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SHERRARD KUZZ LLP
Employment & Labour Lawyers

Childcare Obligations Protected Under "Family Status" – so says Federal Court

Most human rights legislation in Canada prohibits discrimination in employment on the basis of "family status." However, the scope of this protection and, in particular, whether it covers standard childcare obligations has been anything but clear due to considerable divergence in the case law.

The Federal Court's recent decision in *Johnstone v. Canada* represents the latest judicial pronouncement on the issue. The decision determines that parental childcare obligations fall squarely within the protected ground of 'family status', signaling to employers that when work obligations and childcare responsibilities come into conflict, the duty to accommodate *may* be triggered.

Ms. Johnstone's complaint

Initially heard by the Canadian Human Rights Tribunal, Ms. Johnstone alleged her employer, the Canadian Border Services Agency ("CBSA"), discriminated against her on the basis of family status by failing to accommodate her parental childcare obligations.

Both Ms. Johnstone and her husband worked irregular rotating shifts as CBSA Officers. After the birth of their children, Ms. Johnstone wished to retain her full-time status, but requested she be scheduled on fixed day shifts asserting she would otherwise be unable to arrange suitable childcare.

CBSA refused Ms. Johnstone's request relying on its unwritten policy that fixed daytime shifts were limited to part-time employees. Ms. Johnstone was offered part-time employment on a fixed-shift basis, but this meant she would no longer be eligible for certain benefits extended only to full-time employees. She rejected the offer and filed a human rights complaint, alleging CBSA had failed to meet its duty to accommodate.

The Tribunal ruled in Ms. Johnstone's favour, finding CBSA's refusal to accommodate her scheduling request prevented her from taking advantage of various employment opportunities and amounted to 'family' status discrimination.

The Federal Court weighs in

CBSA filed an application for judicial of the Tribunal's finding with the Federal Court, arguing the protected ground of family status did not include childcare obligations. In the alternative, CBSA argued, Ms. Johnstone failed to prove the rotating shift schedule applicable to all full-time CBSA Officers interfered with her ability to arrange suitable childcare.

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In respect of this latter argument, CBSA relied on the fact that Ms. Johnstone's childcare issues were the result of choices she and her husband made despite their understanding CBSA employees served a 24-hour, 7-day-a-week operation requiring irregular rotating shifts. These choices included: (i) the family's decision to move to a small city a significant distance from the workplace; (ii) the decision Ms. Johnstone's husband would continue working on rotating shifts; (iii) the preference to have their children only in their own care, or the care of family members; and (iv) the decision not to pay for live-in childcare.

The Federal Court rejected these arguments and upheld the Tribunal's decision.

What does this mean for employers?

The trend in family status case law, as punctuated by the Federal Court's decision in *Johnstone*, has left some employers fearing that each and every conflict between work and childcare must be accommodated. This is not the case.

> *Not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence.*

An employer's duty to accommodate a request based on childcare obligations will only be triggered where the obligation is "one of substance" and the employee has made an effort at self-accommodation by trying to "reconcile family obligations with work obligations." In the words of the Federal Court: "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." To this end, employers can take comfort in the Tribunal's statement, reiterated by the Federal Court, that "not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence."

Against this backdrop, one may question why the *Johnstone* case was decided as it was? It is important to remember the Tribunal's finding was that the CBSA dismissed Ms. Johnstone's request for childcare accommodation out-of-hand. That is, instead of considering Ms. Johnstone's circumstances, or whether her request could or should be accommodated, the CBSA inflexibly relied on its unwritten policy to deny her request. Having not considered the request on its merits, it was difficult for the CBSA to justify its decision before the Tribunal.

