The Duty to Accommodate: legal obligation is evolving in groundbreaking ways

Sep 21, 2015 | by Sheldon Gordon | Lexpert Magazine September 2015 Issue

Courts, human rights tribunals and arbitration boards continue to interpret the legal obligation to accommodate workers' needs in groundbreaking ways

Merging human rights issues such as family status, the aging workforce, religious observance and transgender identity are creating new challenges for employers and their in-house counsel. The legal obligation to accommodate the needs of workers (up to the point of undue hardship) is being interpreted in groundbreaking ways by courts, human rights tribunals and arbitration boards.

"The rulings have increased discussion on the topic of accommodation," says Lynn Korbak, General Counsel at health and benefits consultancy Morneau Shepell Ltd. in Toronto. "When certain rulings came out, we had managers come to the legal department and ask us, 'What do we do? How does this impact us?' It was a good opportunity to engage in discussion about the accommodation process."

Family Status

Family status discrimination is prohibited by human rights laws across the country. The duty to accommodate employees with caregiver responsibilities has long been recognized as part of an employer's duty to accommodate. Recent court and arbitral decisions have clarified how far that obligation extends.

The Federal Court of Appeal's decision last year in *Canada (Attorney General) v. Johnstone*, has figured prominently in the case law. Employee Fiona Johnstone complained that her employer, Canada Border Services Agency (CBSA), had discriminated against her by refusing her request for regular shifts so that she could arrange for continuing childcare.

In a second case, *Canadian National Railway Company v. Seeley*, Denise Seeley, an employee of Canadian National Railway, was dismissed when, due to childcare difficulties, she failed to temporarily relocate from Alberta to Vancouver to cover a staff shortage. She noted that employees with medical conditions had been accommodated.

In both cases, the Canadian Human Rights Tribunal found that the employers had discriminated against their employees based on family status by refusing to accommodate their childcare obligations. The tribunal's decisions were upheld by the Federal Court of Appeal (FCA).

While the *Canadian Human Rights Act* does not define family status, the FCA interpreted the ground broadly to include childcare obligations – "those which a parent cannot neglect without engaging his or her legal liability" – but not personal preferences, such extracurricular classes.

Donna Parish, Vice President and Deputy General Counsel at Bank of Montreal in Toronto, says that, following *Johnstone* and *Seeley*, "employers must accommodate family status requests. Employees must demonstrate legitimate need and that they've considered or pursued alternatives. Both the employer and employee must engage in a process of trying to figure out what the legitimate need is and what a feasible alternative might be."

She adds: “Employees sometimes approach the conversation with a view that the duty to accommodate is about accommodating what the employee wants rather than what the employee needs. That can set up a tricky employer-employee conversation, depending on what the going-in expectation is. It’s trickier than for the broader employee base, which might interpret accommodation as unfair in some cases. And it might be hard to explain because the underlying need is something personal or private.”

While the decisions in *Johnstone* and *Seeley* are binding only upon employers that are federally regulated, they provide important guidance for provincially regulated employers, except perhaps in Québec.

There, the pendulum has swung the other way. In an August 2014 arbitration ruling in the grievance between the University of Montreal Support Workers Union and the University of Montreal, an employee named Fernand Landry requested a flexible schedule to meet her family obligations arising out of a joint custody agreement. The employer refused and the arbitrator found in its favour. The ruling said the employee had to show – but did not – that she tried to use other means to fulfill her childcare duties under the custody agreement.

The arbitrator went even further, saying he did not find that childcare obligations were part of the Québec *Charter of Human Rights and Freedoms* “civil status” ground of discrimination. “This Québec decision appears to go against the *Johnstone* decision,” says Dominique Monet, at Fasken Martineau DuMoulin LLP in Montréal. “It cites the specific provisions about childcare already included in Québec’s employment standards legislation. This accounts for the fact that our human rights jurisprudence in Québec is different on family status than in the rest of the country.”

The definition of “family status” has expanded to cover eldercare. The Ontario Human Rights Tribunal’s 2012 decision in *Devaney v. ZRV Holdings Limited*, was a landmark ruling. Francis Devaney was an employee of ZRV, an architecture firm, for 27 years until he was fired in January 2009. He was the primary caregiver for his disabled mother, and in 2007 began working from home frequently to facilitate his caregiver duties. The employer wanted him to be at the office during normal business hours, but Devaney said most of his work could be done remotely from home. Ultimately, he was fired for cause.

The tribunal adopted a new test that distinguished between the preferences and needs of employees with caregiver responsibilities. It found that the employer failed to engage in a dialogue with Devaney about his caregiver needs and thus failed “in its procedural and substantive obligations under the duty to accommodate.” Devaney was awarded $15,000 in general damages.

