MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Oh baby...

Family demographics are changing. According to Statistics Canada, the number of single-parent families in Canada has doubled within the last four decades, and today, represent nearly 16 per cent of families. Together with growing numbers of two working-parent families, an aging population and increasing need for elder care, and enhanced awareness of caring for the disabled, the result has been increased stress on employers and employees to find the right balance between work and home.

In every Canadian jurisdiction, human rights legislation recognizes "family status" as a protected ground of discrimination. Interpreted to include the responsibilities and obligations arising out of the parent-child relationship, requests for accommodation on the basis of "family status" have exploded in recent years.

For their part, employers are often caught in a difficult position; pulled between their professional obligation to manage the workplace efficiently, profitably and lawfully, and the desire to recognize and accommodate the *bona fide* requests of valued employees.

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As with so many human rights issues, there are no simple answers and each case must be considered on its own merits. To compound matters, different jurisdictions have taken different approaches to when a family-related obligation will trigger an employer's duty to accommodate under human rights law.

Different Legal Approaches

In British Columbia, the Court of Appeal has set a high threshold. To successfully argue discrimination on the basis of family status, an employee must demonstrate the employer made a change to a term or condition of employment resulting in serious interference with a substantial parental or other family duty or obligation of the employee.

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Other jurisdictions, most notably the federal courts and Canadian Human Rights Tribunal (the "Tribunal"), have disagreed with the British Columbia Court of Appeal. These federal adjudicative bodies take the position an employee should not be required to meet a higher threshold in establishing discrimination on the basis of family status than any other protected ground, such as 'disability'. As such, once an employee has demonstrated he has been discriminated against by virtue of his family obligations, the burden shifts to the employer to explain why the employee's needs could not have been accommodated without imposing undue hardship on the employer.

Three Recent Decisions

Three recent decisions released by the Tribunal provide good illustration of the latter test. Kasha Whyte, Denise Seeley and Cindy Richards were all employed by the Canadian National Railway ("CNR") stationed in Jasper, Alberta. In 2005, the three employees were recalled to work in Vancouver, British Columbia. Unhappy with the prospect of transferring to Vancouver, they requested CNR excuse them on a compassionate basis. They asked to be allowed to remain on layoff until a more suitable opportunity – closer to Jasper – became available.

Two of the employees were single mothers with primary custody of young children and were restricted from moving their children away from their fathers. The third employee also had young children and a husband who worked at CNR with an unpredictable work schedule.

CNR denied the employees' requests but provided them with an extension of time to make appropriate child care arrangements before transferring to Vancouver. Not satisfied with this accommodation, the employees refused the recall and transfer and, as a result, their employment was terminated. They subsequently filed complaints with the Tribunal alleging discrimination on the basis of family status.

At the hearing, CNR argued there had been no discrimination on any ground protected under human rights legislation. Specifically, CNR argued the following:

1. "Parental preferences and lifestyle choices" are not protected under the ground of family status.
2. If the recall and transfer terms under the collective agreement did result in discrimination based on family status, the offer to extend the time by which the employees were required to report to Vancouver constituted reasonable accommodation.
3. If these employees were exempted from the recall and transfer terms due to their parenting responsibilities, this would amount to providing them with "super seniority" under the collective agreement simply because they were parents.
4. Granting these employees "super seniority", would open the "floodgates" to similar requests from other employees who were also parents; a scenario that would result in undue hardship to the company's operations.

The Tribunal rejected each of CNR's arguments.

First, the Tribunal held that the fact that the employees had lost their jobs as a result of their family obligations was sufficient to make out a *prima facie* case of discrimination on the basis of family status. The burden then shifted to CNR to demonstrate it had provided reasonable accommodation. To this end, the Tribunal found the extension of time granted to the employees to relocate to Vancouver was neither *reasonable* accommodation nor a *meaningful* response to their request. The granting of additional time did not address the underlying issues raised by the employees. Nor had CNR met the *procedural* obligation of the duty to accommodate to assess each employee's *individual* circumstances.

Finally, the Tribunal rejected CNR's argument that acceding to the employees' request would be tantamount to giving them "super seniority" based solely on the fact they were parents. According to the Tribunal, this was not sufficient to oust the requirements of the *Canadian Human Rights Act*. Nor had CNR proffered evidence to suggest it was being "overwhelmed" with requests relating to parental accommodation.

> *If asked to accommodate an employee on the basis of family status, an employer should be prepared to undertake and demonstrate an individualized assessment of the circumstances complained of. Failure to do so has been, and will continue to be, the trigger for many successful human rights complaints.*

In the end, the Tribunal awarded each employee damages in the amount of $20,000 for wilful and reckless discrimination and $15,000 for pain and suffering. CNR was also ordered to reinstate the employees with compensation for lost wages. Finally, CNR was ordered to participate in human rights training and ensure appropriate policies, practices and procedures were in place to prevent future discriminatory action.

Lessons Learned

These decisions are a stark reminder to employers that every allegation of discrimination in the workplace merits thoughtful, *individual* and thorough investigation and response.

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In terms of accommodation, the cases suggest an employer will be held to a stringent level of hardship before *undue* hardship will be found. Still, an employee must be open to every option which might alleviate the disadvantage complained of, and an employer is justified in limiting accommodation to the minimum of what is required to meet the employee's need.

