BREASTFEEDING AND WORKPLACE ACCOMMODATION: A MOTHER'S PREFERENCE OR DUTY?

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In 2014, the Public Service Labour Relations and Employment Board considered a grievance alleging that an employee was discriminated against on the basis of family status and/or sex when her employer denied her request to work full-time from home so that she could breastfeed her child. In *Flatt v. Treasury Board (Department of Industry)*, 2014 PSLREB 02, the Board found that a requirement that the employee be physically present in the workplace did not constitute discrimination on the basis of either family status or sex, despite its effect on the employee's breastfeeding schedule.On judicial review the Federal Court of Appeal upheld that decision: 2015 FCA 250. On May 5, 2016, the Supreme Court of Canada refused the grievor's application for leave to appeal.

Facts

Flatt worked for Industry Canada. Her job duties were largely administrative; however, field work was regularly required. The employer had a telework policy that permitted employees to perform some of their work at other government offices closer to their homes, or to work out of their homes, for part of their regular workweek. The policy expressly stated that teleworking could not be used as a long term substitute for family care responsibilities.

Flatt took a one-year maternity leave following the birth of her child. Prior to the expiry of her leave, she asked the employer to accommodate her desire to continue breastfeeding for an additional year by permitting her to work full-time from home. Flatt also advised the employer that she needed to have her work duties modified so that she could nurse her child at 8:00am, 12:00pm and 2:30pm. Despite various proposals and counter-proposals, the parties failed to agree on an arrangement.

Analysis

In order for a working mother to establish a *prima facie* case of discrimination on the basis of family status and/or sex related to childcare obligations, including breastfeeding, the Court of Appeal affirmed the Board's adoption of the test previously applied by the Court in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110. Under the *Johnstone* test she must demonstrate:

(1) a child is under her care and supervision;

(2) the childcare obligation at issue engages her legal responsibility for that child, as opposed to a personal choice;

(3) she has made efforts to meet the childcare obligation through reasonable alternative solutions, and that no such solution is reasonably accessible; and

(4) the impugned workplace condition or rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

The Court stated that this analysis must be done on a contextual basis. In the Court's view Flatt satisfied the first condition, but not the second and third conditions.

In respect of the second condition, the Court affirmed the Board's conclusion that a parent has a legal responsibility to nourish her child, but how the parent fulfills that responsibility is a question of choice, and not parental duty. The Court conceded that breastfeeding could be a parental duty if medical evidence established that by reason of a child's physical condition or illness, breastfeeding was necessary. In this case, Flatt produced no such medical evidence, only a doctor's note supporting her decision to continue breastfeeding. In respect of the third condition, the Court affirmed the Board's conclusion that Flatt made no reasonable effort to find an alternative viable solution.

What this means for Employers

As with previous cases this decision affirms that childcare-related parental obligations may require accommodation. It also provides much needed clarification as to what constitutes a personal choice as opposed to a parental duty. Moreover, the decision helps to illuminate the length to which an employee must go to satisfy the obligation to accept reasonable alternatives to her desired accommodation arrangement.

When confronted with a request for accommodation on the basis of an employee's child or elder care obligations, employers should seek legal assistance (i) to determine whether the employee's stated needs attract the duty to accommodate under applicable human rights legislation and, if so, (ii) how accommodation can best be achieved.

Federal Government Consultations

The Flatt decision is particularly interesting in light of the federal government's pledge to amend the *Canada Labour Code* to allow workers in federally regulated sectors to formally request flexible work arrangements from their employers. The government has announced that between May 16 and June 30, 2016, it will be consulting with Canadians on how to help federally regulated employees better manage work, family and

other personal responsibilities through flexible schedules, hours, locations, leaves and rest periods. The result may very well be legislative amendments that would have given Flatt what she was seeking.

For more information on the consultation process including access to the government's discussion paper, visit the "Consulting Canadians on flexible work arrangements" page on the Government of Canada website.

by David Elenbaas and Stefanie Di Francesco

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.