24/7 Operations and Childcare Responsibilities – An Employer's Obligation [1]

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EXCERPT

The definition of "family status" under human rights legislation continues to be one of the hottest topics in Canadian employment law. Yet another case involving this area of human rights is *SMS Equipment Inc. v Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162. At Arbitration, SMS Equipment Inc. (the "**Employer**"), was found to have discriminated against an employee, Ms. Cahill-Saunders (the "**Employee**"), on the basis of family status pursuant to the *Alberta Human Rights Act* ("***AHRA***") because it required her to work rotating day and night shifts. The Employer was found to have an obligation to accommodate the Employee with respect to her childcare duties. Judicial review of the Arbitration Award was sought by the Employer at the Alberta Court of Queen's Bench.

Facts:

The Employee was a single mother of two young children. Originally from Newfoundland and Labrador (NL), she moved to Fort McMurray for work and commenced employment with the Employer on November 30, 2010. She initially worked as a labourer working 14 days on and 14 days off with rotating day and night shifts. For her first nine months in Alberta, her son, born in 2007, remained in NL with his grandmother but later joined his mother out west. The son's father also moved to Fort McMurray and provided some childcare while the Employee worked however, the two did not cohabit.

In February 2012, the Employee had her second son with a different father, who had no involvement in childcare. While on maternity leave, she successfully applied for the position of first-year welder apprentice with the Employer. The shifts were seven days on and seven days off with rotating days and nights. The Employee returned from her maternity leave early on October 11, 2012 and during her first night shift on November 8, 2012, requested that her Employer change her shifts to days only as she was "finding it a bit difficult". At this point, the work schedule of her oldest son's father had changed and he was no longer providing any significant childcare. Since the Employee had no family in living in Fort McMurray, having moved from NL, she had to rely on third-party childcare for both of her children. The Employer refused the Employee's request and on December 21, 2012, her union filed a grievance on her behalf.

The Employee explained to the Employer that she had obtained childcare but that when she worked night shifts, it was too expensive for her to pay for childcare during the day, while she slept, and also during the night, while she worked. She therefore had to look after the children during the days when she was scheduled to work nights which resulted in her receiving very little rest. The Employer also denied the union's request for a shift modification whereby another welder apprentice was willing to do exclusive night shifts while the Employee worked only during the day.

Decision:

Madam Justice Ross found that the decision of Arbitrator Kanee, that "family status" in the *AHRA* included the duties and responsibilities of childcare, was reasonable. She denied the Employer's application for judicial review and held that it was also reasonable for the arbitrator to conclude that there was a *prima facie* case of discrimination against the Employee based on family status. Of note, Madam Justice Ross would have also upheld the decision of the arbitrator on a standard of correctness.

Madam Justice Ross found that if the test for a *prima facie* case of workplace discrimination based on family status as set out in *Canada (Attorney General) v Johnstone*, 2014 FCA 110 ["***Johnstone***"], a decision released after the Arbitration Award, was correct, it did not change the substance of the law reviewed by the arbitrator, who relied on the test for adverse effect discrimination as set out by the Supreme Court of Canada in *Moore v British Columbia (Education)*, 2012 SCC 61 ["***Moore***"]. She found that in order to demonstrate discrimination on the ground of family status, a claimant must show "that a child is under her care and supervision" and "that the childcare obligation at issue engages the individual's legal responsibility to that child as opposed to a personal choice". In addition, she stated at paragraph 77 that "[c]omplainants are not only required to prove that a workplace rule has a discriminatory impact on them, but that they were unable to

avoid that impact".

Madam Justice Ross applied the following three-part test for adverse effect discrimination *generally* set out by the Supreme Court of Canada in *Moore* rather than the four-part test for discrimination on the basis of family status as outlined in *Johnstone* by the Federal Court of Appeal. The test was as follows:

1. The complainant has a characteristic that is protected from discrimination;
2. The complainant has experienced an adverse impact; and
3. The complainant must show that the protected characteristic was a factor in the adverse impact.

Holding that the Employer did not justify its requirement that all employees were required to work rotating night and day shifts, Madam Justice Ross found that the Employer did not establish the rotating shifts to be a *bona fide* occupational requirement. Furthermore, the Employer provided no evidence to support a claim of undue hardship while there was evidence that it had previously allowed other employees to work exclusively night shifts.

Lesson for Employers:

As discussed in our previous publications regarding the recent decisions of *Johnstone* and*Clark v Bow Valley College*, 2014 AHRC 4, employers are required to accommodate employees with legal childcare obligations, to the point of undue hardship, however the legal test to be applied with respect to "family status" appears to be dependent on the jurisdiction. The outcome of this decision should be of particular interest to employers whose operations run 24/7 and who expect employees to work a variety of shifts.

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