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Family Ties and the Workplace: New Accommodation Challenges for Employers

Employers are familiar with the need to provide accommodation to disabled employees and may also have accommodated employees' religious practices. Discrimination on the basis of family status is also prohibited by human rights legislation, but how far must employers go in accommodating the everyday childcare or eldercare needs of employees? New decisions on family status accommodation indicate that the law is changing. Employers need to be aware of these new developments and of their obligations when responding to requests for accommodation.

The Federal Court of Canada (the "Court") recently released two important decisions on family status accommodation, *Attorney General of Canada v. Johnstone*, 2013 FC 113 and *Canadian National Railway v. Seeley,* 2013 FC 117, which will directly affect employees in federally-regulated industries such as banking and air transportation and will provide guidance to courts in other jurisdictions. Moreover, a 2012 decision of the Ontario Human Rights Tribunal, *Devaney v. ZRV Holdings Limited,* 2012 HRTO 1590, suggests that the law in Ontario is moving in a similar direction.

The *Johnstone* case and the need to accommodate for childcare scheduling

In *Johnstone*, the Court agreed with the Canadian Human Rights Tribunal (the "Tribunal") that the Canadian Border Services Agency (the "CBSA") discriminated against an employee when it denied her request to work a regular full-time day schedule to accommodate childcare arrangements.

Ms. Johnstone had been working as a border services officer at Pearson airport on rotating day, night and evening shifts. After her birth of her first child, and again after the her second child was born, she asked to go on a full-time work schedule with fixed daytime hours so that she could arrange for extended family to care for her young children. The CBSA denied her request on the basis of an unwritten policy dictating that employees who worked fixed shifts were not eligible to work full-time. This meant that, in order to work a fixed or static schedule, Ms. Johnstone had to become a part-time employee and give up benefits such as her pension and opportunities for training and promotion.

The CBSA did occasionally permit full-time employees to work fixed shifts for medical and religious reasons but not to accommodate childcare needs. Ms. Johnstone filed a human rights complaint with the Tribunal, alleging that the CBSA had engaged in a discriminatory employment practice by denying her employment opportunities because of her family status. (Discrimination on the basis of family status is prohibited by both the *Canadian Human Rights Act* and the Ontario *Human Rights Code.*)

The Tribunal found that Ms. Johnstone had made out a *prima facie* case of discrimination on the basis of family status, and also that the CBSA had not proven the undue hardship necessary to exempt it from its obligation to accommodate her. The Tribunal ordered the CBSA to cease its discriminatory practices towards employees seeking accommodation on the basis of family status and to develop a plan to avoid future incidences of discrimination. Ms. Johnstone was also awarded compensation for the wages and benefits, including pension contributions, which she would have received if she had been allowed to work full time as requested. She was also awarded $35,000 in damages for pain and suffering and special compensation.

On behalf of the CBSA, the Attorney General asked the Court to review the Tribunal's decision. The Court had to determine whether the Tribunal's interpretation of "family status"' and other findings were reasonable. The Court found that, despite her best efforts, Ms. Johnstone had been unable to make appropriate childcare arrangements for her

children while continuing to work rotating shifts. The Court also found that the CBSA's refusal to accommodate her was based on the arbitrary assumption that the need for accommodation on the basis of family obligations was based on an individual's choices and lifestyle rather than on legitimate need.

In concluding that there had been *prima facie* discrimination, the Court rejected the test from older case law indicating that discrimination could only be established where there was a "serious interference" with a substantial or other family duty. The Court held that this standard was too high and that the appropriate question was whether the employer's practices interfered with an employee's ability to fulfill his or her substantial parental obligations in any realistic way. However, the Court also held that an employee must also show that he or she made serious efforts to try to reconcile family and work obligations.

The Court noted that since the CBSA was able to provide fixed schedules to individuals for medical and religious reasons, it would not face undue hardship if required to provide similar accommodation to individuals with child-care obligations. With minor adjustments, the Court also upheld the Tribunal's order and damages awards.

The *Seeley* case and the need to accommodate for place of work

The complainant in *Seeley* was a freight train conductor based in Jasper, Alberta who had been laid off. She was recalled to work because of a staff shortage in British Columbia and ordered to report to Vancouver for a temporary assignment. Ms. Seeley advised her employer that she was unable to report to Vancouver because of childcare issues and asked for compassionate accommodation. Her employer granted her an extension of time but ultimately terminated her for failing to report for work as requested. Ms. Seeley filed a complaint with the Tribunal alleging discrimination on the basis of family status.

The Tribunal found that the order to cover the shortage in Vancouver made it impossible for Ms. Seeley to arrange childcare and that CN failed to show that the order was a bona fide occupational requirement. CN did have a comprehensive accommodation policy but refused to consider Ms. Seeley's request because it had decided that "childcare obligations" was not a family status category for which accommodation was required. The Tribunal ordered CN to cease its discriminatory practices and reinstate Ms. Seeley. The Tribunal awarded her for lost wages and benefits and $35,000 in damages for pain and suffering and special compensation.

