Evolution of the Duty to Accommodate:

Attorney General of Canada v. Fiona Ann Johnstone and Canadian Human Rights Commission, 2013 FC 113.

Winter 2013

COX & PALMER

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A decision last week from the Federal Court[1] upholding a successful human rights case[2] confirms that employers must accommodate reasonable childcare-related requests from employees. Why is this noteworthy? It has potentially significant consequences for employers in how they deal with employees' requests for accommodation, not only for childcare, but other types of care that may now fit within the definition of "family status".

THE FACTS

Fiona Johnstone ("Johnstone") and her husband, Jason Noble, worked with the Canada Border Services Agency ("CBSA") as full-time employees. Johnstone began work as a part-time customs inspector in April 1998, but within five months her position was converted to full-time border services officer and became indeterminate in 2001. Both she and her husband worked a rotating shift schedule; while their schedules overlapped 60% of the time, they were not coordinated. In January 2003, following the birth of her first child, she requested accommodation to continue full-time employment with fixed daytime shifts, as her and her husbands' schedules meant they could not care for their children on a reliable basis, and the irregular hours and days meant they were unable to find alternate care in a daycare or from family members. Johnstone's request was denied and she was offered part-time work on a fixed schedule. It was made clear to her that CBSA's (unwritten) policy was that fixed shifts were only available to part-time employees, up to a maximum of 34 hours per week. After returning to work as a part-time employee, Johnstone made two different requests to remain on full-time status, but her requests were denied. Full-time employment carried not only extra pay, but the additional benefits of opportunities for training and advancement, and pension.

Johnstone renewed her request in December 2005 after the birth of her second child, and was again refused. She filed a human rights complaint pursuant to sections 7(b), 10(a) and 10(b) of the *Canadian Human Rights Act,* RSC 1985, c. H-6 (the "Act") in April 2004, alleging discrimination on the basis of family status in matters relating to employment.

Following other decisions[3,4], the complaint eventually proceeded to a hearing before the Canadian Human Rights Tribunal (the "Tribunal"). After hearing evidence from both parties, the Tribunal allowed Johnstone's complaint, finding that a prima facie case of discrimination had been proven, and that the CBSA had discriminated against Johnstone on the basis of family status by failing to accommodate her and engaging in adverse differential treatment based on her family status. The Tribunal

(1) http://decisions.fct-cf.gc.ca/en/2013/2013fc113/2013fc113.html
(2) http://www.canlii.org/en/ca/chrt/doc/2010/2010chrt20/2010chrt20.html
(3) 2007 FC 36
(4) 2008 FCA 101

also found that the CBSA had not proven the undue hardship necessary to exempt it from its obligations to accommodate its employee. The Tribunal ordered CBSA to:

1. cease discriminatory practices against employees seeking accommodation based on family status for the purpose of childcare responsibilities;
2. consult with Johnstone and the Canadian Human Rights Commission to develop a plan to prevent further incidents of such discrimination;
3. establish written policies including processes for individualized assessments to address family status accommodation requests within six months;
4. compensate Johnstone for lost wages and benefits, including overtime and pension contributions;
5. ensure Johnstone be entitled to pension contributions as a full-time employee during the period in question; and
6. pay Johnstone $15,000 for general damages for pain and suffering and $20,000 for special compensation.

The CBSA applied to the federal court for judicial review, contesting whether the term "family status" in the Act includes parental childcare obligations. The CBSA submitted that childcare is not meant to be included in the definition of "family status", challenged the Tribunal's legal test for finding prima facie discrimination, and contested several remedial orders of the Tribunal.

THE DECISION

Justice Mandamin at the Federal Court reviewed the Tribunal's determinations on a standard of reasonableness and concluded that the Tribunal reasonably found parental childcare obligations fall within the scope and meaning of "family status" in the Act, and that the Tribunal applied the proper legal test for its finding of prima facie discrimination on the basis of family status. He also found that the Tribunal did not generally err in the remedies, but erred in part as it failed to reduce her compensation award for a period of time when Johnstone chose unpaid leave to accompany her spouse on relocation.

The decision notes that the inclusion of family childcare obligations within the meaning of "family status" has been adopted in other forums and jurisdictions, and that, considering this, along with the scope of the ordinary meaning of the words, and keeping consistent with the objects of the Act, the Tribunal's decision was reasonable.

One point to note is that the CBSA accommodated those seeking accommodation for medical and religious reasons, but not family status, which demonstrated its operational ability to accommodate the request for fixed shifts at full-time hours. Justice Mandamin noted that this request stems from genuine need, and is not simply a product of lifestyle choices – family obligations are a legitimate need and not, as CBSA policy implied, a result of choices that individuals make.

LESSONS FOR EMPLOYERS

This decision provides some clarity to employers regarding types of accommodation that will be required to comply with human rights legislation. Employees must still show that they pursued all other reasonable avenues to resolve their issue relating to family care before requesting accommodation, and employers will still only be required to accommodate to the point of "undue hardship". Employers can expect challenges as the sheer number of employees with childcare and eldercare responsibilities will likely mean a high volume of accommodation requests that may quickly outnumber the availability of accommodating shifts. Employers may wish to consider implementing policies to deal with the predicted increased demand for these types of accommodation as many of your employees will continue to struggle with the demands of caring for both young children and elderly parents. Although the facts of this case are specific to the context of shiftwork and irregular schedules, this decision could have a broader impact on employers as our culture changes its perceptions on work-life balance.

Note: "Family status" is a protected ground in the federal Act, which applies to employers under federal jurisdiction, but is not a protected ground in all provinces. In Newfoundland and Labrador, Prince Edward Island, and Nova Scotia "family status" is a prohibited ground of discrimination, but is not in New Brunswick. If you have any questions about whether this applies to you, please contact one of the lawyers listed here.

Contact

Please direct questions or suggestions to:

New Brunswick
Trisha Gallant-LeBlanc
506.462.4764
tgallant-leblanc@coxandpalmer.com

Newfoundland & Labrador
Chris Peddigrew
709.570.5338
cpeddigrew@coxandpalmer.com

Nova Scotia
Alison Bird
902.491.4138
abird@coxandpalmer.com

Prince Edward Island
Alanna Taylor
902.629.3921
ataylor@coxandpalmer.com