicators are normally adept at understanding and identifying the circumstances of claimants, and what constitutes a reasonable

---

104. Of course, this is subject to any other facts that might make the alternative choice unreasonable. For instance, if the choice was made to schedule the appointment during work hours because there was an emergency or a risk to the health of the child if the appointment was delayed, that would obviously *not* leave the employee with a reasonable choice to fulfill both family and workplace obligations.

ability to fulfill a workplace condition in a manner that is sensitive to those particular circumstances and the overall purposes of the human rights codes. The standard we propose would allow them to do so.

In this way, our proposed analysis does not result in a “decontextualized invocation of choice that looks at a specific choice in a vacuum and fails to examine the limits on available alternative constraints on the chooser.”<sup>105</sup> To the contrary, focusing on the reasonable opportunities or options available to an employee to avoid a conflict between work and family life is a valuable tool in this context, precisely because it can account for the unique circumstances of each individual. It not only permits, but expressly requires, a consideration of “the limits on available alternative constraints on the chooser,”<sup>106</sup> in order to determine whether the employee faces circumstances that properly require accommodation under the human rights codes. While adjudicators should not presume the presence of a choice where no reasonable choice exists, they should also not blind themselves to circumstances where a workplace conflict is primarily the product of a choice or preference of an employee, rather than that employee’s family status.

## B. “SOMETHING MORE”

Many authors—including one of the authors of this article<sup>107</sup>—have in the past criticized courts and tribunals for imposing an additional burden on a claimant at the prima facie stage, mirroring the standard often applied in the context of *Charter* claims.<sup>108</sup> This “something more” often includes requiring a claimant to establish, in addition to adverse treatment based on a protected characteristic, some normative “wrong” at the prima facie stage, whether it be in terms of stereotyping, prejudice, or arbitrariness. Our view is that such considerations are generally irrelevant at the prima facie stage and are better dealt with (if at all) in the context of the duty to accommodate analysis.

However, as we have sought to identify above, there are certain circumstances that raise different considerations. Where the adverse impact is not imposed by

---

105. See Majury, *supra* note 23 at 210.

106. *Ibid.*

107. See Benjamin Oliphant, “*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada’s Human Rights Code Jurisprudence?” (2012) 9 JL & Equality 33.

108. See *e.g.* Denise Réaume, “Defending the Human Rights Codes from the Charter” (2012) 9 JL & Equality 67 at 80-87. See also the survey of literature in A Wayne MacKay, “The Marriage of Human Rights Codes and Section 15 of the Charter in Pursuit of Equality: A Case for Greater Separation in Both Theory and Practice” (2013) 64 UNBLJ 54; Bruce Ryder, “The Strange Double Life of Canadian Equality Rights” (2013) 63 SCLR (2d) 261.

the rule or obligation itself as a necessary consequence of the family status, but rather as a result of a voluntary decision of the claimant that puts an individual's circumstances in conflict with the rule, it is not obvious why this should be treated as *prima facie* discriminatory or leading to an obligation to accommodate that decision to the point of undue hardship. Where an employee is presented with a meaningful range of options, and they chose the option that creates a workplace conflict instead of an equally reasonable option that avoids it, the adverse treatment is more a result of that free choice, rather than something flowing directly from the family status itself.

To this extent, it is not reasonably possible to completely avoid any sort of normative analysis at the *prima facie* stage of the analysis in the context of situations where, as in the context of family status claims, there are necessarily elements of choice mixed in with the family status. As Brown-Osborne points out, "family status cases *inevitably* raise the thorny issue of choice versus obligation."<sup>109</sup> As such, there must be some basis upon which to determine which factor is the dominant cause of the adverse impact: a choice or preference that creates a reasonably avoidable conflict, or the absence of such a choice and hence the family status itself. This will necessarily require recourse to some normative judgments in relation to the reasonableness of the options available to an employee to avoid the conflict.

If a reasonable ability or reasonable choice standard were adopted, as proposed in this article, there are at least two types of situations in which adjudicators will have to rely on a normative judgment. First, they must decide what types of choices fall into the "problematic use of choice" category, such that they should be presupposed as integral to the family status itself, and therefore irrelevant to both the *prima facie* and *Meiorin* analyses. Second, even where the choice in question is not so fundamentally connected with the family status itself so as to be beyond scrutiny, adjudicators will still have to determine whether an employee was reasonably able to fulfill both workplace and family obligations, on the basis that they had reasonable alternative options available to them to avoid the conflict. Both of these judgments may be difficult in certain cases and may result in reasonable disagreement.

---

109. Osborne-Brown, *supra* note 7 at 90.

As an example of the first type of question, take the controversial case of the “choice” to breastfeed a child.<sup>110</sup> On our approach, the threshold question in these cases is whether the decision to breastfeed or not is a mere family “preference,” or rather is the type of fundamental choice in relation to family status that should be immune from consideration, such as the “choice” of whether to have children at all. To make this determination, an adjudicator must initially decide whether it is reasonable to put an employee to the choice of either breastfeeding her child, or fulfilling workplace requirements by, for instance, using a breast pump and bottle outside of work hours. The answer to this question is not self-evident, and ultimately will depend on the enlightened and careful reasoning of adjudicators, informed by the overall purposes of the human rights codes.

