EMOND HARNDEN
LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

Canadian Human Rights Tribunal delivers landmark decision on "family status" under the Canadian Human Rights Act

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In what has been hailed as a groundbreaking decision, the Canadian Human Rights Tribunal recently ruled that the Canada Border Service Agency (the "CBSA") discriminated against Fiona Johnstone by failing to provide accommodation that would allow her to meet her child care obligations. In *Johnstone v. Canada Border Services* (August, 2010), the Tribunal held that child care obligations fall within "family status", a prohibited ground of discrimination under the *Canadian Human Rights Act*. The Tribunal ordered the employer to cease its discriminatory practices against employees that seek accommodation on this basis, and to establish written policies which will address requests for such accommodation.

Fiona Johnstone, a customs inspector employed by the CBSA at Toronto's Pearson International Airport, took maternity leave in 2003. When she returned to work, she faced the challenge of finding child care in circumstances where both she and her spouse, a fellow customs officer, were required to be available for 24-hour-per-day rotating shifts. Johnstone asked her employer to accommodate her with three fixed 13-hour shifts per week so she could obtain child care for the time she spent at work.

The employer refused, citing its accommodation policy that restricted fixed shifts to 34 hour per week. The employer offered her fixed shifts over four days per week to a maximum of 34 hours. Eventually Johnstone settled on three 10-hour shifts per week because she determined it would not be cost-effective to come to work for one four-hour shift.

Dissatisfied that she had been forced to accept part-time employment in return for securing the fixed shifts, Johnstone complained to the Canadian Human Rights Commission. Although the Investigator appointed to look into her complaint recommended that the Commission proceed, the Commission instead dismissed her claim. Johnstone commenced an application to the Federal Court to quash the Commission's decision. The Federal Court allowed Johnstone's application and sent the matter back to the Commission to be decided on the merits. (see "Federal Court quashes HR Commission decision to drop parental shift work accommodation complaint").

"FAMILY STATUS" INCLUDES CHILD CARE OBLIGATIONS

The Tribunal first considered the meaning of "family status" under the *Canadian Human Rights Act*(the "Act") and whether the term encompassed child care obligations. Although the case law addressing this issue was inconsistent, the Tribunal applied a broad, purposive interpretation of the

Act, and found that:

> ...the underlying purpose of the *Act* as stated is to provide all individuals a mechanism "to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society..." *It is reasonable that protections so afforded include those naturally arising from one of the most fundamental societal relationships that exists, that of parent to child*. [Emphasis Added]

A *PRIMA FACIE* CASE

Having found that child care obligations fell within the meaning of family status, the Tribunal then considered whether Johnstone had established *a prima facie* case of discrimination. Although the employer argued that there is a high threshold to meet in order to establish discrimination on the basis of family status, the Tribunal applied the lower threshold test from *Morris v. Canada*(2005):

> ...to establish a *prima facie*case the Complainant need only demonstrate that a policy has some differential impact on her due to a personal characteristic which is recognized as a prohibited ground of discrimination.

The Tribunal stated that an individual should not have to tolerate some "unknown level" of discrimination before being afforded the protection of the *Act*. The Tribunal found that a *prima facie*case had been established: the CBSA engaged in a discriminatory and arbitrary practice in the course of employment that adversely differentiated Johnstone on the basis of her family status.

NOT A BONA FIDE OPERATING REQUIREMENT

Pursuant to the Supreme Court of Canada's seminal decision in *Meiorin*, once it is established that a workplace standard is *prima facie* discriminatory, the onus shifts to the employer to prove that the impugned standard is a *bona fide*operating requirement (a "BFOR"). The test from *Meiorin*requires an employer to establish on a balance of probabilities the following three requirements:

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate the individual employees sharing the characteristics of the

> claimant without imposing undue hardship upon the employer.

The Tribunal expanded on the concept of "undue hardship" by citing the decision in *Council of Canadians with Disabilities v. Via Rail Canada Inc.* (S.C.C. – 2007):

> ...undue hardship is reached when reasonable measures of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain.

The CBSA attempted to establish undue hardship by presenting evidence that suggested that the accommodation of Johnstone would open the floodgates to such requests, and that half of the employees at Pearson International Airport would seek similar accommodation. The Tribunal rejected this defence stating that "impressionistic evidence of increased expense will not generally suffice" in establishing undue hardship. It noted that other than what was submitted in preparation of the hearing, "no analysis has been done, no scientific study undertaken, no consultants brought in to look at accommodation issues..."

In the absence of any evidence to the contrary, the Tribunal found that the CBSA could not establish that its discriminatory practice was a BFOR, or that accommodating Johnstone would create undue hardship. It awarded Johnstone lost wages and benefits from January of 2004. In addition, the Tribunal awarded Johnstone $15,000 for damages for pain and suffering, as well as special compensation in the amount of $20,000 for the CBSA's willful and reckless conduct.

In our view

The decision in *Johnstone* provides much needed clarity in respect of an employer's legal obligation to accommodate the child care obligations of employees. These obligations are protected under the *Act* (as well as the provincial Human Rights Codes) under "family status". Employers should develop policies for addressing requests for accommodation for child care obligations. Although the policies will assist the employer in addressing the accommodation requests consistently, it is also important for employers to address each request for accommodation on an individual basis. Both Johnstone and CBSA have filed applications for judicial review.

For further information, please contact Jennifer Birrell at (613) 940-2740.