A 2013 decision of the Canadian Human Rights Tribunal in *Hicks v. Human Resources and Skills Development Canada*, recognized eldercare responsibilities to include “in-laws.” Leslie Hicks was an HRSDC employee who was relocated from Sydney, NS, to Ottawa for work. His wife stayed in Sydney to care for her ailing mother. They maintained two residences.

Under the collective agreement, relocation assistance was available to employees who were forced to maintain two residences, one of which was occupied by a “dependant with a temporary illness.” Hicks applied for – but was denied – the benefit, because his mother-in-law lived in a nursing home and suffered from a chronic illness. He lodged a complaint of discrimination on the basis of family status.

The tribunal found that Hicks had made out a *prima facie* case of discrimination. Although the relocation benefit didn’t cause a conflict between the complainant’s work and family obligations, the eligibility rules were nevertheless discriminatory. The tribunal awarded Hicks $15,000 for pain and suffering, and $20,000 (the maximum under the Act) for having been willfully and recklessly discriminated against.

“There has been a lot of media reporting about the family-status discrimination cases,” says Gary Clarke, a partner at Stikeman Elliott LLP in Calgary. “I think one of the reasons you’re seeing more of these cases is because this particular ground of discrimination is in the public spotlight. It could lead people to come up with creative family-status accommodation requests. I think there is a real need for employers to have a system in place to deal with family-status requests.”

TransCanada Corp. of Calgary has not had more requests for accommodation on family-status grounds since *Johnstone*, but the company has made sure it has a formal process to handle such requests when they do arise, says Erika Ringseis, former Senior Legal Counsel who is now the company's Manager, Human Resources Compliance, Diversity & Global Mobility.

"If someone needs an accommodation at work, they can fill out a form that explains the need for accommodation," she says. "The first step is to speak to the human resources consultant for that particular area to see if the accommodation is permissible. If the accommodation is denied, it would escalate up to our Chief Harassment Investigator. He is well aware of our legal obligations. But just because it might not be required by law doesn't mean we're not going to accommodate someone. Legal sets the bar but that's not necessarily the limit for accommodation."

Gender Identity

Courts and tribunals in all provinces (and territories) and federally recognize implicit human rights protections for gender identity under the ground of gender. Ontario, Manitoba, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, Saskatchewan and the Northwest Territories all have explicit human rights protections for "gender identity" (and "gender expression" in some cases).

Human rights tribunals have clarified that how people identify their gender is what matters, not whether they've had reassignment surgery or not, says Erin Kuzz, a partner at Sherrard Kuzz LLP in Toronto. "At this point, we're really into a traditional analysis of, 'Is the workplace conduct related to the protected grounds?' The legal concepts are pretty clear. We're at the same place here [with gender identity] as we were with sexual orientation 20 years ago."

In 2014, the issue of gender-identity discrimination came before the Alberta Human Rights Commission in *Greater St. Albert Roman Catholic Separate School, District No. 734 v. Buterman.* A Catholic school teacher, Jan Buterman, was struck from the school's substitute teacher list after disclosing his transgender status to the school's deputy superintendent.

The school acknowledged that this status was the reason for Buterman's removal. The tribunal, however, did not address the case on its merits, ruling that because a settlement had been agreed to previously, it had no jurisdiction to hear the matter.

The most vexed workplace issue involving transgender people is access to washrooms. The employer should rely on a medical opinion from the trans employee's psychologist, says Greg Heywood, a partner at Roper Greyell LLP in Vancouver. "Once they reach the point [in their transition] where they'll be known by a woman's identity, employers are obligated to treat the person as a woman and provide access to a women's restroom."

The employer should start by asking the TG employee what he or she wants, says Kuzz. "If someone says they would like access to a private washroom, I rarely see a circumstance where we shouldn't provide that *if we can*.

"If that's not possible, or if the transitioning employee wishes to use the female washroom," she says, "it becomes a matter of education, and you really have to get the employees' buy-in. There is no easy answer. The reason it keeps coming up is because it's the obvious difficult one."

Having a one-person unisex restroom, in addition to male and female restrooms, has, for several years, been part of the Morneau Shepell "clubhouse area" on each floor of its Toronto building, says Korbak. This provides a simple means of accommodation, though she notes that "that particular setup wasn't done with any one objective in mind."

Retirement Age

Mandatory retirement has largely been settled as an issue in that few employees (firefighters and police excepted) are forced to leave the workplace at age 65 because of an organization's formal policy.

"But the implications of having older workers still have not been settled," says Heywood. When an employees approaching 65 were losing their edge, employers could wait it out. "Now there's no guarantee that that employee is going to leave at 65, so you have to performance-manage them and do for-cause terminations if their performance starts to deteriorate."

