EMPLOYMENT & LABOUR LAW ALERT – ACCOMMODATING FAMILY STATUS – CASE LAW UPDATE (AUGUST 2010)

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Employment & Labour Law Alert

Question: *What is the definition of "family status" and when is accommodation in employment based on family status required?*

Under human rights legislation, employers are prohibited from discriminating against an employee (either through direct action or policy/procedure) based upon his or her family status. Over the last several years, the concept of family status and what requires accommodation has been unsettled. One of the leading cases in this area, the B.C. Human Rights Tribunal's 2004 decision in *Campbell River*, stands for the proposition that something more than ordinary family obligations is required to warrant accommodation and something more was defined as 'a serious interference with a substantial parental or other family duty or obligation'. However in recent years the *Campbell River* approach has been criticized as being too restrictive in comparison to other grounds of discrimination.

One such case that criticizes the *Campbell River* approach is the recent decision of the Canadian Human Rights Tribunal (CHRT) in *Johnstone v. Canada Border Services (2010)*. In this Alert we examine the *Johnstone* case and provide some useful commentary about approaching requests for accommodation on the basis of family status.

Case Law Update: *Johnstone v. Canada Border Services 2010 CHRT 20*

Facts: The facts outlined in the case were as follows: Johnstone was employed as a Border Services Officer (BSO) by Canada Border Services (CBS). To cover operational requirements necessitated by the workplace, the collective agreement was built around a rotating shift plan. The shift plan required full time employees to rotate through 6 different start times over the course of days, afternoons and evenings with no predictable pattern. Employees also worked different days of the week throughout the duration of the schedule, which was based upon a 56 day pattern. Any employee who worked 37.5 scheduled hours per week was considered full-time, anything less than that was considered part-time. In addition to their regular hours, BSO's were required to work overtime, which was often unpredictable.

Johnstone's husband was also employed by CBS and was subject to the rotating shift plan.

In 2002 to 2004, both before and after her first maternity leave, Ms. Johnstone sought accommodation due to her new

child rearing responsibilities. She sought the same accommodation upon her return from her second maternity leave. Both times she was faced with an unwritten CBS policy providing that full-time hours would not be given to those requesting accommodation on the basis of child-rearing responsibilities.

The accommodation Ms. Johnstone sought was three 13-hour static shifts per week, allowing her to maintain her full time status and the associated pension and benefits. Ms. Johnstone's request was based upon her inability to arrange for alternate childcare beyond 3 days per week (she could arrange for alternate childcare through family members for up to 3 days per week). Apart from family assistance, alternative childcare coverage was not possible due to the unpredictable shifts, including overnight shifts.

CBS was willing to provide Ms. Johnstone with static shifts for 3 days per week, 10 hours per day plus 4 hours on a forth day. The result of this was that her employment would be considered part-time. Ms. Johnstone ended up working only the 3-day static shifts since it was not financially beneficial to arrange childcare for the 4-hour shift and she would be considered part-time in any event. At the hearing there was no dispute that CBS had accommodated employees with static shifts and full-time hours for medical or religious reasons.

Ms. Johnstone's complaint that she was discriminated against based upon family status was originally dismissed by the Canadian Human Rights Tribunal (CHRT). Ms. Johnstone initiated judicial review proceedings with the Federal Court of Canada, which remitted the case back to the CHRT. CBS took the position that 'family status' discrimination had not been established on a *prima facie* basis and that even if it had been, the discrimination was justifiable as a Bona Fide Occupational Requirement (BFOR) based upon undue hardship.

It was not disputed that at least two other coworkers of Ms. Johnstone had modified full-time schedules due to their childcare responsibilities.

Analysis: *Did CBS engage in a discriminatory practice, directly or indirectly, in the course of employment, to differentiate adversely in relation to Ms. Johnstone, on the prohibited ground of family status?*

The parties took different positions with respect to what constitutes 'family status' and therefore the Tribunal had to address the meaning of family status before it could determine whether a *prima facie* case was made out.