However, it is our view that this is the type of personal or fundamental parenting decision that should be treated as part and parcel of an individual’s family status. That is because the decision is so fundamental to the relationship between a mother and child that a workplace obligation necessarily impeding that decision should be treated as *prima facie* discriminatory, and properly subject to a *Meiorin* analysis. Importantly, this does not preclude an assessment of whether a particular workplace rule, policy or decision necessarily *conflicts* with an employee’s ability to breastfeed her child. It merely suggests that where there is such a necessary and reasonably unavoidable conflict, an employee should not be disentitled from protection on the basis of the “choice” to breastfeed her child, any more than the decision of whether to have a child in the first place.

Moreover, even leaving aside the types of “problematic uses” of the concept of choice, there will still be the question of whether an employee was reasonably able to fulfill both workplace and family obligations. This can raise a number of difficult issues and will require judgment as to whether the alternatives available to an employee to avoid the conflict were really reasonable alternatives in the claimant’s particular context. It may require, as in the *SMS Equipment* case, an assessment of whether the alternative options are truly “viable” in the context of a particular case. Fortunately, as outlined above, this has almost always been the heart of the issue in the family status jurisprudence to date, which should provide at least some guidance.

Therefore, we do not dispute that the *prima facie* analysis we propose, at least for the most difficult cases, requires a lot of work by the application of normative

---

110. This issue has arisen in cases like *Flatt FCA*, *supra* note 8 at para 35 (which involved a claimant requesting to work from home in order to continue to breastfeed her child). In that case, the Federal Court of Appeal held that “[b]reastfeeding during working hours is not a legal obligation towards the child under her care. It is a personal choice.”

terms like “reasonable” and “meaningful.” It will not always be easy or obvious whether a particular factual circumstance presents an employee with reasonable alternative options or unreasonable ones. As Professor Shilton points out, the distinction between a meaningful choice and an obligation will “often be far from clear.”<sup>111</sup> We agree, and do not suggest that our approach will easily resolve all difficult cases, or that it can completely eliminate any type of normative judgment at the *prima facie* stage of the analysis.

Rather, the purpose of the standard we propose is to identify the crux of the dispute in these cases, in a manner consistent with the vast majority of adjudicative approaches to date. It is to focus the analysis on where it matters—whether or not a reasonable or meaningful option exists that would allow an employee to fulfill both family and workplace obligations, such that it cannot be said that their family *status* led to any non-trivial workplace disadvantage. Although this standard does not create a bright line distinction, in our view, that is a good thing in this context: our approach leaves room for growth and reasonable disagreement, without either adopting a standard that either places too high a burden on the complainant, or one that seems to presume every *assertion* that an individual has a family obligation that conflicts with a workplace obligation necessarily constitutes *prima facie* discrimination.

## V. CONCLUSION

The confusion and concern raised by some adjudicators and scholars regarding the various approaches to establishing *prima facie* discrimination in family status cases (e.g., the *Hoyt* test, the *Campbell River* test, and the *Johnstone* test) is, in our respectful view, misplaced. The deep commonality among these approaches is their attempt to identify a principled point at which it can be said that the *prima facie* case is made out. The leading tests in this area consistently hold that there must be more than an asserted conflict with *family-related activities, duties or obligations* in order to show that *family status* is a “factor” in any related adverse treatment. In deciding where to draw the line, they all revolve around an employee’s “meaningful choice” or “reasonable ability” to avoid a conflict, such that the claimant must be able to show that he or she does not have meaningful or reasonable options that would avoid the conflict between workplace and family obligations. In our view, that is when an impact on *family-related obligations* or activities constitutes an adverse impact on the basis of *family status*.

---

111. Shilton, “Work–Family Divide,” *supra* note 23 at 54.

In addition, as we have tried to demonstrate, these various approaches do not necessarily place a higher burden on claimants to establish prima facie discrimination compared with other protected grounds of discrimination. To the contrary, they are consistent with a range of other types of cases—particularly in the context of disability, addiction, and religion—where there is an element of personal choice that can complicate the assumption that *any* superficial factual connection between the protected characteristic and adverse treatment is sufficient to constitute a prima facie case of discrimination.

Ultimately, and with respect, we suggest that the sometimes-heated debate between proponents of various “tests” in the family status context are often more rhetorical than substantive. By and large, adjudicators generally agree on the factors that are relevant to establish a prima facie case in this context. Most fundamentally, they appear to agree that it matters whether there is an actual *need* for accommodation, which we suggest will arise as a result of the absence of reasonable alternatives that would avoid the conflict entirely. We have tried to identify and highlight this underlying consensus and to propose a theoretical framework within which it can be best understood, which is through the lens of the concepts of “meaningful choice” or “reasonable ability” to avoid the conflict entirely.” This general formulation still leaves many questions in specific cases unanswered, but in our view, it provides a principled starting point, consistent with the available approaches to family status discrimination and human rights code jurisprudence, in which to view those conflicts on a case-by-case basis.