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Discrimination and Family Status: the Federal Court of Appeal Weighs In

The Federal Court of Appeal has decided that discrimination on the basis of family status is established where a work schedule interferes with an employee's childcare obligations, and the employee has been unsuccessful in reasonable efforts to make alternate arrangements.

The decision in *Johnstone v. Canada (Border Services)*, released on May 2nd, 2014, partially allowed the Attorney General of Canada's appeal of the Federal Court's decision to dismiss its judicial review application, which challenged a decision of the Canadian Human Rights Tribunal. While the substantive decision of the lower court remained intact, the remedies flowing from the Tribunal's decision were varied.

The Tribunal had held that Canada Boarder Services Agency (CBSA) had discriminated against Ms. Johnstone on the ground of family status by refusing to accommodate her childcare needs through scheduling arrangements, in violation of the *Canadian Human Rights Act*.

Ms. Johnstone had taken a year-long maternity leave after the birth of each of her two children. Prior to returning from her leaves, Ms. Johnstone had requested modified hours permitting her to work only on days when she could obtain childcare. Ordinarily, she worked a 56-day variable schedule that contained six different start times on different days of the week, with no predictable pattern. Ms. Johnstone's husband also worked for CBSA on the same type of variable schedule that was not generally coordinated with his wife, although there was some overlap.

CBSA refused to provide the requested accommodations, not on the basis that it would constitute undue hardship, but on the basis that it had no legal obligation to do so.

Ms. Johnstone filed a complaint with the Canadian Human Rights Commission, which, on the order of the Federal Court of Appeal, forwarded the complaint to the Tribunal.

The Tribunal held that neither parent could provide childcare on a reliable basis. It decided that the protected ground of "family status" includes family and parental obligations such as childcare. The Tribunal rejected a test for *prima facie* discrimination that required a "serious interference" with family and parental obligations; rather, it held that individuals should not have to tolerate *any* discrimination. It held that CBSA had a legal obligation to accommodate Ms. Johnstone, which it did not fulfill, nor did it provide any reason for its failure to do so. The Tribunal ordered that CBSA cease its discriminatory practice against employees who seek accommodation related to childcare responsibilities, that it consult with the Commission to develop a plan to prevent further incidents of discrimination based on family status in the future, and that it establish written policies, satisfactory to Ms. Johnstone and the Commission, implementing a mechanism whereby family status accommodation requests would be addressed within six months, and which would include a process for individualized assessments of such requests.

Further, CBSA was ordered to compensate Ms. Johnstone for lost wages and benefits from when she first commenced part-time employment until the date of its decision, and to pay Ms. Johnstone $15,000 for pain and suffering and $20,000 for special compensation.

The Attorney General sought judicial review to the Federal Court. The Federal Court dismissed the application, but referred the matter back to the Tribunal to reconsider the quantum of lost wages and to remove CBSA's obligation to consult with Ms. Johnstone in developing a workplace policy.

Regarding the definition of "family status", the Court found that, while no decisions were binding on the Court, judges and adjudicators have defined family status to include parental obligations such as childcare. The Court also reiterated that human rights legislation must be interpreted in a broad, liberal, purposive, flexible and adaptive manner if it is to be fully effective in preventing parents from being marginalized in the workplace by their decision to have children. The Court then considered the French language equivalent of "family status" to be indicative of Parliament's intention of a broad interpretation, which includes childcare obligations. Finally, the Court held that the *Act* is intended to address the types of childcare needs that are not reflective of personal choices but rather are of an immutable or constructively immutable characteristic, "such as those that form an integral component of the legal relationship between a parent and a child," which a parent cannot legally neglect under the *Criminal Code* and the Quebec *Civil Code*.

Regarding the legal test for finding a *prima facie* case of discrimination on the protected ground of family status, the Federal Court of Appeal stated that a "serious interference" with "substantial" parental obligations is *not* required. Instead, the Court stated that in order to make out a *prima facie* case of discrimination in employment on the protected ground of family status resulting from childcare obligations, the applicant must demonstrate the following:

- a child is under his or her care and supervision, either as a parent or as a *de facto* caregiver;
- the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
- he or she has made reasonable efforts to meet those childcare obligations but no alternative solution is reasonably accessible (this includes looking to his/her spouse and childcare service providers) and,
- the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation. This requires a fact-specific regard for the context in which the childcare obligations conflict with the work schedule.

The Court declined to state categorically what specific types of evidence would be required to meet all four elements of the test, providing instead for a case-by-case determination.

In applying the test to the instant case, the Court found the applicant to have met all of the four elements, and the Tribunal's decision was therefore deemed to be reasonable.