CBS argued that protection is not provided with respect to family obligations at all, and the only protection relates to one's actual status of being in a family relationship. CBS denied that protection extended to the activities or responsibilities relating to one's status as a parent. The Tribunal disagreed with CBS's interpretation and found that *family status should not be limited to identifying one as a parent or a familial relation to another person but should also include the needs and obligations that naturally flow from that relationship.*

With regards to establishing a *prima facie* case, in the ordinary course, the complainant need only demonstrate that a policy has had some differential impact on her due to a personal characteristic that is protected by the Code.

CBS took the position that the ground of family status carried a higher burden of proof to establish a *prima facie* case than other grounds of discrimination. In support of its position, CBS relied upon *Campbell River* and subsequent decisions that applied *Campbell River*.

Ms. Johnstone relied upon *B v. Ontario (Human Rights Commission*) wherein it was held that *to establish discrimination based upon family status, the claimant only need to demonstrate that they were arbitrarily disadvantaged based upon family status. Ms. Johnstone agreed that the family obligation must be substantial, however if it is, once interference with that obligation is established a prima facie case is made out.*

Ms. Johnstone also relied upon the case of *Hoyt v. CNR* where the CHRT accepted the scope of family status as encompassing obligations of the nature faced by her.

While the Tribunal found that not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence it did agree with Ms. Johnstone and found that the enumerated ground of 'family status' included childcare responsibilities of the type and duration experienced by Ms. Johnstone and in doing so concluded that Ms. Johnstone had made out a prima facie case of discrimination. The Tribunal concluded that CBS engaged in a discriminatory and arbitrary practice in the course of employment that adversely affected Ms. Johnstone on the prohibited ground of family status and that CBS engaged in a discriminatory practice by establishing and pursuing an unwritten policy communicated to and followed by management that affected Ms. Johnstone's employment opportunities and benefits. The Tribunal also found that CBS did not establish a *bona fide* occupational requirement, present a reasonable explanation for or otherwise justify the case of *prima facie* discrimination against it.

What damages was Ms. Johnstone entitled to? In addition to a systemic remedy requiring CBS to cease its discriminatory practices against employees seeking accommodation based upon family status, the Tribunal awarded Ms. Johnstone with lost wages and benefits associated with CBS's conduct, $15,000.00 for pain and suffering and $20,000.00 under the heading of 'special compensation' related to CBS willful and reckless conduct.

What does this mean?

While the *Johnstone* case signals a further shift away from the *Campbell River* approach to family status and accommodation, *it is important to understand the decision in context.* There were a *number of factors that may make this ruling unique to CBS.*

In our view, the decision does not stand for the proposition that all employers are required to accommodate every employee request related to family obligations. However, the decision does suggest that Tribunals may take a broader approach when determining whether a particular employee's family obligations require accommodation, in certain circumstances. It is also important to note that in order to qualify for accommodation it is likely that an employee will first have to exhaust all possible means to accommodate the family obligation themselves before seeking reasonable accommodation from their employer.

Other things an employer should keep in mind with regards to requests for accommodation based upon family status:

- the concept of family status is not limited to parent-child relationships and does extend to other relationships including child-parent relationships (i.e. caring for an aging parent).
- when approached by an employee requesting accommodation based upon family status, determining whether the employee's request properly relates to family status as protected under the Code and whether he or she has taken all reasonable steps to resolve the situation himself/herself will be paramount. For example, leaving work early to attend a child's soccer game is unlikely to give rise to an accommodation obligation. That said, if the request does constitute a request for accommodation under human rights legislation, an employer may need to be flexible respecting leaves of absence, scheduling, and absenteeism policies, short of undue hardship.

Given that the scope of family status appears to be expanding, employers should revisit their policies and assessment processes so they are better positioned to appropriately address accommodation requests.

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