The Duty of an Employer to Accommodate Employees With Special Needs Family Members

Duties Related to Family Status

The recent case of ***Simpson v. Pranajen Group Ltd. o/a Nimigon Retirement Home***, 2019 HRTO 10 provides an interesting overview of the extent to which an employer must accommodate an employee that requires such accommodation so to enable the employee, as a parent, to attend to the special needs of family members.

Factual Summary

Jessica Simpson was a Personal Support Worker employed with Nimigon for at least four years. Ms. Simpson was married with two young children, the eldest, being five years-old, is autistic and requires the attendance of a caregiver to meet the school bus at the end of each school day. The husband of Ms. Simpson, due to employment hours, was unable to meet the school bus. Additionally, other family members, being the in-laws of Ms. Simpson, were also unavailable to assist at the required time. Nimigon was aware of the special needs circumstances of Ms. Simpson.

In or about March 2017, Nimigon, via management personnel, proposed to amend the work hours of Ms. Simpson. Mr. Simpson provided notice of incapacity to accept the proposed amended hours due to the conflict such amended hours would cause in attending to the autistic child, and other child. Initially, Nimigon appeared prepared to accommodate the work hour needs of Simpson whereas a midnight shift was offered to Simpson.

In April 2017, Simpson took a day off work for illness. It is notable that such was a very rare occurrence for Ms. Simpson. Upon receiving notice of the absence, Nimigon management issued a warning to Ms. Simpson. Within the warning, Nimigon alleged a neglect of responsibilty by Ms. Simpson. The alleged neglect stated a failure to source a substitute colleague. Nimigon also issued a requirement for the submission of a doctor's note confirming the illness of Simpson.

During the employment history of Ms. Simpson, when previous absence for illness situations arose, Ms. Simpson provided advance notice, usually a few hours, and the sourcing of a substitute colleague was performed by other persons employed by Nimigon. Accordingly, the warning issued to Simpson, as well as implication that Simpson was responsible for sourcing a substitute colleague, were changes to the prior and usual procedures. Furthermore, a few days later, Nimigon issued an advisement that the personal support workers must provide forty-eight (48) hours notice of absence or accept the duty to source a substitute colleague to cover off any absenteeism.

In May 2017, Nimigon provided notice of incapacity to provide the 'midnight' shift as was previously discussed with Ms. Simpson. Ms. Simpson advised of incapacity to perform the 'afternoon' shift. Subsequently, Nimigon terminated the employment of Ms. Simpson. Nimigon based the termination on various allegations of misconduct including causing a disturbance and failings of performance as by Ms. Simpson.

Further Factual Findings

The Human Rights Tribunal of Ontario found a satisfactory historical performance in favour of Ms. Simpson. The Nimigon hours of work and illness reporting expectations, among other things, were deemed unreasonable by the HRTO.

The Law, statutory

The HRTO deemed that the Human Rights Code applied to the circumstances. These HRTO referred to specific sections by stating:

> [24] The following Code provisions are relevant to this case:
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> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of ....family status.
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> 11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the member is a member, except where,

> (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or

> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

> (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[25] In section 10(1) of the Code, “family status” is defined as “the status of being in a parent and child relationship”.

The Law, jurisprudence

Furthermore, the HRTO applied significant jurisprudence as precedent cases applicable to the determination that discrimination arose. The jurisprudence supported the allegation that a parent should be accommodated on the basis of 'family status' where a parent is legally required to attend to the responsibilties of parenthood.

[26] The Federal Court of Appeal issued a decision that clarified that the sorts of parental obligations that fall within the protected ground of “family status” under human rights legislation are substantive obligations that engage a parent’s legal responsibility to a child. See, *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 (CanLII) (“Johnstone”).

[27] In *Johnstone*, above, the Federal Court of Appeal at para. 93 set out a specific test for establishing family status discrimination in the context of childcare, stating that a claimant must prove:

> a. The child is under his or her care and supervision;

b. The childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to personal choice;

c. The individual has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and

d. The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

[28] *Johnstone*, above, at para. 70, also held that the childcare obligations protected under the ground of family status are those which a parent cannot neglect without engaging his or her legal liability.

[29] In *Power Stream Inc. and I.B.E.W., Local 636 (Bender) (Re)*, (2009) 186 L.A.C. (4th) 180 ("*Power Stream*"), an arbitrator used the term "self-accommodation" to describe the principle formulated in Johnstone, above, that an employee had to prove he or she made reasonable efforts to meet childcare obligations through reasonable alternative solutions and that no alternative solution was reasonably accessible.

> [30] In *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229 (CanLII) ("*Misetich*"), the Tribunal did not agree with the principle in Johnstone that in order to prove discrimination, an applicant must establish that he or she could not self-accommodate the adverse impact caused by a workplace rule. The Tribunal also endorsed the submissions of the intervener, the Ontario Human Rights Commission, which argued against using a special test for family status cases when determining whether there was a breach of the duty to accommodate. The Tribunal reasoned that there may be obligations that caregivers do not necessarily have as a result of their legal responsibilities, but those obligations may still be essential to the parent/child relationship. The Tribunal concluded that there should be the same test to establish discrimination in cases regarding family status discrimination as in cases of discrimination regarding the other Code grounds: the applicant must establish that he or she is a member of a protected group, has experienced adverse treatment, and the ground of discrimination was a factor in the adverse treatment.

Remedy Request and Remedy Decision

Ms. Simpson requested a remedy that contained, among other things, compensation in the amount of $30,000 for discrimination as well as $15,000 for injury to dignity.

> [39] The applicant requested $15,000 for the loss of the right to be free from discrimination, plus another $15,000 for injury to dignity and self-respect. At the hearing, she clarified that she is seeking the total amount of $30,000 in monetary compensation for injury to dignity, feelings and self-respect.

Upon review of various prior decisions including, ***Arunchalam v. Best Buy***, 2010 HRTO 1880, ***Chittle v. 1056263 Ontario Inc.***, 2013 HRTO 1261, and ***Conklin v. Ron Joyce Jr. Enterprises Ltd. o/a Tim Horton's***, 2017 HRTO 723, the HRTO agreed and awarded the $30,000 in compensation to Ms. Simpson.

> [43] I find that it is appropriate to award $30,000 in compensation for injury to dignity, feelings and self-respect in this case.