Turning to the Attorney's General's challenges to the remedies awarded by the Tribunal, the Court agreed that Ms. Johnstone was not entitled to compensation for wages lost during a period in which she was on unpaid leave.

The Court stated that the *Act* permitted the Tribunal to order CBSA to develop family status policies in consultation with the Commission, but did not necessarily require that the policies be deemed satisfactory by the Commission. Accordingly, CBSA was ordered to consult with the Commission, and the issue whether the Commission could be granted an implicit power of approval was left to be decided at a later date.

Finally, the Court declined to vary the award of special damages, as it agreed that CBSA had engaged in "wilful and reckless conduct" by failing to follow a previous binding Tribunal decision dealing with similar issues.

In addition to the decision in *Johnstone*, the Federal Court of Appeal also released its decision in *Canadian National Railway Co. v. Seeley*, regarding CN's judicial review of the Tribunal's finding that it had discriminated against Denise Seeley.

Ms. Seeley and her husband, also a CN employee, had one child in 1999 and another in 2003. In 2005, Ms. Seeley was transferred from her home in Brule to report to work at a

terminal in Vancouver. Noting that her husband would be unable to care for the children given his work schedule, and that she would be unable to take the children to Vancouver, she sought accommodation from CN in the form of permission to refuse the transfer. CN refused and, instead, it ultimately informed Ms. Seeley that her seniority rights had been forfeited and her employment terminated.

Ms. Seeley filed a complaint with the Tribunal, which found that the protected ground of family status included the childcare obligations of a parent. Further, the Tribunal opted to follow the test for a *prima facie* case as applied in *Johnstone*. The Tribunal found that, in demonstrating that she could find no alternate childcare arrangements, Ms. Seeley had met the test.

With regards to CN's conduct, the Tribunal found that it had not demonstrated an inability to accommodate Ms. Seeley to the point of undue hardship and had not fulfilled the procedural component of the duty to accommodate. Thus, the Tribunal ordered that CN ensure the discriminatory practice does not continue, that it reinstate Ms. Seeley and her seniority with compensation, and pay Ms. Seeley $15,000 for pain and suffering and $20,000 for special compensation.

CN was unsuccessful in its appeal to the Federal Court, which agreed with the Tribunal's decision in its entirety. At the Federal Court of Appeal, the Court adopted the test it had established in *Johnstone* and, in applying that test, honed in on the last two elements: whether Ms. Seeley made reasonable efforts to find alternative solutions, and whether her employment obligations interfered with her parental obligations in more than a trivial manner.

The Federal Court of Appeal found that CN did not respond to Ms. Seeley's inquires for details about the transfer such as its duration, location, and associated shifts and housing, and with the limited information she was provided, she would have had "significant difficulty" in making alternative reasonable childcare arrangements. On the second question, the Court stated that it was obvious that requiring Ms. Seeley to leave her children behind would interfere with her legally-required parental obligations in a manner that is more than trivial or insubstantial.

The Court went on to establish that CN had not demonstrated that accommodating Ms. Seeley would result in undue hardship. In light of the fact that CN had not addressed Ms. Seeley's concerns in any meaningful way, did not offer her the various forms of accommodation that it had provided to other employees to allow them to remain at their home terminal, and did not demonstrate that it considered the applicability of the seniority provisions in the collective agreement to the facts in any meaningful way, CN had discriminated against Ms. Seeley.

The Court refused to quash the $20,000 award for special compensation on the basis that CN's failure to provide Ms. Seeley with all the information she requested regarding the transfer constituted reckless conduct.

The decisions in *Johnstone* and *Seeley* clarify the law with respect to family status discrimination and provide employers with the clear test for establishing a *prima facie* case of discrimination where an employee requests accommodation to address his or her childcare obligations. They also emphasize that there is an obligation on the employee to take reasonable steps to secure childcare where possible, before a *prima facie* case of discrimination will be found.

Suncor v. Unifor: Universal Random Drug and Alcohol Testing Policies

In a decision released this Spring, an arbitration board ruled that Suncor Energy Inc.'s drug and alcohol testing policy was in violation of employees' privacy rights.

In May of 2012, when Canadian oil and gas producing company, Suncor, announced its intention to implement a random drug and alcohol testing policy that would apply to employees in "safety sensitive" positions, Unifor (formerly the Communications, Energy and Paperworkers Union), Local 707, grieved immediately.

The Union successfully defended its position in the Alberta courts to prevent Suncor from rolling out its policy prior to a board of arbitration's determination of its legitimacy on the merits.

