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Feature

Accommodating Employees with Childcare Needs

Ongoing obligations for employers

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One of the fastest-growing issues facing employers is the need to accommodate employees with childcare and eldercare needs. As these issues emerge with more regularity in our workplaces, our courts and tribunals appear to be prepared to weigh into the debate — with consequences for employers.

In May 2014, the Federal Court of Appeal clarified employers' obligations in a decision called *Johnstone*. Unfortunately, a subsequent Ontario decision may have muddied the waters once again. *Partridge v. Botony Dental Corporation* provides a tutorial for employers on what not to do when an employee is returning from maternity leave.

First, the employer stripped her of the office manager position she had held for four years and demoted her to be a dental hygienist, despite her clear legal right to be returned to the position she held before her leave.

Next, the employer changed her hours of work in a way that it knew would interfere with her daycare arrangements. These arrangements had been in place for several years since her older child was born.

Finally, when the employee complained about these changes, the employer accused her of being insolent, insubordinate and even harassing him. As a result, her employment was terminated, allegedly for cause.

Not surprisingly, the Ontario Superior Court of Justice concluded that the employer had breached its obligation to reinstate the employee to her same position following her maternity leave, and that there was no cause for her termination. This was not at all a surprise.

But the court, perhaps influenced by its distaste for the other bad things the employer had done, then went a step further. It concluded that the employer had also violated the employee's human rights by interfering with her daycare arrangements. Its conclusions on that point are somewhat concerning.

In *Johnstone*, the Federal Court of Appeal had decided that an employer only needs to accommodate employees' childcare needs if the employee has already made reasonable efforts to address the problem, and other solutions are not reasonably accessible. In other words, it is primarily the parent who must work out childcare arrangements. The employer's obligation kicks in when the parent, despite best efforts, cannot do so without accommodation in the workplace.

In this case, the employee had been asked to work until 6:00 pm instead of 5:00 pm. She lived in Barrie, a large city with multiple daycare options. Her husband was self-employed, so he probably had some flexibility in his work hours. Surely, with reasonable efforts, the family could have ensured their children were cared for during the one extra hour the employee was required to work. Yet, although the court claimed to be applying *Johnstone*, it found without much analysis that the employee couldn't find a "sustainable" childcare arrangement on her own. Therefore, the employer had an obligation to accommodate her by going back to the original work schedule, and since it breached that obligation, it was ordered to pay her $20,000.

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The lesson for employers is to continue to take accommodation requests based on childcare and elder-care very seriously. An employer should feel free to ask the employee about his or her childcare situation and what other care options they have explored before jumping to the conclusion that a workplace accommodation is necessary. All the same, as this case demonstrates, there is still some uncertainty as to when accommodation is necessary, and it is better for employers to be safe than sorry.

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