When Childcare Interferes With Work: When Is An Employer's Duty To Accommodate Triggered?

Most employers are aware that human rights legislation prohibits discrimination in employment on the basis of such things as age, race, religion, physical disability and mental disability; however, employers may be less familiar with the fact that human rights legislation prohibits discrimination in employment based on a person's "family status". A person's "family status" includes his or her status as a parent, including any childcare obligations he or she may have.

In short, this means that employers may now have a duty to accommodate employees with childcare obligations, unless this causes undue hardship for the employer.

"Family status" is not a new protection for employees, but its application to childcare obligations has become much more prevalent in recent years. Below are examples of the types of complaints that have recently been advanced by employees on the basis of family status:

- An employee's shift was 8:30am-3:00pm. For legitimate work-related reasons, the employer changed her shift to 11:30am-6:00pm. The employee asked to keep her old shift, as she had to provide after-school care to her son who had a psychiatric disorder. She filed a human rights complaint when the employer said no. The Human Rights Tribunal found that the employee's family status triggered the employer's duty to accommodate (but was ultimately undecided on whether the employer failed to accommodate her).
- An employee, who resided in Alberta, was on lay-off. She was recalled to work in Vancouver. She had 2 young children. Her husband worked for the same company and had an unpredictable schedule. She had no family in BC. Accordingly, she would not be able to provide childcare if she moved to BC. She refused the transfer, was terminated, and subsequently brought a human rights complaint. The Human Rights Tribunal found that the employer failed to accommodate the employee based on family status.
- An employee worked 8:00am to 4:00pm every day. He was a single parent and had custody of his children every other week. The school bus did not pick the kids up in the morning until 8:45am. For the weeks in which he had the kids, he asked if he could change his schedule to 9:00am to 5:30pm. For operational reasons, the employer said no. The employee grieved. There was evidence that the employee did not consider any alternative child care arrangements before bringing his

grievance. The Arbitrator found that there was no human rights violation by the employer.

As in any other discrimination case, the first step is for the employee to prove that he or she has a "*prima facie*" case. This means that the employee must first meet a minimum threshold to prove that he or she did, in fact, suffer some discrimination. Once the employee has met this threshold, the onus then switches to the employer to prove that accommodating the employee's family needs would have caused "undue hardship".

Unfortunately, an inconsistent approach as to what constitutes a *prima facie* case has developed cross the country. At one end of the spectrum, the test that developed in British Columbia was quite onerous for employees to meet. It required that the employee show that there was "a change in a term or condition of employment that resulted in a serious interference with a substantial parental obligation." At the other end of the spectrum, the test that developed in the Federal jurisdiction was much easier for employees to meet – all that was required was for the employee to show that he or she had a familial obligation that required accommodation because of a work requirement.

In other provinces, such as Ontario and Alberta, a middle ground approach was used, focusing on what efforts the employee made to help address the situation (e.g. to find alternative childcare arrangements) before requesting accommodation from the employer.

In Manitoba, there has only been one grievance arbitration decision which has considered what this *prima facie* test is. Unfortunately, the arbitrator declined to specify which approach applied in Manitoba.

A New Test and a Focus on Self-Accommodation

Not unexpectedly, the approach adopted by the Federal courts and tribunals made employers nervous that it would open the floodgates to human rights complaints.

The Federal Court has recently revisited its test as to whether an employee has a "prima facie" case for discrimination based on his or her family status. The new test may significantly help to clarify the expectations imposed on both employers and employees in these types of cases.

In *Johnstone v. Canada (Attorney General),* Ms. Johnstone was an employee with the Canadian Border Services Agency (CBSA) working at Pearson International Airport. Her husband also worked for the CBSA. Together they had two young children.

At the time, full-time employees with the CBSA worked on a rotating shift pattern. Shifts had 6 different start times over the course of days, afternoons and evenings, on different days of the week, with no predictable pattern. Because both Ms. Johnstone and her husband both worked these variable shifts, neither could provide the childcare they required on a reliable basis.

Accordingly, Ms. Johnstone asked the CBSA for a full-time static shift rotation. The CBSA refused to provide accommodation to employees with childcare obligations as it took the position that it had no legal duty to do so. The CBSA offered Ms. Johnstone a static shift pattern, but on condition that she would be bumped down to part-time status (which had significantly fewer pension entitlements and promotion opportunities). Ms. Johnstone then filed a claim with the Canadian Human Rights Commission.

After a very lengthy court battle, the Federal Court of Appeal set out the 4-step test that Ms. Johnstone would have to meet to establish a "prima facie" case. Those 4 factors are:

- ***The employee must have a child under his or her care or supervision.*** In the case of a parent, this will usually flow from the employee's status as parent. In the case of a caregiver, the employee must have a legal obligation to the child similar to that of a parent.
- ***The childcare obligation must engage the employee's legal responsibility for the child as opposed to a personal choice.*** This requires that the child be of an age where he/she cannot reasonably care for him/herself. This also requires that the childcare need is as a result of a parental obligation (e.g. to not leave a young child alone) versus a parental choice (e.g. to attend an after-school hockey game).
- ***The employee made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, but no such alternative solution is reasonably accessible.*** This is where self-accommodation comes into play. In other words, the employee will have to show that he or she took reasonable efforts to make alternative child care arrangements but none were reasonably available.
- ***The workplace rule in issue interferes with the employee's childcare obligation in a manner that is more than trivial or insubstantial.*** There is no definition of what is meant by "more than trivial or insubstantial"; rather, the unique circumstances of each case will have to be examined in order to determine this.

Having regard to all of these factors, the Federal Court of Appeal found that Ms. Johnstone had established a *prima facie*case. Ms. Johnstone's work schedule could not accommodate her childcare obligations. Nor could her husband's. Ms. Johnstone made significant but unsuccessful efforts to secure reasonable alternative childcare arrangements, including seeking out regulated childcare providers, unregulated childcare providers, and family members to look after the children. Accordingly, the Court held that the CBSA was required to accommodate Ms. Johnstone.

Conclusion

Given the recent attention that family status cases have been receiving, many employers are nervous that they will be flooded with requests for accommodation every time someone wants to participate in a family activity (and possible human rights claims if such request are denied).

The Court was careful to note in *Johnstone* that voluntary family activities, such as family trips or participation in extracurricular sporting events do not fall under the employer's duty to accommodate as they result from parental choices and not parental obligations. Employer's can breathe a sigh of relief, therefore, that they will not be off-side human rights law if they refuse to change an employee's schedule to accommodate his or her child's soccer games.

That being said, employers should not be too quick to brush off family status requests where the basis for the request is related to childcare obligations. Employers will have to look at the facts of each individual case to determine whether the employee's request will trigger the employer's duty to accommodate.

We cannot say conclusively that the 4-part *Johnstone* test will apply in Manitoba. Only time will tell whether Manitoba arbitrators and tribunals decide to adopt this test. In the meantime, however, the *Johnstone* test nonetheless presents a useful framework to guide employers' decisions when family status issues arise.

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