"We've been dealing with [the abolition of mandatory retirement] since 2006, so we're used to it by now," says Peter Cuff, Senior Counsel at Ontario Power Generation Inc. in Toronto. "If an individual is not capable of performing or is having issues, we'll deal with those in the normal course. It wouldn't just be tied to age. With such a diverse workforce, we deal with accommodation issues at all ages."

However, having employees stay past 65 has often been to OPG's advantage, he says, because they can transfer their skills to younger employees. "Becoming a vehicular operator is not an easy task. Someone with 20 years' experience has a lot of knowledge they can pass on, so we're not necessarily rushing to get them out the door."

In virtually all Canadian jurisdictions, a mandatory retirement age is prohibited, unless it is based on a *bona fide* occupational requirement (BFOR) or a *bona fide* retirement or pension plan. The federal government was the last jurisdiction in the country to abolish mandatory retirement, amending the *Canadian Human Rights Act* and the *Canada Labour Code* in 2012.

"BFOR is always a defence against a complaint of discrimination," says Monet. "It means that the mandatory retirement is essential for the proper functioning of the job. You also have to show that you've been accommodating to allow the person to continue employment despite the age."

In *Cowling v. Alberta (Employment and Immigration)* in 2012, the Alberta Human Rights Tribunal ordered that a complainant be reinstated to her former job in addition to receiving five years' salary, and a general damages award of $15,000. Joan Cowling worked as a labour relations officer for the Province of Alberta for eight years on a series of contracts. In 2007, at the age of 67, Cowling reapplied for a position at the end of her latest contract.

Although she was assessed as "fully meeting expectations," the government refused to rehire her. Cowling brought a complaint alleging age discrimination, and the tribunal found in her favour.

The employer had stipulated that the position had to be filled for the long term. "By throwing in a five- to 10-year requirement, they were essentially excluding older applicants, including her," says Clarke. "Employers have to be careful not to 'game' the hiring process. Yes, they may avoid getting the applicants they don't want but, by doing that, it sets them up potentially for a complaint of discrimination."

The tribunal "really lowered the boom," says Clarke. The award was significantly larger than Cowling likely would have received from a court for wrongful dismissal. Reinstatement is also an unusual remedy "because the relationship by then is usually completely destroyed."

Religious Observance

There is a considerable body of case law defining the scope of an employer's duty to accommodate religious freedom at work. Cases tend to fall into four categories: work schedules that conflict with observance of a weekly Sabbath; leave of absence to observe religious holy days; dress codes; and workplace duties that conflict with beliefs.

While employers have a duty to accommodate – to the point of undue hardship – this duty isn't absolute. In addition, employees have a corresponding duty to cooperate in finding appropriate accommodations, and to accept reasonable proposals.

The Supreme Court has held that employees requesting religious accommodation do not have to prove that they are required by their faith to observe the practice at issue. They need only prove that they are sincere in their belief and observance of a particular practice.

Québec's Bill 62 will, if passed by the National Assembly in the autumn, require employees in the province's public sector to have their faces visible when providing services — effectively a ban on the wearing of the niqab in the workplace by devout Muslim women. Once adopted, this legislation seems certain to be challenged under the freedom of worship provisions of Québec's *Charter of Human Rights and Freedoms* and the Canadian *Charter*.

However, recent arbitral decisions in Ontario and Québec have clarified the limits to religious accommodation.

In the July 2014 ruling in *Ontario Public Service Employees Union, Local 560 v. Seneca College (Kaduri Grievance)*, Harvey Kaduri, a full-time teacher at Seneca College who also taught computer classes at a Jewish high school, CHAT, asked the college to accommodate his morning teaching schedule at CHAT by scheduling his college classes after 1 p.m. The college refused and Kaduri alleged discrimination on the basis of creed.

Kaduri had a sincerely held belief that he was required by his faith to give back to his community, the arbitration panel found. But it held that failure to schedule the grievor so that he could teach in the mornings was not discrimination. His request would have required the college to accommodate his desire to hold a second job.

As a result, the arbitrator found that the employee failed to make out a case of discrimination on the basis of creed. The arbitrator wrote that "it is not the requirement to give back that is being infringed but the particular choice of how to fulfill it." The grievor had other avenues open to him to "give back" to his community. Teaching mornings at a Jewish school was only one of several means Kaduri could have chosen to fulfill his sincerely held religious belief.

A similar push-back against religious accommodation occurred in an arbitration ruling in Québec in 2015 in the grievance between the Val-Maska Teachers Union and the St.-Hyacinthe (Que.) School Board. An elementary teacher, Chantal Frégeau, asked for two weeks off during the school year so that she could travel to Israel on an evangelical pilgrimage.

The school board refused her the time off, and she charged religious discrimination. The arbitrator ruled that her request was insufficiently specific.

"It's not sufficient to say this is because of my religious beliefs," says Monet. "You have to show that this is something that your religion imposes on you."

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