All of these issues, and more, will be explored at our upcoming ***HR*eview Breakfast seminar to be held on Thursday March 24, 2011.** We invite you to join us for a thoughtful and practical discussion tailored to employers (see invitation on back page of this Newsletter).

Changes to the Employment Standards Act Mean Ontario is *Open for Business*

As of January 19, 2011, amendments to the *Employment Standards Act* ("ESA") changed the ESA claim process in Ontario. Intended to address the current backlog of some 14,000 ESA complaints, and encourage employers and employees to resolve ESA issues internally, the amendments streamline the process and encourage early settlement. Part of a broader package of reforms to various pieces of legislation, Bill 68 is known as the *"Open for Business Act, 2010"*.

Highlights

Key changes to the ESA include:

- A new ESA complaint procedure.
- New Employment Standards Officer (ESO) powers to engage in mediation and settlement of complaints.
- In the absence of settlement, powers for ESOs to decide matters expeditiously and without undue delay.

Intended to address the current backlog of some 14,000 ESA complaints and encourage employers and employees to resolve ESA issues internally, the amendments streamline the process and encourage early settlement.

New ESA Complaint Procedure

Under the previous system, a complaint filed with the Director of Employment Standards would be assigned to an ESO for investigation and decision on the merits. Under the new regime, before the complaint is assigned to an ESO, an employee is required to alert the employer (in person, in writing or by phone) that he 'believes' a right under the ESA has been or is being violated. At that point the employee and employer are encouraged to take steps to resolve the issue if possible.

If internal resolution is not reached, an employee may file a complaint with the ESA Branch. At this stage, the employee must show the ESA Branch that the employer was notified of the allegations and the information provided to the employer. The employee must also state the manner in which the information was provided and the employer's response. Finally, the employee must fill out a detailed claims form to provide evidence and information in support of the allegations.

Should the employee fail to undertake these steps within six months of filing a complaint, the Director of Employment Standards can refuse to assign the file to an ESO, or an ESO can be deemed to have refused to issue an Order. However, even if an employee fails to take the necessary steps, the Director has discretion to assign a complaint to an ESO. This might occur, for example, when an employee has language difficulty or a disability and the Director exercises his/her discretion to assist the employee.

Mediation and Settlement

Under the previous system, an ESO had authority to gather information and determine the merits of a complaint but not to participate in or encourage settlement. Under the new regime, during the investigation stage or any time before the issuance of a decision, an ESO has authority to assist the parties to settle by way of voluntary mediation. This new provision is intended to offer to the parties a further opportunity to resolve the issue internally. If settlement is reached with the assistance of the ESO, the terms of the settlement are binding on the parties, the complaint is deemed to have been withdrawn, the investigation is terminated and any proceeding in respect of the violation alleged, other than a prosecution, is terminated.

New Powers to Decide

The power of an ESO to decide a complaint has also been expanded. Under the new regime an ESO has authority to require a party to provide certain evidence or information within a specified time period, failing which the ESO may decide the matter on the best information available. This amendment recognizes that not every participant will co-operate in the process and some information may not be available. An ESO may therefore decide the claim where a person served with notice fails to attend, or make available documentation or submissions, as requested.

"Self Help Kit" For Employees

To assist employees navigate the new procedures, the Ministry of Labour has produced a Self Help Kit designed specifically for employees. Available on-line, the Kit includes answers to frequently asked questions as well as sample demand letters and worksheets to assist employees determine whether they are owed money by their employer, and if so, how much. Employers may wish to familiarize themselves with the Kit at: *www.labour.gov.on.ca/english/es/pdf/selfhelp.pdf*

Under the new regime employers are more likely to become aware of and be in a position to remedy an ESA complaint before it escalates to the ESA Branch.

What the Changes Mean for Employers

The amendments bring welcome change for employers. Under the new regime employers are more likely to become aware of and be in a position to remedy an ESA complaint before it escalates to the ESA Branch. The amendments also encourage and foster early settlement among parties most familiar with the particular workplace. As then Minister of Labour, Peter Fonseca, said when announcing the Bill, the changes are meant to *"get money owed into the pockets of hard-working Ontarians faster. And it will help employers to get claims off their books sooner.*

Time will tell whether this new initiative will bear fruit for employers in Ontario. In the interim, for assistance proactively navigating or responding to an ESA issue, please contact a member of Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

DID YOU KNOW?

Effective, October 1, 2012, an employer employing an elect to work employee is required to provide notice of termination or payment in *lieu* of notice and severance pay (if applicable) pursuant to the *Employment Standards Act*. Length of employment prior to October 1, 2012 will be considered for determining the notice period.

To learn more, contact Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Hot Topics in Accommodation: How Far is *Far Enough*?

1. **What constitutes a disability? Are chemical sensitivities, common ailments and 'stress' considered disabilities under human rights legislation?**
2. **Must an employer accommodate a request for time off to observe a religious holy day? Must an employee 'prove' his/her religious observance? How?**
3. **Family status and the request for accommodation: How far does the duty to accommodate extend? What, if any, is an employee's responsibility to participate in the accommodation process?**
4. **Tips, traps and best practices for addressing accommodation requests.**

DATE: **Thursday March 24, 2011; 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 Highway 7 West, Vaughan, ON L4K 5Z7

COST: Please be our guest

RSVP: **By Friday March 11, 2011** to 416.603.0700 or register on-line at *www.sherrardkuzz.com/seminars.php*

HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this *HReview Seminar*.

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