Tips and best practices for employers

As the issue of family status accommodation continues to evolve, employers are well-advised to consider the following tips:

- ***Take childcare-based requests seriously.*** Because parental childcare obligations fall within the protected ground of 'family status', ignoring or trivializing these requests may lead to a finding your organization has run afoul of human rights legislation.
- ***Consider each request for accommodation on its merits.*** Applying a workplace rule without regard to the individual circumstances of the employee seeking accommodation will increase the risk of a finding of discrimination. Accordingly, while it is acceptable (indeed advisable) to have and apply a carefully thought-out workplace policy, remember that in doing so each case must be considered on its own merits.
- ***Talk to employees about self-accommodation.*** An employee has an obligation to make efforts to accommodate him or herself. Therefore, canvass with employees what efforts *they* have made to reconcile work and childcare responsibilities and take notes of these efforts.
- ***Involve employees and think creatively.*** Family status accommodation can take a multitude of forms and employers should not feel confined to 'traditional' accommodation measures. Involving employees in the brainstorming process may facilitate 'outside the box' thinking and the creation of a solution with which everyone can live. Collaboration may also unveil reasonable options neither party had explored or realized even existed.
- ***Don't get too caught up in legalities.*** Regardless whether your *legal* duty to accommodate has been triggered, there may be sound business reasons to accommodate childcare-based requests. Supporting employees in their quest to balance work and family obligations, where it's reasonably feasible to do so, fosters positive employee relations and can stave off costly human rights litigation.
- ***Conduct a review of your current workplace policies.*** Proactive steps on your part to ensure workplace policies and practices are compliant with human rights legislation may prevent a complaint from ever arising. Policies should be reviewed at regular intervals as well as whenever a shift in the law has occurred.

To learn more and/or for assistance reviewing, preparing and implementing an accommodation policy tailored to your organization, please contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

The Integrated Accessibility Standards under the *Accessibility for Ontarians with Disabilities Act* have been amended to require public and private sector organizations to ensure newly constructed or redeveloped "public spaces" are more accessible. This includes exterior walkways, outdoor eating areas, parking lots, service counters, and public waiting areas. The requirements will be phased in between 2015 and 2018.

To learn more, contact a member of Sherrard Kuzz LLP.

"Sometimes a Swimming Pool is Just a Swimming Pool"

Ontario's occupational health and safety regime exists to protect workers in the places they work. This includes a duty on employers to promptly report to the Ministry of Labour any workplace critical injury or death.

But what is a 'workplace' and when is the duty to report triggered? In the case of *Blue Mountain Resort* (see initial report in *Management Counsel*, December 2011) both the Ontario Labour Relations Board ("OLRB") and Ontario Divisional Court held that a 'workplace' included *all areas in or near where workers perform work*, resulting in the resort having a duty to report when a non-worker guest drowned while swimming in the resort pool at a time when no worker was in the area.

The OLRB and Divisional Court decisions shocked employers across the Province. If the OLRB and Court were correct, virtually every place could be considered a 'workplace' and every death or critical injury to anyone, anywhere, whatever the cause, would have to be reported to the Ministry of Labour.

Fortunately, the Court of Appeal for Ontario has now brought clarity to the issue, much to the relief of employers.

What happened in *Blue Mountain*?

On December 24, 2007 a guest at the Blue Mountain Resort suffered a heart attack and drowned in the resort's indoor swimming pool. The pool was not supervised at the time and no resort employees were present.

The resort did not report the death under section 51(1) of Ontario's *Occupational Health and Safety Act* (the "Act") which requires an employer to notify the Ministry of Labour whenever a "person" is killed or critically injured by any cause at a "workplace". It also failed to comply with section 51(2) of the Act which requires that "[w]here a person is killed or is critically injured at a workplace, no person shall ... interfere with, disturb, destroy, alter or carry away any wreckage, article or thing at the scene of or connected with the occurrence until permission to do so has been given by an inspector."

The resort argued it did not comply with those sections of the Act because the sections only apply when a worker is injured or when the place of injury is a workplace. The purpose of the Act, the resort noted, is to protect workers, not the public at large.