At arbitration, Suncor submitted that the policy would involve a computer-based random selection of employees and that the process of testing would involve urine samples. It also indicated that the policy was a further step in a series of policy changes it had made over the years in order to avoid accidents at its industrial worksite, where the work was dangerous and the risk of injury was high. It presented statistics showing over 100 safety incidents, including three fatalities involving workers under the influence of alcohol or drugs in the last two years. It also asserted that, as the employees already faced a similar test, the intrusion into workers' privacy was minimal. Finally, it made the argument that, while on the worksite, employees ceded some of their privacy rights to the exercise of management rights, consistent with the express terms of the collective agreement.

The Union submitted that this small margin of accidents could not justify what it saw as a violation of privacy rights enshrined in the collective agreement, the common law, the *Canadian Charter of Rights and Freedoms*, the *Personal Information Protection Act* and the *Alberta Human Rights Act*. The policy was not part of the collective bargaining

negotiations with the Union and its implementation would therefore be a unilateral employer action, which had to meet a reasonableness standard.

In its award, the Board acknowledged the Supreme Court of Canada's decision in *Irving Pulp & Paper Ltd.*, which endorsed the "balancing of interests" approach for determining the interplay between an employer's right to advance safety interests and an employee's right to privacy. Thus, the Board sought to ascertain the reasonableness of the policy by determining whether the benefit gained by Suncor in its universal random drug testing by urinalysis outweighed the infringement upon employees' privacy rights.

The Board determined that Suncor did not demonstrate that urinalysis was able to confirm current impairment, and it could not gauge whether an employee was currently fit for work; therefore, its claim to improving workplace safety was unfounded. Rather, this method of testing would implicate employees who were fit for work, but tested positive due to activities outside the workplace. This inequity made the policy unreasonable.

Suncor intended to test at least 50 percent of its 2771 employees. This number was found to be disproportionately greater than the threat that drug and alcohol impairment posed to the workplace, a finding that also made the policy appear unreasonable.

Further, Suncor did not demonstrate that it had a problem sufficient to justify random alcohol testing in these circumstances. The Board considered the number of impairment-related incidents and found them to have been few in number, not to have occurred in the bargaining units to which the proposed policy would be applied, and to lack the necessary casual connection between the impairment and the accident. The Board also looked at the evidence Suncor presented regarding impairment-related incidents in the community and in "for cause" testing instance, and still did not find a sufficient problem to justify the testing.

In addition, Suncor did not provide sufficiently detailed information to explain the evidence that it presented to compare the number of positive testing results at the site in question with the number of positive testing results at its other sites across the nation.

Finally, Suncor had instituted other alcohol and drug testing policies over the years, and the evidence demonstrated that positive test results were on the decline. Therefore, the Board found the rationale of an "endemic problem" or "out-of-control" culture in this workplace to be unreasonable.

The grievance was allowed and the Board found the proposed policy to be an unreasonable exercise of management rights. It did, however, accept the wisdom of "for cause" testing when the need is triggered by an event, and the test is conducted in a manner that will detect current impairment. Finally, while the Board acknowledged that it did not have the jurisdiction to determine what a reasonable policy would look like, it endorsed the Drug and Alcohol Risk Reduction Pilot Project (DARRPP) principles for developing drug and alcohol testing, which include:

- a time-limited trial project;
- measurement of effects and results;
- maintaining respect of the dignity of employees;
- a dispute solution mechanism;
- a clear and unequivocal impairment prohibition;
- consistent training; and,
- the use of oral fluid as the testing method.

This decision reinforces that, in order to implement a universal random drug and alcohol testing policy, employers must demonstrate much more than the safety-sensitivity of the workplace or position. In fact, employers must demonstrate that the policy will be minimally intrusive to employees' privacy and that the workplace in question struggles with an endemic problem of substance abuse.

Legislative Update: Leaves to Help Families

In the Spring 2013 issue of EMPlawyers Update, we informed readers about Bill 21, the *Employment Standards Amendment Act* (Leaves to Help Families), 2013, which amends the *Employment Standards Act*, 2000 (*ESA*) to create the following leaves:

- Family caregiver leave: up to eight weeks of unpaid, job-protected leave for employees to provide care or support to a family member with a serious medical condition.
- Critically ill child care leave: up to 37 weeks of unpaid, job-protected leave to provide care to a critically ill child.
- Crime-related child death or disappearance: up to 52 weeks of unpaid, job-protected leave for parents of a missing child and up to 104 weeks for parents of a child who has died as a result of a crime.

After amendments were made to the definitions of "qualified health practitioner", "serious medical condition" and "child", and after the removal of the requirement that leave be taken in entire weeks, Bill 21 received Royal Assent on April 29th, 2014 and will come into force on October 29th, 2014.

In anticipation of the coming into force of the *Act*, employers should review their leave policies and procedures and make revisions accordingly.