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Lawyers & Mediators

WELCOME TO THE
Exclusive Human Resources Seminar Series
September 19th, 2013



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RELIGIOUS ACCOMMODATION IN THE WORKPLACE

L. Viet Nguyen

Religious Accommodation

Religion as a Fundamental Freedom

- Guaranteed by the *Charter of Rights and Freedoms*
- Human Rights Code prohibits discrimination
- Supreme Court of Canada – “the right to entertain such religious beliefs as a person chooses”
- “openly and without fear and hindrance or reprisal”

Religious Accommodation

Amselem v. Syndicat Northcrest

- Two-part test:
- Sincere belief related to religion – genuine not secular; and objective religious obligation
- Contractual or legislative provisions that affect capacity to act according to religious beliefs in a substantial manner



Religious Accommodation

Accommodation in the Workplace

- Employers required to accommodate to the point of undue hardship
- Create a work environment where a worker is able to benefit from all rights



Religious Accommodation

Bona Fide Occupational Requirement

- Conflict between work requirements and religious obligations
- Schedule of work, dress codes
- Accommodation may not require full accommodation



Religious Accommodation

Undue Hardship

- Financial cost
- Disruption of a collective agreement
- Problems with morale of co-workers
- Size and interchangeability of the workforce and operation



Religious Accommodation

Unified Approach

- Measure or policy rationally connected to performance of the job
- Sincere belief that measure or policy is necessary for legitimate work-related purpose
- Impossible to accommodate the employee without undue hardship



Religious Accommodation

Strategies

- Be proactive
- Involve all parties – employee, union, counsel
- Consider exceptions in legislation
- Focus on reasonableness
- Alternative dispute resolution



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ACCOMMODATION
OF FAMILY STATUS
IN THE
WORKPLACE

Flora M. Poon



What is “family status”?

... means the status of “being in a parent and child relationship”. Ontario *Human Rights Code*, s. 10.

Relationship does not necessarily need to be founded on blood or adoption ties, but can include ones that are based on care, responsibility and commitment.

Note: not defined under the *Canadian Human Rights Act*
(but clarified in case law)



Examples in the Workplace

- An employee is terminated because his manager will not provide a flexible work schedule so that he can take a parent to medical appointments during work hours
- An employee is denied a promotion because her manager believes that mothers are not committed to their work
- An employee is required to use vacation days in order to attend to caregiving needs and therefore receives a lower level of benefits compared to other employees



Duty to Accommodate

- Will only arise when *prima facie* case of discrimination on basis of family status has been demonstrated
- Becomes an issue where rules, policies, practices or institutional structures are leading to the disadvantages of persons identified by a particular family status
- Accommodation for family status is usually associated with caregiving needs and may change over time
- Two Components of Duty to Accommodate:
SUBSTANTIVE + PROCEDURAL

The Legal Test - SCC



For Employers:

If *prima facie* case for discrimination set out, must establish, on the balance of probabilities, that the standard, requirement, policy or rule:

1. was adapted for a purpose or goal that is rationally connected to the function being performed;
2. was adopted in good faith, in the belief, that it is necessary for the fulfilment of the purpose or goal; and,
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the individual without undue hardship.



Narrow Approach

Health Science Assoc. of British Columbia v. Campbell River and North Island Transition Society, 2004 BCCA 260

- Employer unilaterally changed hours of work for genuine business reasons
- Change of hours made it difficult for Employee to provide medically necessary after-school care to child with mental illness
- Medical evidence showed Employee's attendance was "an extraordinary important medical adjunct" to child's well-being
- Change in hours was a "*serious interference with a substantial parental or other family duty or obligation*"
- If caregiving needs do not go beyond ordinary demands, no basis for employee complaint

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Broader Approach – Needs vs. Preference

Devaney v. ZRV Holdings Limited, 2012 HRTO 1590

- Employee (27 years of service) – required to care for elderly, disabled parent
- Starts working from home to accommodate caregiving responsibilities
- Employer insists that employee be present in office from 8:30am to 5:00pm
- Terminated for cause in January 2009
- Rejected *Campbell River* – no basis for higher test for family status discrimination
- Employee's absences were “required” as a result of being mother's primary caregiver, not a choice
- Employer knew caregiving responsibilities were affecting Employee's attendance but breached procedural duty to make meaningful inquiries and explore accommodation

