

EMPLOYMENT MATTERS

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DUTY TO ACCOMMODATE CHILDCARE NEEDS

Court Upholds Tribunal's Decision on Duty to Accommodate Childcare Needs

A recent decision from the Federal Court has many employers feeling uneasy about the duty to accommodate. In *A.G. and Johnstone et al* ("**Johnstone**"), the Federal Court upheld a decision by the Canadian Human Rights Tribunal ("**Tribunal**") whereby it held that the Canadian Border Services Agency had discriminated against Ms. Fiona Johnstone when the agency failed to accommodate her request for a shift change to meet her childcare needs.

In *Johnstone*, the employee and her husband both worked for the border agency on rotating shifts. Despite their 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 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 falls within the scope and meaning of "family status" in the Act and upheld that aspect of the decision.

Does that mean employees can pick and choose their shifts if they have children?

No. *Johnstone* does not stand for the proposition that employees with childcare needs can insist upon working certain shifts. Rather, it clarifies the employer's obligation to treat requests for accommodation on the basis of childcare needs in the same manner it would any other request for accommodation (e.g., for medical or religious reasons).

Employers should carefully consider requests made by their employees with respect to family-related grounds. This would include requests with respect to childcare, eldercare and care for disabled family members.

There is no set formula for accommodation. Each request must be evaluated on its own facts. When receiving a request for accommodation, employers are advised to show a willingness to explore solutions and work together with their employees to accommodate their (reasonable) requests, short of undue hardship. Generally, undue hardship means a hardship that is "*disproportionate, improper, inordinate, excessive or oppressive.*"

If you require assistance navigating this difficult issue, I would be happy to help.

**Johnstone* does not represent a typical workplace situation. Expert evidence was given to the effect that her situation with respect to work hours was one of the most difficult childcare situations the expert could imagine due to the unpredictability of hours.



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