
Hot Topic Update: Accommodation in the Workplace

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Session Overview

- Family status – where are we now?
- Accommodating religious observances
- Accommodating aberrant behaviour in the workplace
- Update on recent HRTO damage awards for failure to accommodate

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Family Status Accommodation

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Family Status – Establishing a *Prima Facie* Case for Discrimination

- Two conflicting approaches
- British Columbia *Campbell River* approach
 - High threshold test
 - A change in a term or condition of employment
 - Resulting in a serious interference with
 - A substantial parental or other family duty or obligation

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Family Status – Establishing a *Prima Facie* Case for Discrimination

- Federal approach
 - Inappropriate to require a higher standard of proof
 - All protected grounds should be treated equally, same test
 - Any adverse effect test
- *Hoyt* approach:
 - complainant had the status of a parent and was incurring the duties and obligations attached thereto; and
 - duties and obligations, combined with an employer rule, render the complainant unable to participate fully and equally in employment

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Canada Border Services Agency v. Johnstone

- **Facts:**
 - Johnstone, a border services officer, worked rotating shifts
 - On return from maternity leave faced challenges finding child care
 - Her spouse, also a CBSA employee, worked rotating shifts
 - Johnstone requested accommodation – full-time employment working fixed day shifts
 - CBSA unwritten policy limited fixed day shifts to part-time employment
 - Johnstone was forced to accept part-time employment in return for securing fixed shifts

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Canadian National Railway v. Seeley

- **Facts:**
 - Seeley, freight train conductor on lay-off, lived in Jasper, Alberta
 - Recalled to work to cover a shortage in Vancouver
 - Advised employer she could not relocate due to child care obligations and sought accommodation
 - CN granted initial extension for when Seeley was required to report to work in Vancouver
 - CN later dismissed Seeley for failing to relocate

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Tribunal Findings in *Johnstone* and *Seeley* – 2010

- Family status includes child care obligations
- Tribunal applied low threshold test for determining whether there was a *prima facie* case of discrimination
- Neither CBSA nor CN were able to demonstrate that accommodation would cause undue hardship
- CBSA and CN applied for judicial review

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Judicial Review of *Johnstone and Seeley* – 2013

- Federal Court upheld the Tribunal decisions
- Tribunal's definition of family status was reasonable and consistent with previous law
- Tribunal applied correct test
 - Does employment rule interfere with an employee's ability to fulfill substantial parental obligation in any realistic way?
- Tribunal noted child care obligations must be of substance and complainant must have tried to reconcile family obligations with work obligations
- CBSA and CN have filed for appeal of decisions

Family Status in Ontario

- OHRC defines family status as being in a parent and child relationship
- Ontario arbitrators have applied a blended approach to determine *prima facie* discrimination
- Recent decision from HRTO involving elder care
 - *Devaney v. ZRV Holdings Ltd.* (2012)
 - Reviews existing tests and adopts a new test

Devaney v. ZRV Holdings Ltd. **(2012 – HRTO)**

▪ **Facts:**

- Devaney, architect with 27 years of service, primary caregiver of ailing mother
- Frequently late, absent or worked from home due to extensive care giving responsibilities
- Employer insisted Devaney be present at office daily between business hours of 8:30 a.m. to 5:00 p.m.
- Employment terminated due to failure to work out of employer's office
- Devaney filed HR complaint alleging discrimination on the basis of family status

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Devaney v. ZRV Holdings Ltd. **(2012 – HRTO)**

▪ **Findings:**

- HRTO reviewed existing legal tests, adopted a new test
 - Focused on distinction between the needs and preferences of employees with caregiving responsibilities
- Required to demonstrate:
 - Employee is adversely affected by an employment policy
 - Adverse impact relates to employee's needs rather than employee's choice or preference
- Employer's strict office attendance policy resulted in *prima facie* discrimination on basis of family status
 - Adverse impact as a result of Devaney's status as a caregiver for his elderly mother

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Devaney v. ZRV Holdings Ltd. **(2012 – HRTO)**

▪ **Findings:**

- Employer had a duty to consider and explore accommodation possibilities even though Devaney never made a formal request for accommodation
- Accommodating Code-related absences did not result in undue hardship
- HRTO ordered:
 - \$15,000 for injury to dignity, feelings and self-respect
 - Employer develop and implement a workplace human rights policy, that includes duty to accommodate and distribute policy to partners and staff
 - Provide mandatory human rights training, including duty to accommodate to supervisory and human resources staff

Practical Implications

- Have a documented accommodation program/policy
- Accommodation policies cannot be applied in a blanket way
- Requests for accommodation must be considered on an individual basis
- Engage in an open dialogue with employees
- Employees have an obligation to take reasonable steps to self-accommodate
- Employer's obligation is to provide reasonable accommodation
- Document the accommodation process

Accommodating Religious Observances

Accommodating Religious Observances

- OHRC protects from discrimination based on “creed”, interpreted to mean “religion”
- Requirements if accommodation requested
 - *Bona fide* religion
 - Sincere belief in the religion
 - Undue hardship
- Common issues
 - Dress code
 - Break policies
 - Flexible scheduling
 - Religious leave

