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EMPLOYMENT NEWS

THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

FALL 2004

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EMPLOYER FOUND TO HAVE DUTY TO ACCOMMODATE FAMILY OBLIGATIONS

In a recent decision, the British Columbia Court of Appeal held that the obligation not to discriminate based upon "family status" can include the obligation to accommodate the employee's specific parental duties.

The employee was the mother of four children, one of whom had severe behavioral problems requiring specific parental and professional attention. She had worked part-time for the employer for approximately eight years as a child and youth support worker in a shelter. Her ordinary hours of work were 8:30 a.m. to 3:00 p.m. Monday through Thursday. She was advised that effective six weeks later, her hours would be changed to 11:30 a.m. to 6:00 p.m. Monday through Thursday. After the new schedule commenced, she met with the employer and expressed her concern that she needed to be home for her son when he returned from school which was not working with the new schedule. She also submitted a letter from her son's pediatrician supporting her need to be home for her son. Notwithstanding, the employer decided to maintain the new schedule and reassess matters six months hence. The employee then was forced to take a stress induced leave of absence.

The matter was initially decided at arbitration. The arbitrator held that the *British Columbia Human Rights Code* protection from discrimination based upon "family status" did not extend to a legal obligation that employers accommodate employees who have children because of their status as parents but protects only from discrimination resulting from the fact one is a parent.

The Court of Appeal held that while the concept of protection from discrimination based on "family status" does not provide unlimited protection for all parenting responsibilities, it also is not limited to simple discrimination because one is a parent. Whether particular conduct does or does not amount to discrimination will be fact dependent; however, it held that: "a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee."

While the court went on to say that in the vast majority of circumstances, such a *prima facie* case would not be made out, it held that in the case at bar it had. The mother's attendance to her child's needs during after school hours was "an extraordinary important medical adjunct to her son's wellbeing" and constituted a "substantial parental obligation" deserving of protection.

Having found that a *prima facie* case existed, the Court of Appeal referred back to arbitration the issues of whether there existed a *bona fide* occupational requirement or reasonable accommodation as well as the issue of damages.

It will be interesting to see how this obligation is subsequently addressed, how onerous the duty will eventually become, and what long-term impact this will have on the workplace as we know it.

NO OBLIGATION ON EMPLOYEE TO SIGN NEW EMPLOYMENT CONTRACT GIVING EFFECT TO NEW TERMS OF EMPLOYMENT

In a decision of the Ontario Court of Appeal released in mid-August, the court held that employees who were terminated when they failed to execute new contracts of employment were wrongfully dismissed.

The employees who were employed as commissioned insurance sales representatives were given notice that in a few months the terms of their contracts would be modified to provide for a different commission structure. They were requested to acknowledge the changes by signing new agreements. They refused, were terminated, and sued for wrongful dismissal.

The Court held that the employer was not justified in terminating the employment relationship because the employees refused to sign the new agreements. While the employer had the right to impose the new terms upon reasonable notice, it did not provide cause for termination if the employees did not sign the acknowledgment relating to those new terms. The termination having been without reasonable notice, was wrongful. The Court further held that the employer had failed to adduce sufficient evidence that the employees had not mitigated their damages. The employer was not able to rely upon the employees' obligation to mitigate by accepting the new contract of employment because its termination effectively removed that option.

Therefore, employers should not terminate when employees refuse to sign the new contracts, but advise that they are considered bound by the new terms after reasonable notice. Employees should be aware that if they do not wish the new terms to apply, they must act quickly and if reasonable take the position that the changes are so fundamental as to constitute constructive dismissal.

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