Unfortunately for the resort, the Ministry of Labour disagreed, issuing an Order against it essentially on the basis that because employees occasionally performed maintenance work around the pool it was to be considered a 'workplace'.

The OLRB upheld the Order finding "person" meant both workers *and* non-workers, and "workplace" meant *all areas in or near where workers perform work, regardless whether workers are present at the time of an injury*. This decision was upheld by the Ontario Divisional Court.

The Court of Appeal prefers a more reasonable approach

On February 7, 2013, the Court of Appeal for Ontario overturned the decisions of the OLRB and Divisional Court, as follows: *"[t]he interpretations they gave to s.51(1) of the Act would make virtually every place in the province of Ontario (commercial, industrial, private or domestic) a 'workplace' because a worker may, at some time, be at that place. This leads to the absurd conclusion that every death or critical injury to anyone, anywhere, whatever the cause, must be reported. Such an interpretation goes well beyond the proper reach of the Act and the reviewing role of the Ministry reasonably necessary to advance the admittedly important objective of protecting the health and safety of workers in the workplace."*

The Court noted several examples which punctuated the absurdity of the preceding decisions: *"[The inspector in this case] acknowledged that if there were a critical injury to a hockey player or a spectator during a Toronto Maple Leaf hockey game at the Air Canada Centre, it would have to be reported to the Ministry. If the injury occurred on the ice, the hockey game would have to be shut down – televised or not – until the premises were released by a Ministry inspector. He took the same position with respect to a wide variety of other circumstances. For instance, he took the view that reporting to the Ministry would be mandatory in the case of customer injuries at a Canadian Tire Store or other retail outlet; in the case of injuries sustained by the public on highways patrolled by police (because the police or other workers may arrive after the accident, or may have passed by on a prior occasion)…"*

The Court concluded that for the reporting requirements of s.51(1) of the Act to be engaged there must be some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that workplace.

The bottom line for employers

The Court of Appeal's ruling brings much needed clarity to once murky waters.

In the event of a critical injury or death of a worker or non-worker, an employer should at the very least ask itself the following three questions when determining whether to report the incident to the Ministry of Labour:

1. Did the death or injury occur at a place and time where a worker was carrying out his or her employment duties?
2. If not, did the incident occur in a place where an employee might reasonably be expected to perform work duties?
3. Is there a reasonable connection between the cause of the incident and worker safety at that workplace?

In *Blue Mountain* the cause of the accident was a guest's apparent heart attack while swimming, an event which while tragic, could not reasonably be said to create risk to employees carrying out their work duties. That is, the death was not related to worker safety at that workplace. Hence, the obligation to report to the Ministry of Labour was not triggered. In the words of the Court of Appeal, not every death or injury can reasonably be linked to a hazard to a worker, and "sometimes a swimming pool is just a swimming pool".

To learn more and/or for assistance reviewing, preparing or implementing an accident workplace policy tailored to your organization, please contact a member of Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

In Sickness and In Health:

Managing Employees with Illnesses or WSIB Injuries

Illness in the Workplace

- Obtaining useful medical information about an employee's condition.
- Employee obligations during accommodation and return to work.
- Implementing and monitoring a gradual return to work program.
- What is (and is not) a "disability" under the Human Rights Code?
- Disciplining (or terminating) for illness or injury-related attendance issues.

WSIB Claims

- Reporting and return-to-work obligations under the WSIB.
- Handling recurring conditions.
- Entitlement to WSIB cost relief.
- Disciplining (or terminating) after a WSIB claim.
- Objecting to a WSIB ruling.

DATE: **Tuesday May 28, 2013; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hilton Garden Inn, Toronto-Vaughan,** 3201 Hwy 7 West, Vaughan, ON L4K 5Z7

COST: Please be our guest

RSVP: **By Friday May 16, 2013 at www.sherrardkuzz.com/seminars.php** or call 416.603.0700
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