The Federal Court was again asked by the employer to judicially review the Tribunal's decision. Before the Court, CN argued that a parent's personal choices about how to meet childcare obligations, such as Ms. Seeley's decision to live in a location with fewer childcare options, were not protected by human rights legislation.

The Court considered the interpretation of the words "family status" in the human rights legislation and decided that it should extend to childcare obligations. The Court said it was difficult to think about family status without thinking about the relationship between parents and children and about the obligations of parents to care for their children. The Court concluded that if Parliament had intended to exclude a parent's childcare obligations from the scope of family status, it would have clearly said so.

The Court also reviewed a number of earlier cases in which employees had sought accommodation for their childcare needs and noted that an individualized assessment of the employee's childcare options was required. Employees who are the sole or primary caregiver for their children would likely require accommodation more often than employees who were co-parents or who had realistic childcare alternatives available. In this case, however, the Court found that CN had failed to consider Ms. Seeley's personal circumstances or offer her any information or assistance in making arrangements that might have allowed her to report for work in Vancouver. CN was therefore found to have discriminated against Ms. Seeley and to have failed to show that accommodating her family status would have resulted in undue hardship. The Court also upheld the Tribunal's orders and its award of compensation.

The *Devaney* case and the need to accommodate for elder care

Mr. Devaney was an architect who had been with his employer for over 25 years when he was terminated, allegedly for cause, because of repeated absences from the office. Mr. Devaney filed an application with the Ontario Human Rights Tribunal (the "Ontario Tribunal") alleging that he had been discriminated against on the basis of family status because his employer denied him the opportunity to work a flexible schedule in order to care for his elderly ailing mother.

Mr. Devaney was his mother's primary caregiver and had very limited outside assistance. He also demonstrated that he was able to access, and had in fact made use of, technology that allowed him to work remotely and to be reached by clients at any time of the day or night. The employer's position was that full time attendance at the office was strictly required unless an accommodation was requested and approved and that Mr. Devaney had never formally requested an accommodation.

The Ontario Tribunal held that discrimination claimants must show they are adversely affected by their employer's policies but saw no reason to require a higher standard of "serious interference" for family status complaints. The issue was whether Mr. Devaney could show that his absences from the office were required (and not a matter of choice) as a result of his family responsibilities as his mother's primary caregiver. After reviewing the evidence, the Tribunal concluded that a significant number of Mr. Devaney's absences were required due to his family circumstances and that a *prima facie* case of discrimination was established.

The Ontario Tribunal also found that although the employer knew about Mr. Devaney's family circumstances and had no reason to doubt his explanations for his absences, it made no effort to accommodate him but rather continued to insist that he attend at the office between 8:30 am and 5:00 pm without exception. The employer was unable to show that accommodating Mr. Devaney would have caused it undue hardship as there was only a minor impact on office morale as a result of his absences.

The employer was found to have failed in both its procedural and substantive obligations to accommodate Mr. Devaney. The Ontario Tribunal awarded Mr. Devaney $15,000 in damages as a result of his termination and ordered the employer to develop a workplace human rights policy that included the duty to accommodate and to provide mandatory human rights training to its entire staff. Mr. Devaney's claim for lost wages and benefits was denied as he had obtained new employment (with his former employer's major client) within days of being terminated.

Implications for Ontario employers

While the *Johnstone* and *Seeley* cases were decided under the *Canada Human Rights Act,* it is likely that the Court's reasoning in both cases will be applied in cases where complaints of family status discrimination are made under the Ontario *Human Rights Code.* The *Devaney* case also suggests that the Ontario Tribunal is moving away from the stringent standards applied in earlier decisions.

The likely combined effect of these decisions is that to establish *prima facie* discrimination, employees will no longer need to demonstrate that the employer's policies and practices resulted in substantial interference with their family responsibilities. Instead, they will have to show that they had substantial childcare or eldercare responsibilities and had made serious efforts to reconcile their family and work responsibilities but were still adversely affected by their employer's human resource practices.

The cases also indicate that employers will be required to give serious consideration to both express and implied requests for family care accommodation. The employers in all three cases were found to have failed to properly consider the unique needs and circumstances of their employees. Employers will now find it increasingly difficult to argue that conflicts between serious family and work obligations are the result of employees' personal choices, such as where to live, or that accommodation need not be offered until an employee formally requests it.

The debate about an employer's duty to accommodate employees' family status obligations will likely continue until an appellate court conclusively decides the issue.

However, prudent employers should carefully consider all employee requests for accommodation based on family status and assess whether they can be accommodated without serious hardship. Employers should also be aware that it may be difficult to convince a court or tribunal that they will face undue hardship if they arbitrarily deny accommodation for family status while allowing it for medical or religious reasons.

Employers may want to consider reviewing or developing policies on accommodation and consider whether they have rigid scheduling and other practices which could create difficulties for employees caring for young children or elderly parents. The members of our Labour and Employment practice group would be pleased to assist you in performing such a review or in responding to employee requests for human rights accommodation.

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