EMPLOYMENT MATTERS

June 2014

UPDATE ON "FAMILY STATUS"

What is the issue?

In my newsletter of February 2013, I reported on the *Johnstone* case. In that case, a wife and her husband both worked for the border agency on rotating shifts. Despite best efforts, they found it impossible to arrange for childcare because of their unpredictable work schedules. Ms. Johnstone approached her employer and requested full-time day shifts to permit her to arrange for childcare. Her request was ultimately denied.

Ms. Johnstone filed a complaint with the Canadian Human Rights Tribunal wherein she alleged she had been discriminated against on the basis of family status with respect to her parental childcare obligations. The Tribunal found that Ms. Johnstone had proven *prima facie* employment discrimination on the basis of family status, contrary to the *Canadian Human Rights Act* (the "**Act**"), and further held that the employer had not proven the element of undue hardship necessary to exempt it from its obligation to accommodate her. In its review of the Tribunal's decision, the Federal Court concluded that the Tribunal had reasonably found that parental childcare obligations fall within the scope and meaning of "family status" in the Act and upheld that aspect of the decision. The decision was appealed to the Federal Court of Appeal.

Federal Court of Appeal

On May 2, 2014, the Federal Court of Appeal provided some excellent guidance on the issue of accommodation on the basis of family status. In its decision, the Court upheld that family status includes childcare obligations and clarified the issue of parental choices versus legal obligations. In its decision, the Court held that an individual advancing a claim on the basis of family status would have to show:

1. That the child is under his/her care and supervision;
2. That the childcare obligation at issue engages the individual's legal responsibility for the child, as opposed to a personal choice;
3. That he/she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions and that no such alternative solution is reasonably accessible; and
4. That the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

In its decision, the Court also clarified that voluntary family activities such as family trips, hockey tournaments and dance classes would not normally trigger the duty to accommodate.

Conclusion

Employers continue to have a duty to accommodate childcare obligations on the ground of family status but the determination of how far that obligations extends is clarified by this decision.

Andrea M. Marsland
Partner
amarsland@foglers.com
416-365-3703

Fogler, Rubinoff LLP
Lawyers
77 King Street West
Suite 3000
P.O. Box 95
TD Centre North Tower
Toronto, ON M5K 1G8
Direct: 416.365.3703
Main: 416.864.9700

fogler rubinoff