Workwise - Important Case Update

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Update on Family Status Accommodation: Federal Court Finds that Childcare Not a "Choice"

by Joel Fairbrother

The Federal Court of Canada has upheld a decision of the Canadian Human Rights Tribunal which found that employers have a duty to accommodate an employee's childcare obligations in certain circumstances on the basis of "family status," a protected ground of discrimination under human rights legislation.

In ***Canadian (Attorney General) v. Johnstone***, Ms. Johnstone, an employee of the Canadian Border Services Agency, wanted to work full-time for the purposes of career advancement, but required changes to her shift schedule so that she could arrange childcare for her children. She came up with some scheduling compromises that, if accepted, would allow her to work full-time without causing a great deal of difficulties for the employer. The employer refused to allow the requested modifications based on an unwritten policy that it only allowed such accommodation for part-time workers. In accepting Ms. Johnstone's complaint of discrimination based on family status, the Canadian Human Rights Tribunal found that the employer's refusal to accommodate amounted to discrimination. The Federal Court upheld the decision on appeal.

The Federal Court noted that parental childcare obligations come within the scope and meaning of "family status". This finding has been echoed in other human rights adjudicators in the past, including the Alberta Human Rights Commission in ***Rennie v Peaches and Cream Skin Care***.

In articulating the test for establishing a *prima facie* case of family status discrimination, the Court stated that "the question to be asked is whether the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way."[1] In its analysis, the Court explained that the childcare obligations must be "of substance" and that the complainant is required to take steps to "reconcile family obligations with work obligations." By framing the test this way, the Court rejected the approach established by the British Columbia Court of Appeal in ***Campbell River and North Island Transition Society***, one of the foundational cases on family status accommodation, which held that in order for a *prima facie* case to be established, there be a serious interference with a substantial parental or other family duty.

Although ***Johnstone*** dealt with Federal human rights legislation, it is likely to have far-reaching significance because it may followed by other human rights tribunals across Canada. While ***Johnstone*** is the latest word on this rapidly evolving area of the law, it is still difficult for employers to know when an employee's family status should be accommodated in the workplace as labour arbitrators, who often have jurisdiction to rule on human rights issues, still appear to favour the ***Campbell River*** approach.

What is an employer to do?

From a demographic perspective, the fact that many employees have both childcare and eldercare obligations means that requests for family status accommodation in the workplace are likely to increase in the future. When faced with such requests, employers should always consider (1) the actual difficulties that would ensue in the workplace if the request were granted and (2) what steps the employee has taken to address the conflict between his work obligations and family obligations. Where no viable alternatives for child care or elder care exist and the employee's request would not result in undue hardship to the employer, then the employer's duty to accommodate will likely be triggered. As family status accommodation is a challenging area of law that is constantly evolving, employers should seek legal counsel in order to minimize the risk of complaints and costly legal proceedings.

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[1] At para. 125.

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