

Accommodating For Child Care Needs As Family Status



The Federal Court of Canada recently released companion decisions that give some helpful guidance to employers in handling requests for work accommodations for child care. These cases help to highlight the unique and challenging issues employees and employers face in trying to balance employment and family duties and obligations.

Refusal of fixed full time shifts to accommodate child care

In the first case, *Canada v. Johnstone* 2014 FCA 110 the Federal Court upheld prior decisions that a border services officer had been discriminated against on the basis of family status because her requests for fixed full-time shifts to accommodate her child care needs were refused. Full time employees were assigned rotating irregular shifts, with five days on, three days off. The employer had an unwritten policy that full-time hours would not be provided to employees requesting accommodation on the basis of child-rearing responsibilities. Those sorts of accommodations were provided to employees for medical or religious reasons. As a result, Johnstone was forced to become a part-time employee, so her pension and benefits were pro-rated, she missed out on training opportunities, was not permitted to become an acting superintendent or work on Special Teams, and her overtime was paid at a lower rate.

The Federal Court agreed that the agency discriminated against Johnstone on the prohibited ground of family status, contrary to the *Canadian Human Rights Act*. The Court said family status includes certain childcare obligations which a parent cannot neglect without engaging legal liability. The court easily found a prima facie case of adverse discrimination based on family status.

Refusal of transfer due to child care obligations

In the second case, *Canadian National Railway v. Seeley* 2014 FCA 111 the Federal Court of Appeal unanimously upheld a previous finding that the Railway discriminated against a female conductor by firing her for refusing to accept a transfer from Alberta to BC. She refused due to childcare obligations and because the Railway would not tell her the estimated duration of transfer, nor the exact location in which she would be working. The Court commented that it seemed obvious that the move interfered with the fulfillment of Seeley's childcare obligations in a manner that was more than

trivial or insubstantial. It is notable that the Railway did not consider family status matters that involve parental obligations as a ground of discrimination that necessitated any form of accommodation whatsoever. The Railway failed to duly inquire of its employee and could not establish undue hardship.

Differences in the law in BC

We note that the test to engage the duty to accommodate family status is currently higher in BC than other jurisdictions. The British Columbia Court of Appeal established a more restrictive test, which requires proof of “serious interference” with a substantial parental obligation in the *Campbell River* case: 2004 BCCA 260. Although the Federal Court of Appeal in both *Johnstone* and *Seeley* rejected the restrictive “serious interference” test endorsed in *Campbell River*, it placed an onus on the parent to demonstrate that the interference in question is more than trivial or insubstantial, and that they have made significant efforts to self-accommodate.

What are substantial parenting duties and obligations?

In *Johnstone* and *Seeley*, the Federal Court has provided some useful discussion of the nature of the family obligations that may attract protection under human rights legislation. The Court distinguished activities that result from “personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities” from those that arise from parental obligations, whose fulfillment or non-fulfillment engages the parent’s legal responsibility to the child. In these cases, child care obligations engaged the parent’s legal responsibility to the child.

The decisions highlight the challenges for employers in determining whether an accommodation is appropriate and its extent. Employers may have to inquire about the need for accommodation, what sort of other options may be available and whether they have been explored. Employees will not be entitled to accommodation for every activity, nor will they be entitled to a perfect accommodation. *Johnstone* and *Seeley* are cautionary tales of employers who did not seriously consider the need for accommodation and the balance between parental duties and employment duties.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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