

## Must accommodate child care: Tribunal

*But family status still evolving area of case law, says lawyer*

BY SHANNON KLIE

**A RULING THAT** found an employer discriminated against an employee because it wouldn't accommodate her child-care responsibilities is a warning for employers, but it won't drastically change the legal landscape when it comes to work-life balance, according to an employment lawyer.

"The tribunal did not say that, in any conflict between a work obligation and a parental obligation, the parental obligation wins," said Erin Kuzz, a lawyer at Sherrard Kuzz in Toronto. "We haven't seen a case yet that decides where that line is drawn between ordinary, everyday parental obligations, or parental choices, versus something that's much more serious than that and much more challenging than that."

The Canadian Human Rights Tribunal found the Canada Border Services Agency (CBSA) discriminated against Fiona Johnstone on the basis of family status when it refused her request for static, full-time shifts following her maternity leave.

Johnstone's schedule and child-care needs were very challenging and she did everything she could to make her child-care arrangements work before asking for accommodation, said Kuzz.

"In my view, the result probably would have been different if she hadn't made those efforts. That's what takes it from 'I just have a conflict' to 'I have a conflict I need accommodation to deal with,'" she said. "There has to be some onus on the employees because they're the ones with the greatest ability to impact their own family situations."

Johnstone's first application

to the Canadian Human Rights Commission was rejected because the commission used a test set out in a 2004 British Columbia Court of Appeal decision. For there to be discrimination under family status, there had to be a change to the condition of employment that resulted in a serious interference with a substantial family obligation, stated the court.

But the Federal Court of Canada reversed the commission's decision, stating the B.C. Court of Appeal set the bar too high.

"This is such an evolving area of case law," said Kuzz. "Now the tribunals that are hearing these cases, based on the facts before them, are in that area of having to explore exactly where that bar is set."

As full-time border services officers at Toronto's Pearson Airport, Johnstone and her husband worked variable, rotating shifts. The shifts were irregular and unpredictable. Prior to returning to work on Jan. 4, 2004, after the birth of her first child, Johnstone asked to work three 13-hour shifts per week to maintain her full-time status and the attendant benefits and pension.

The three days she asked to work were the only days she could arrange child care. She couldn't get third-party care because of her and her husband's rotating shifts and she was only able to secure help from family on three days.

CBSA denied her request. Its unwritten policy is to only accommodate employees around child-care responsibilities by giving them part-time static shifts, to a maximum of 34 hours per week, without full-time benefits and pension.

However, it accommodates employees for medical and religious reasons by giving them

static shifts with full-time hours. The unwritten policy is applied unevenly, with some employees working 36 hours, others working full-time static shifts and others working part-time shifts while maintaining the equivalent of full-time benefits and pension.

The employer argued having children is a lifestyle choice and doesn't require accommodation. However, having children is a fundamental right society should support, found the tribunal.

"For the employer, this means assessing situations such as Ms. Johnstone's on an individual basis and working together with her to create a workable solution that balances her parental obligations with her work opportunities, short of undue hardship," it stated.

CBSA didn't assess whether or not it could accommodate Johnstone's family responsibilities and, therefore, failed to establish that accommodating her would cause undue hardship, found the tribunal.

In its August ruling, the tribunal ordered CBSA to compensate Johnstone for her lost wages and benefits, including her pension contributions and interest, had she been working on a full-time basis from Jan. 4, 2004, to the present. It must also pay her \$15,000 for pain and suffering and \$20,000 for special compensation for "willful and reckless conduct."

CBSA must also establish written policies to address family status accommodation, including a process for individualized assessments, ordered the tribunal.

CBSA is currently reviewing the tribunal's decision and cannot comment, said Sabrina Mehes, a communications officer at CBSA.

"This was a costly decision," said Nora Spinks, president of Work-Life Harmony Enterprises in Toronto.

While CBSA didn't have a written policy about accommodating family status, it did have a practice of how it addressed these situations.

"You will be held accountable for precedent that's set by practice, not just policy," she said.

With more people working non-traditional shifts, the need for child-care accommodation is only going to increase, said Spinks. "Working Monday to Friday, nine to five, is pretty rare these days and yet regulated child care is still 7 a.m. to 6 p.m. And that's not likely going to change," she said. "You can't tell kids to sleep in the day and play at night."

Family status is usually defined as the act of being in a parent-child relationship, which includes adult child-parent relationships. With more employees having responsibility for aging parents, employers will also need to address elder-care accommodation, said Spinks.

"I expect grievances, complaints and lawsuits related to failure to accommodate adult care will increase," she said.

Employers need to look at every request for accommodation on its own facts and seriously consider each one, said Kuzz. Employers need to document the process, all of the options considered and the reasons for reaching the decision.

"An employer is not well-served by coming up with an arbitrary rule and sticking with it," said Kuzz. "Bring the employee in as part of the process. Have them involved in the discussion of what the issues are and how, potentially, their needs can be met."