FTR Now

Accommodating Childcare Needs: Understanding Your Obligations

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In a recent edition of *FTR Now*, we reported on two significant Federal Court decisions, *Johnstone v. Canada* and *Seeley v. Canadian National Railway*, which confirmed that employers have an obligation to accommodate their employees' childcare needs. Since the date that *FTR Now* was published, these two decisions have continued to generate a considerable amount of public discussion and debate about the accommodation of childcare needs in the workplace, and as a result employers may see an increase in requests for such accommodation by employees. To assist with these requests, this *FTR Now* reviews the procedural obligations of employers when responding to these requests and provides a practical checklist for employers to reference when determining whether accommodation is required and, if so, what accommodation is appropriate in the circumstances.

WHEN IS AN EMPLOYER'S DUTY TO ACCOMMODATE TRIGGERED?

In both the *Johnstone* and *Seeley* decisions, the Federal Court confirmed in clear terms that the protection from discrimination in employment on the basis of family status found in human rights legislation includes protection of needs arising from a parent's obligation to care for children. The decisions are somewhat less clear in identifying the circumstances which will trigger a duty to accommodate childcare needs, as there are some differences in the legal tests articulated in the two decisions. The Federal Court appeared to contemplate that any conflict between a work obligation and a "substantial" parental obligation could trigger the duty to accommodate. However, no definition was provided of what was meant by the term "substantial parental obligation", and the decisions appear to contemplate the possibility that some childcare issues will not be sufficiently "substantial" to trigger the duty to accommodate. In addition, the decisions suggest that the employee is expected to make efforts to reconcile work and parental obligations before seeking accommodation from the employer, but provide no guidance concerning the nature or extent of the efforts that an employer may expect.

While some uncertainty remains after *Johnstone* and *Seeley* about the precise limits of an employer's duty to accommodate childcare needs, there is one point about which there can be no uncertainty. Both decisions make very clear that employers who ignore employee accommodation requests or refuse to consider the possibility of accommodation or discuss accommodation with their employees do so at their peril.

THE DUTY TO ENGAGE IN A MEANINGFUL DISCUSSIONS ABOUT ACCOMMODATION

In its decisions in *Johnstone* and *Seeley*, the Federal Court criticized the employers involved for failing to engage in meaningful dialogue with their employees about their childcare needs or how those needs could be accommodated. The Federal Court found that the employers in *Johnstone* and *Seeley* had made little, if any, effort to understand their employees' accommodation needs or explore potential accommodations. It appears that this omission was based on the assumption that there was no obligation to accommodate the childcare needs identified – an assumption which ultimately proved to be mistaken. The Federal Court emphasized in the *Seeley* decision that discussions with employees about accommodation of their childcare needs are not merely optional." Rather, the Court described it as essential" that the employer engage in discussions with employees about their childcare needs and what options exist for accommodating those needs.

Notably, the Human Rights Tribunal of Ontario adopted a similar approach in a decision released in August 2012, *Devaney v. ZRV Holdings Limited*. *Devaney* was a case in which the employee's needs related to care of an elderly and ailing parent, rather than care of a child. The Tribunal found that, like childcare needs, eldercare needs are needs related to family status

and are protected under human rights legislation. Like the Federal Court, the Tribunal emphasized that, once an employer becomes aware that an employee has needs related to family status, the employer has a proactive duty to make inquiries about those needs to determine whether it has a duty to accommodate those needs:

[B]eing aware that the applicant had eldercare responsibilities, the respondents had a duty to consider and explore the possibilities of accommodating the applicant's needs relative to his eldercare responsibilities. When a respondent is notified that an individual has *Code*-related needs, the respondent has a duty to make meaningful inquiries about the needs to determine whether or not a duty to accommodate exists.

