Case In Point

Is an Employer Required to Accommodate an Employee's "Personal Choice" to Breastfeed?

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In Flatt v. Canada (Attorney General), a case that has garnered media attention, the Federal Court of Appeal upheld a decision that found an applicant who requested accommodation to breastfeed her child during working hours failed to meet the test for establishing *prima facie* discrimination. The Court held this request involved the applicant's "personal choice" – not a legal obligation towards a child under her care as required by the applicable legal test. Moreover, the applicant had made no reasonable effort to find a viable solution.

The matter arose from a decision of the Public Service Labour Relations and Employment Board. Following her third maternity leave, the applicant requested permission to telework from her home in order to continue breastfeeding her child; the applicant and the employer had agreed to a similar arrangement after her previous maternity leaves. Despite several exchanges, the parties failed to establish a suitable work schedule that would meet both of their needs. The applicant reverted to requesting that she be allowed to telework on a full-time basis; the applicant's request was denied. Since the applicant was unionized, she filed a grievance claiming that the failure to accommodate was discriminatory on the basis of sex and family status and contrary to the *Canadian Human Rights Act* and the collective agreement. The grievance was denied.

In dismissing the application for judicial review, the Court held, among other things, that there was no *prima facie* case of discrimination based on the evidentiary record and the facts of the case, for the following reasons:

- The *Johnstone* test applied, whether the alleged discrimination was based on sex or family status.
- Breastfeeding during work hours was a personal choice made by the applicant, not a legal obligation towards the child under her care for the purposes of the second branch of the *Johnstone* test.
- The applicant made no reasonable effort to find a viable solution, as required under the third branch of the *Johnstone* test. In particular, the employer had "generally agreed" with one of the proposals, but raised reasonable concerns. The applicant failed to address these concerns and abandoned that possible arrangement entirely, reverting instead to her original request of teleworking from her home on a full-time basis.

The Court noted that there may be circumstances where there could be a *prima facie* case of discrimination related to breastfeeding:

It seems to me that to make a case of discrimination on the basis of sex or family status related to breastfeeding, an applicant would have to provide proper evidence, foreseeably divulging confidential information. For example, such information may address the particular needs of a child or particular medical condition requiring breastfeeding; the needs of an applicant to continue breastfeeding without expressing her milk; and the reasons why the child may not continue to receive the benefits of human milk while being bottle-fed. This list of examples, of course, is not exhaustive. The purpose of such evidence would be to establish that returning to work at the workplace is incompatible with breastfeeding. [para. 33]

Additionally, the Court did not wish its reasons to be understood as "trivializing breastfeeding":

The medical profession and numerous health organizations encourage mothers to breastfeed babies, praising, *inter alia*, the benefits of human milk on the immune system of young children. The applicant chose to breastfeed her children and respect must be had for her decision. This case is not about that choice but rather about the difficulties of balancing motherhood and career. It is about balancing the rights of mothers and that of employers having regard to the basic principle that one must be

at work to get paid. The test for establishing *prima facie* discrimination is well entrenched in Canadian jurisprudence. In the case of breastfeeding, the onus is on working-outside-the-home mothers to make a *prima facie* case of discrimination. Unfortunately in this case, the applicant failed. [para. 38]

As the first decision from the Federal Court of Appeal on this issue, it will likely have implications across Canada at the federal and provincial levels. It is important for employers to realize that this case does not state that breastfeeding is a personal choice in all circumstances; rather, each such request should by analyzed on a case-by-case basis.

The Court has confirmed that breastfeeding accommodation can be based on the protected ground of family status or sex. As such, requests for breastfeeding accommodation should be managed by employers in the same way that other accommodation requests based on family status or sex are managed, including continued discussions between the parties and creating reasonable solutions to meet both parties' needs, up to undue hardship.

For more information about the *Johnstone* test, please see our *FTR Now* on the case, *Federal Court of Appeal Upholds Johnstone, Clarifies Nature and Scope of Family Status Protections*.