What Your Employer Must Do For You!

This is the message being sent to the labour relations community by arbitrator Lyle Kanee in a very recent award (*re Communications, Energy and Paperworkers Union, Local 707 and SMS Equipment Inc., [2013] CanLii 68986 ON LA) (SMS)* released October 29, 2013.

In this case the Employer, SMS, operated a 24/7 business supplying equipment, parts and service to the construction, mining and petrochemical industries in the Fort McMurray, Alberta area. The Grievor, a resident of Newfoundland, successfully applied for a job as a labourer at SMS and left the Rock to take up employment at SMS in November 2010. Initially, she worked 12 hour shifts, with the shifts rotating between 14 day shifts, followed by 14 days off and then 14 night shifts.

When the Grievor relocated to Alberta, she left behind a young son in the care of her mother. Shortly after arriving in Alberta, the Grievor became pregnant with a second child and her first child arrived to live with her around August of 2011. Also in August 2011, the Grievor went off work on leave and she had the second child in February of 2012. The two children came from different fathers, neither of whom was willing to provide either monetary or parenting support to the Grievor.

While off, the Grievor applied for and was awarded a position as an apprentice welder. This position would involve her returning to work on 12 hour shifts, but with a 7 day rotation instead of 14. The Grievor returned to work in October of 2012. After working her first night tour in November, 2012, the Grievor filed a grievance claiming she was being discriminated against on the basis of her "family status" based on the company's decision to deny her request to work fixed day shifts. The Grievor claimed that when she worked nights, she either had to stay up during the days with little sleep to care for her children or secure around the clock childcare when she was working nights (neither of which were viable alternatives, she claimed).

The matter proceeded to arbitration where the evidence showed, amongst other things: the Grievor was earning over $100k per annum; extended childcare was readily available but more costly; the Grievor had not applied for a childcare subsidy that is available in Alberta; the Grievor had not pursued a claim for child support against either father; and, her primary concerns were financial ones. Nonetheless, arbitrator Kanee found that the Grievor was experiencing discrimination on the basis of family status and awarded her a fixed day shift.

For employers, there are 3 extremely disturbing aspects to this decision:

1. Arbitrator Kanee concluded that “family status” encompasses essentially all parental/childcare responsibilities and not just those that are “extraordinary”, as has been suggested at least by the Courts in B.C.Thus any interference that a work rule creates with a parental/childcare responsibility, no matter how minimal, is potentially discriminatory.
2. Arbitrator Kanee also suggests that employees do not need to show they have made reasonable (or indeed any) efforts to “self-accommodate” (i.e. find a solution on their own that allows them to meet both their employment and parental obligations) before a *prima facie* case of discrimination can be established.This analysis is at odds with the awards of several other prominent arbitrators who have in past found exactly the opposite.
3. Arbitrator Kanee additionally found that there need not be a change in working conditions for a *prima facie* case of family status discrimination to arise.Rather, a change in the employee’s personal circumstances (even a voluntary one) can give rise to a family status discrimination claim if the workplace rules then interfere with parental obligations.To quote, “The “choice” to become a working parent, or in this case a single working parent, and to fulfill the duties and responsibilities of both work and parenthood, do not negate a claim of discrimination.” [**Ed. Note** – Apparently this is so despite the Grievor’s full prior knowledge of the work rules, including the employer’s shift schedule, at the time hiring and when applying for the welder’s position]

In our considered view, if the reasoning outlined above is picked up on and adopted by arbitrators in Ontario we can expect to see a plethora of family status discrimination claims being made in workplaces across the province. What is unknown at this time is whether SMS is seeking judicial review of this very disturbing award? We certainly hope that a judicial review will be pursued and will advise of any further developments as we become aware of them.

Article by Jayson Rider

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