Award

- \$15K for failure to accommodate, injury to dignity, feelings & self-respect
- Employer ordered to develop and implement workplace human rights and accommodation policy and provide mandatory training



Expansive Approach

Attorney General of Canada v. Johnstone, 2013 FC 113

- Employee had irregular rotating shift schedule
- Requested fixed 13-hour shifts to arrange for child care
- Accommodation policy of Employer only permitted fixed shifts for part-time employees
- Accommodation request refused
- CHRT rejected “substantial interference” test
- CHRT rejected undue hardship argument
- Ruled that Employer: 1) undertook no analysis or consultation re: possibility of accommodating Employee’s child care needs; 2) accommodation policy requiring employees to accept part-time status in exchange for fixed shifts discourages employees from seeking accommodation

Award

- lost wages and pension benefits on full-time basis from January 4, 2004 to date of award (6 years of back pay); \$15,000 for pain and suffering; \$20,000 for wilful and reckless discrimination

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Best Practices for Employers in Dealing with Accommodation Requests



1. Don't dismiss requests so easily.
2. Document the accommodation process.
3. Policies should be reasonable and well documented.
4. Gather evidence of under hardships (if necessary).

Questions?





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**Disability Benefits:
Employer & Employee Obligations**

Meghan Ferguson



Disability Benefits Overview

Types of Benefits:

- Short Term – insured / self (employer) insured
- Long Term Disability – insured / self (employer) insured
- Self Insured (also know as ASO: Administrative Services Only)
- Government EI sickness benefits
- ESA leaves (personal emergency leave, compassionate care)



Disability Benefits Overview

Why does the type of plan matter?

LIABILITY AND OBLIGATIONS!



Disability Benefits Overview

What are the Employer and Employee obligations?

- Employment Contract
- *Benefit Plan text*
- Benefit booklet???



Disability Benefits Overview

Employee's Obligations

- Is the employee aware of his/her obligations?
- Has the employee signed agreeing to the Benefit Plan and any amendments?
- Are premiums up to date?
- Has there been any changes to the Plan and was the employee made aware of those changes?
- Apply for benefits and appeal within limitation periods set by the Benefit Plan



Disability Benefits Overview

Employer's Obligations

- Incorporate Benefit Plan in the employment contract
- Only make changes permitted by the employment contract and/or the Benefit Plan
- If disability arises, has the Employer provided the necessary documentation to apply and facilitated the application process? (Be helpful...*spoon feed!*)
- Make employee aware of and enforce limitation periods



Disability Benefits During Employment

- Benefit Plan text governs the benefit entitlement and any set-offs (like CPP disability benefits)
- On-going medical may be required to support disability
- Disabled employees must be accommodated to point of undue hardship
- Even if denied disability benefits, employer may still be required to accommodate employee and/or protect their job



Disability Benefits During Employment

How long do you protect the employee's job?

- Duration of ESA leave
- Until *no reasonable prospect the employee will return to work in the foreseeable future* ...but use caution!



Disability Benefits After Employment

- Significant issues of liability for employers
- Continue benefits for statutory notice period under ESA
- Ensure employment contract addresses disability benefits upon termination and that the termination clause complies with ESA
- Call/Email a DSF lawyer!



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Disability Benefits: Employer & Employee Obligations

Meghan Ferguson



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Working Notice:
Obligations of the Employer and Employee
Alexandra Tratnik



Employer Notice Period

- Employer's Obligations
 - Minimum employer notice requirements under S. 57 and S. 58 of the *Employment Standards Act, 2000*
 - Reasonable employer notice requirements pursuant to case law
- Employee Obligations
 - Duty to mitigate damages

Working Notice of Termination

- Generally, it is the employer's choice whether to provide working notice of termination or payment in lieu thereof
- But, consider:
 - Statutory exceptions
 - whether it is unreasonable to expect an employee to work through the notice period
 - the practicality of providing working notice
 - the level of risk to the employer

Things to Consider

- Employee's length of service/seniority
- Employee's relationship with the employer
 - Reason for the termination
- Employee's access to confidential information
 - Business risk – information to competitors
 - Security risk – sensitive computer data
- Workplace morale

Issue:

- What if the employee does not work through the notice period provided by the employer?
 - Can an employer be liable for wrongful dismissal damages where the employee refuses to continue working?