A CHILDCARE ACCOMMODATION CHECKLIST

The decisions discussed above make clear that, once an employer becomes aware that one of its employee has childcare needs, the employer must initiate a dialogue to ensure it understands the employee's needs, whether accommodation is required and, if so, what options exist for accommodation. In order to guide employers in carrying out this obligation, we have provided below a checklist of topics which employers may wish to discuss with employees as part of the accommodation process:

1. What is the duration of the accommodation the employee is seeking?

(a) Is the employee seeking a permanent or indefinite accommodation?

(b) Is the employee seeking a temporary accommodation pending the arrangement of alternative care arrangements?

2. Does the request for accommodation relate to a substantial parental obligation, or does it relate to a matter of personal choice or personal preference?

3. What is the nature and extent of the conflict between the employee's work obligations and the employee's parental obligations?

(a) Is the employee unable to return to work after a pregnancy/parental leave because of inability to secure suitable childcare?

(i) If so, can the issue be addressed by granting an extension of the leave to enable the employee to make appropriate childcare arrangements?

(b) Is the employee unable to work for all or part of a shift or series of shifts?

(i) Is this a recurring issue (e.g. the employee is unable to work fixed days each week) or does it only arise on an occasional or as needed" basis?

(ii) Can the conflict be addressed through shift changes (e.g. either permanent/indefinite or as the need arises)?

(c) Is the conflict limited to the start and/or end times of the employee's shift (e.g. because of difficulties in dropping off or picking up the child in a timely way at the beginning or end of the shift)?

(i) Can the conflict be addressed through flexible start/finish times and/or making up time missed?

(d) Does the conflict arise because of a difficulty in arranging childcare around unpredictable or rotational work schedules?

(i) Can the conflict be addressed by changing the frequency or predictability of working hours or fixing the days and/or hours on which the employee will be required to work?

(e) Are there other special needs related to childcare that affect the employee's ability to carry out his/her work obligations and, if so, what are they and how do the affect the employee's work obligations?

(i) the child's special needs

(ii) custody arrangements

(iii) other special needs

4. Has the employee made reasonable efforts to explore alternative childcare arrangements which would enable the employee to meet his/her work obligations?

(a) If the conflict is created by difficulties in arranging suitable childcare, has the employee explored all reasonable childcare alternatives?

(i) spouse/partner

(ii) adult family members

(iii) teenage family members

(iv) friends or neighbours

(v) nannies or baby sitters

(vi) professional caregivers for special needs children

(vii) day care facilities

(viii) placing name on waiting list for a day care placement

(b) If the conflict is created by difficulties arising from existing childcare arrangements, has the employee explored making changes in existing arrangements, such as transportation arrangements, childcare arrangements or other pertinent arrangements in order to address this issue for the future?

(c) If the conflict is created by difficulties in custody arrangements, has the employee initiated steps to change existing custody arrangements in order to enable the employee to meet his/her childcare obligations and, if so, with what results?

(d) If the employee has not pursued available alternatives, does the employee have a reasonable explanation?

5. What assistance can the employer provide to the employee in identifying or securing alternative childcare arrangements?

(a) Are there programs or resources available through the Employee Assistance Plan which the employee can access to identify alternative childcare arrangements?

(b) Can the employer provide direct assistance, such as by compiling a list of potential options and following up on the employee's behalf?

6. Are there alternative positions within the organization which the employee has the skill and ability to perform, in which the employee can work his/her preferred schedule?

(a) Can the employer provide support or assistance to the employee in searching for an alternative position within the organization?

7. If the workplace is a unionized environment, has the employer involved the trade union and/or secured the trade union's cooperation in the accommodation process?

8. If other employees will be affected by the accommodation, have they been approached and are they prepared to cooperate to facilitate accommodation?

9. Has the employer kept detailed records of all discussions with the employee, any potential accommodations that were considered and, if those potential accommodations were not pursued, the reasons why they were not pursued?

While this checklist is not an exhaustive list of the issues that may need to be discussed with employees seeking childcare accommodation, we trust it will be helpful to your organization in initiating discussions with employees about their childcare accommodation needs.

If you require any information about accommodation of childcare needs or other needs related to family status, please contact your regular Hicks Morley lawyer.

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