

Federal court rules employers must accommodate workers' child-care needs ^[1]

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EXCERPTS:

Employers who wish to remain on the right side of Canada's human rights laws must be willing to factor in the family obligations faced by their staff members, a recent court ruling has found.

A decision handed down by Justice Leonard Mandamin explicitly states that requests for childcare accommodations stem from genuine need and are not simply the product of lifestyle choices.

Mandamin's ruling was made in the context of parents grappling with irregular shift work, but experts suggest the ruling could pave the way for much more broadbased discussion on the role family life plays in the workplace.

Mandamin's ruling, delivered late last week, upheld a successful human rights case launched by Ottawa resident Fiona Johnstone.

Both Johnstone and her husband worked as full-time employees of the Canada Border Services Agency, putting in a series of irregular, rotating shifts before their first child was born in 2003.

Johnstone asked the agency to accommodate her childcare needs by allowing her to work more stable shifts. The agency declined, saying the only way to maintain a static schedule was to cut back to part-time hours.

Johnstone filed a complaint that ultimately came before the Canadian Human Rights Tribunal in 2010.

The tribunal ruled in her favour, saying the agency had discriminated against Johnstone on the basis of her family status.

Mandamin's ruling supported the tribunal's findings.

"The CBSA allowed individualized assessments of employees seeking accommodation on medical or religious grounds but responded to Ms. Johnstone on the basis of a blanket policy that required her to forfeit her status as a full-time employee," Mandamin wrote.

"The CBSA's policy was based on the arbitrary assumption that the need for accommodation on the basis of family obligations was merely the result of choices that individuals make, rather than legitimate need."

Stuart Rudner, employment law specialist with Miller Thomson LLP, said the landmark decision makes a bold statement about the country's legal landscape.

Disability, gender and religion are no longer the primary basis for human rights complaints, he said, adding family-related issues are bound to gain more prominence in the coming years.

"This is likely the next frontier," Rudner said in a telephone interview. "(The ruling) does set the precedent now that confirmed what many of us suspected, which is that employers are susceptible to these complaints."

Canada's demographics alone are a factor in the emerging trend, Rudner said. Parents are not only having to care for their children, but will increasingly be required to care for aging and ailing members of the older generations.

Rudner predicted cases involving elder care will surface in court before too long.

But the ruling that may seem encouraging to thousands of struggling employees does not represent an unqualified victory, he said. The decision forces employers to accommodate family status requests up to the point of "undue hardship," a concept he said is left loosely defined.

"The courts and tribunals want to maintain discretion to look at every individual case," he said. "But the most important factor in determining undue hardship is probably going to be cost. A large company with more significant financial resources will probably be expected to be more flexible than a small business."

The ruling also leaves the onus on employees to prove that they have made reasonable efforts to sort out their family obligations before requesting help from their employers, Rudner said.

That, child care experts say, is easier said than done.

Winnipeg's Discovery Children's Centre is one of only a handful of programs that offer child care services for parents contending with non-

traditional work hours.

The flex program -- which remains open until 12:30 a.m. on weekdays and 7:30 p.m. on Saturdays -- is in high demand from the more than 900 people on the centre's waiting list, said program director Donna Freeman.

The logistical challenges of staffing such a program while remaining within provincial licensing guidelines, however, mean the service can't be offered as widely as families might like to see.

"That one program is more work administratively than the other 240 spaces in our centre," she said. "But we know that it's needed in the community, so that's why we do it."

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