Recent Cases

Giza v. Sechelt School Bus Service Ltd., 2012 BCCA 18

- British Columbia Court of Appeal decision
- Intention of employee to repudiate employment relationship by failing to work during the notice period provided
- Implications where employer working notice period is inadequate

Recent Cases

Dechene v. Dr. Khurrum Ashraf Dentistry, 2012 ONCS 4594

- Appeal of a Kitchener Small Claims Court decision
- Distinguished from *Giza* in that the employee did not intend to repudiate the employment relationship and that the employer failed to keep open the employee's opportunity to working during the notice period
- No reduction in employee's damages

Conclusion

- Carefully review and consider the feasibility of working notice
 - Cost effectiveness v. risk associated with working notice
- Consider a combination of working notice and pay in lieu of notice
- Where employee fails to work during the working notice, obtain clear, written confirmation that the employee will not be returning to work



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**Fixed Severance Entitlements:
Does the Employee have a duty to mitigate?**

Justin R. Winch

Background: reasonable notice of termination and the duty to mitigate



- Employees who are terminated without cause are entitled to receive “reasonable notice” of their termination, or pay in lieu thereof.
- reasonable notice varies in every case, generally based upon the employee’s age, length of service, the nature of his or her position and the availability of similar employment.

Duty to Mitigate

- employees who sought damages for the loss of their employment had a “duty to mitigate” their losses.
- this duty obligated the employee to seek out and accept reasonable alternate employment and it allowed the employer to reduce its obligation.
- this duty applied to both common law dismissal damages and termination payments fixed by contract



Limiting the Uncertainty

- To avoid the uncertainty of common law damages, employers will often draft employment contracts that offer fixed payments to employees who are terminated without cause. In so doing, the employer avoids leaving the determination of the appropriate notice period to the courts.

Bowes v. Goss Power Products Inc.



- Bowes was terminated from Goss Power Products Ltd. (Goss), without cause. His entitlements on termination were governed by an employment contract that provided him with six months' pay in lieu of notice.
- Two weeks after his termination, Mr. Bowes found new employment at the same salary and the employer ceased paying his contractual entitlements.

The court's decision and its reasons



The court made three significant findings:

- i. An employee does not have a duty to mitigate his or her losses where the employee's entitlement to notice of termination (or pay in lieu of notice) is set out in the employment contract;
- ii. An employer cannot reduce the amount of notice of termination (or pay in lieu of notice) owed to the employee, even where the employee finds new employment during the contractually agreed upon notice period; and



Bowes... cont'd

- iii. An employment agreement must clearly specify that the duty to mitigate applies, if an employer wants the employee to be subject to the duty to mitigate.

The court held that by fixing a contractual notice period in the employment agreement, employers and employees opt out of paying common law reasonable notice. In doing so, they avoid the uncertainty of having the appropriate amount of notice or pay in lieu of notice of termination decided by the courts.



However, because the notice or the payment in lieu of notice is owed under the contract, the employee cannot be required to seek out other employment nor can the notice or payments owed under the contract be reduced if other employment is found.

- This means **NO DUTY TO MITIGATE**

Contractual vs. common law entitlements



- To demonstrate the difference between the two concepts, the court noted that Mr. Bowes' contractual entitlements were based on his base salary and car allowance.
- By contrast, Mr. Bowes' common law entitlements would also include bonus amounts and other monetary benefits and perquisites during the notice period.



Noting the difference between the calculation of common law and contractual notice, the court found that it was entirely appropriate that mitigation should apply to one method of calculating damages for the loss of employment (common law) but not the other (contractual entitlements).



“In my view, there is nothing unfair about requiring employers to be explicit if they intend to require an employee to mitigate what would otherwise be fixed or liquidated damages. In fact, what is unfair is for an employer to agree upon a fixed amount of damages, and then, at the point of dismissal, inform the employee that future earnings will be deducted from the fixed amount.”

Implications for employers

- The decision in *Bowes* demonstrates that the courts will strictly interpret employment agreement termination clauses in favour of the employee's interests.
- Employers using employment contracts that set out fixed notice periods or payments on without-cause terminations should carefully review and potentially revise those contracts.
- Revised contracts should specify that the employee's right to notice, or pay in lieu of notice, is subject to the duty to mitigate and that any earnings from new employment may be used to reduce contractual payments owed.



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