LABOUR AND EMPLOYMENT

EXPANDING EMPLOYER RESPONSIBILITIES IN ONTARIO REGARDING EMPLOYEE PARENT AND FAMILY OBLIGATIONS

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A recent decision of the Federal Court of Appeal in connection with a decision of the Canadian Human Rights Tribunal has attempted to clarify the obligation of an employer to accommodate employee needs in the context of "family status". In addition, the Ontario Employment Standards Act (the "ESA") will soon be amended to expand and provide statutory protection to additional types of leaves of absence.

A. Attorney General of Canada v. Fiona Johnstone and Canadian Human Rights Commission

The Facts of the Case

The Canadian Human Rights Act defines the prohibited grounds of discrimination such as race, national and ethnic origin, colour, religion… and includes "family status". Section 7 of the Act provides "it is a discriminatory practice, directly or indirectly,… (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Ms. Johnstone was an employee with the Canadian Border Services Agency where her husband also worked as a supervisor. They had two young children. Both husband and wife were facing work scheduling problems such that childcare provided by family members was only available for certain parts of the work week and other alternatives were unworkable. Ms. Johnstone requested that she work three 13 hour day shifts to allow her to continue to work and be considered a full-time employee. The benefits afforded to part-time employees was significantly less than that afforded to full-time employees. Her employer rejected the request and did not deviate from the general scheduling rules applied to all employees on the basis that it had "no legal obligation to accommodate Ms. Johnstone's childcare responsibilities". The employer did not argue that making such a change would cause the employer undue hardship.

The Federal Court of Appeal Decision

The Court concluded that the employer discriminated against Ms. Johnstone on the basis of family status noting that family status includes childcare responsibilities. The Court stated that "it is generally accepted that human rights legislation must be given a broad interpretation to ensure that the stated objects and purposes of such legislation are fulfilled. As a result, a narrow restrictive interpretation that would defeat the purpose of eliminating discrimination should be avoided". The Court went on to assert that without reasonable accommodation many parents would not be able to participate in the workforce. The Court made it clear that the childcare obligations that were protected under Human Rights legislation were those obligations which a parent cannot neglect without creating legal liability. For example, a parent cannot leave a toddler unattended at home, but rather must provide proper supervision and protection for such child. The Court clarified, however, that the human rights protection did not extend to personal family choices such as family trips, extra-curricular sports and other similar activities.

Test for Discrimination under "Family Status"

The Court referenced the two stage test for making a determination of discrimination on the prohibited ground of family status:

1. A *prima facie* case of discrimination must be made out by the complainant; and
2. A shift in onus to the employer to show that the policy or practice is a bona fide occupational hardship, and that accommodation would amount to undue hardship for the employer.

To assert a *prima facie* case of workplace discrimination relating to childcare obligations and the prohibited ground of family status, the Court cites four factors that must be proven by the complainant:

i. That a child is under the employee's care or supervision;
ii. That the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
iii. That the employee has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such solution is reasonably accessible; and
iv. That the impugned workplace rule interferes with the fulfillment of the childcare obligation in a manner that is more than trivial or insubstantial.

Applying the Test

The Court made it clear that the above test requires a complainant to show that reasonable efforts have been expended to meet childcare obligations within means available to the parent(s) and that neither the employee nor their spouse can reasonably meet the parent(s) legal obligations of childcare while continuing to work. The complainant should also show that available childcare services or alternative arrangements are not reasonably accessible. The Court also made it clear that the employer's workplace rules or working conditions must interfere with the fulfillment of the legal childcare obligations in a manner that is "more than trivial or unsubstantial".

The Court emphasized that these matters should be decided on a case by case basis and are generally fact specific. While the primary obligation to balance work and family responsibilities rest with the parent(s), who must utilize all reasonable alternatives before seeking a modification of their working conditions, employers may be required to actively engage and assist their employees in a meaningful way in reconciling the often difficult balance between work and child obligations should the circumstances warrant it.

Ontario employers should anticipate that the reasoning applied in the Johnstone case will be applied with respect to cases decided under the Ontario Human Rights Code.

B. Changes to the Ontario Employment Standards Act

Effective October 29, 2014, the Employment Standards Act will create three new statutory leaves of absence:

1. Family caregiver leave;
2. Critically ill childcare leave; and
3. Crime related child death or disappearance leave.

Family Caregiver Leave

Employees who need to care for or support an individual described in section 49.3(5) of the ESA who has a serious medical condition can take up to 8 weeks of unpaid, job-protected leave each calendar year. There is no minimum period of employment required before an employee is entitled to family caregiver leave.

Section 49.3(5) states that family caregiver leave applies to:

1. The employee's spouse;
2. A parent, step-parent, or foster parent of the employee or the employee's spouse;
3. A child, step-child or foster child of the employee or the employee's spouse;
4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse;
5. The spouse of a child of the employee;
6. The employee's brother or sister;
7. A relative of the employee who is dependent on the employee for care or assistance;
8. Any individual prescribed, by regulation, as a family member for the purpose of this section.

"Serious medical condition" is not defined, but would include chronic or episodic conditions, and must be certified by a qualified health practitioner.

Critically ill Child Care Leave

An employee who has been employed by his or her employer for at least 6 consecutive months can take up to 37 weeks of unpaid, job-protected leave to care for or support his or her critically ill child if a qualified health practitioner issues a medical certificate, which:

(a) States that the child is critically ill and needs parental care or support; and
(b) Outlines the period during which the child needs parental care or support.

"Child" includes step-child, foster child, or a child who is under legal guardianship of the employee, and who is under 18 years of age.

A "critically ill child" is one whose baseline state of health has significantly changed and whose life is at risk because of an illness or injury. Whether a child meets this definition is to be determined by a qualified health practitioner who is required to provide a medical certificate.

Employees are required to give their employers advanced written notice of their intent to take this leave along with a written plan that includes the weeks on which leave will be taken. An employee may be required to produce a copy of the medical certificate qualifying the child as "critically ill."

The ESA will include additional details with regard to extending the leave, limitation periods, and situations involving more than one critically ill child.

Crime-Related Child Death or Disappearance Leave

An employee who has been employed by his or her employer for at least 6 consecutive months can take up to 104 weeks of unpaid, job-protected leave following the crime-related death of his or her child, and up to 52 weeks of unpaid, job-protected leave following the crime-related disappearance of his or her child.

"Child" includes step-child, foster child, or a child who is under the legal guardianship of the employee, and who is under 18 years old.

Generally, the employee will be required to take the leave in a single period, subject to certain exceptions.

Employees are required to give their employers advanced written notice of their intent to take this leave along with a written plan that includes the weeks on which leave will be taken. An employee may be required to provide evidence to demonstrate that they qualify for the leave.

The ESA will include additional details with regard to limitation periods and situations where the circumstances change.

What This Means for Ontario Employers in a Non-Unionized Workplace

These new statutory leaves of absence will take effect on October 29, 2014.

Employers should discuss these changes with senior management and review how these changes affect their workplace handbooks, employee contracts, training programs and collective bargaining agreements.

What This Means for the Unionized Workplace in Ontario

These new ESA provisions will become, in effect, the new minimum standard benefit for unionized employees; whether or not all or part of these provisions are contained in an existing collective agreement. Unionized employers should anticipate that the relevant union may

attempt to negotiate in any future collective agreement for member benefits in this expanded area of leaves of absence greater than those which come into effect from October 29, 2014.

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