Zienelabdeen v. Best Buy Canada Ltd. **(2013 – HRTO)**

▪ **Facts:**

- Employee, a practicing Muslim, required time off on Fridays to attend prayers
- General Manager permitted employee to leave work and return late from his lunch to attend prayers
- Employee wanted all of Friday off, or to not be scheduled before 2:30 p.m. to attend his community mosque
- Employee alleged discrimination with respect to employment because of creed

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Zienelabdeen v. Best Buy Canada Ltd. **(2013 – HRTO)**

▪ **Findings:**

- No evidence that employee clearly requested to attend mosque in his own language and own community
- Despite preference to have Fridays off at least until 2:30 p.m., actual need was to be able to be absent from work to attend mosque for set period of time in the middle of the day
- Not a requirement for employer to pay an employee for time off work for religious observance
- As time off work was permitted for religious observance to attend prayers application was dismissed

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Practical Implications

- Investigate the particular needs, practices or requirements of employee's religion
- Ensure belief and practice is consistent with religious group even if not widely held by group
- Provide employee with options for making changes to their work schedule
- Allow for open dialogue to discuss options before and following accommodation
- Document accommodation process

Accommodating Aberrant Behaviour in the Workplace

Agropur Division Natrel and Teamsters, Local 647 (2012 – Kaplan)

▪ **Facts:**

- Employee with 10 years service was diagnosed with “severe mental health conditions”
- Went on STD and spent 2 months at a Centre for traumatic stress recovery. Released in June with expectation could return to work in August
- Employer discussed accommodation with Union
- Employee’s behaviour became erratic and threatening
- Employer felt employee’s behaviour posed a real risk to the health and safety of employees
- Employer terminated employee and encouraged him to apply for LTD

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Agropur Division Natrel and Teamsters, Local 647 (2012 – Kaplan)

▪ **Findings:**

- Individual who suffers from “occasional brief psychotic outbreaks” cannot be reinstated
- Risks to workplace and co-workers far outweighed benefits to the employee
- Employer had established undue hardship
- Ordered reinstatement of employee solely to provide opportunity to apply for LTD
 - Employer directed to ensure insurer treats application as though grievor were continuously employed

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Mackenzie v. Jace Holdings Ltd. **(2012 – BCHRT)**

▪ **Facts:**

- Employee with 8 years of service engaged in disruptive behaviour in the workplace
- Employer aware employee suffered from depression
- Employer had no direct medical evidence of disability and employee never requested accommodation
- Employer dismissed employee
- Employee filed human rights complaint alleging discrimination due to disability

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Mackenzie v. Jace Holdings Ltd. **(2012 – BCHRT)**

▪ **Findings:**

- Tribunal found employer had a duty to inquire into whether employee's behavioural issues were related to known disability and whether employee required accommodation
- Tribunal concluded that part of the reason for dismissal was due to discrimination
- Employee was awarded 6 months of lost wages and \$5,000 for injury to dignity

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Practical Implications

- Positive duty to inquire
- You are NOT a doctor!
- Address the performance issues
- Be honest, upfront, professional, caring
- Job at risk? Be clear
- Document the accommodation process

Damages Awarded by HRTO

- Lost wages
- Range of \$6,000 to \$30,000 for:
 - The loss of right to be free from discrimination
 - Injury to dignity, feelings, self-respect
- Public interest remedies
 - Develop policies
 - Provide training

Damages Awarded by HRTO

- **Fair v. Hamilton-Wentworth District School Board (2013 – HRTO)**
 - Decision on remedy following 2012 decision finding employer had failed to accommodate employee with a disability
 - Complaint was filed in 2004
 - Remedies included:
 - Reinstatement to suitable employment
 - Training to prepare for return to work
 - Calculation of 10 years worth of lost wages
 - \$30,000 for injury to dignity, feelings and self-respect

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Damages Awarded by HRTO

- **Davis v. Nordock Inc. (2012 – HRTO)**
 - Applicant alleged discrimination with respect to employment on the basis of disability
 - Applicant broke ankle and was diagnosed with hypothyroidism
 - Terminated for absences even though employer aware of disability
 - Awarded \$12,000 for injury to dignity, feelings and self-respect
- **Byers v. Fiddick's Nursing Home (2012 – HRTO)**
 - Applicant alleged discrimination with respect to employment on the basis of disability, age and reprisal
 - Employer had denied LTD benefits, attendance at a conference and requested applicant work certain shifts
 - Awarded \$25,000 for injury to dignity, feelings and self-respect

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Damages Awarded by HRTO

- **Jeannotte v. 1682298 Ontario Inc. (2012 – HRTO)**
 - Applicant alleged discrimination with respect to employment on the basis of disability
 - Applicant required canes to walk
 - Employer cut the applicant's shifts back, refused to offer the applicant the full-time position and eventually changed the applicant's only remaining shift when learning of the human rights application
 - Remedies included:
 - lost wages in full-time position
 - \$10,000 for injury to dignity, feelings and self-respect

Questions?