FAMILY STATUS QUO: FAILURE TO REINSTATE EMPLOYEE AFTER MATERNITY/PARENTAL LEAVE BREACHES HUMAN RIGHTS LEGISLATION

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Categories: Insights, Publications

In a *recent bulletin*, we advised readers of the Federal Court of Appeal ("FCA") decision in *Johnstone v. Canadian Border Services Agency* ("*Johnstone*"), which affirms that parental childcare obligations are included under the protected ground of family status under the *Canadian Human Rights Act*.In another *recent bulletin*, we advised readers of the Ontario Superior Court of Justice (the "Court") decision in *Partridge v. Botony Dental Corporation* ("*Partridge*"), which was the first decision to apply the four-part test articulated by the FCA in *Johnstone* to a discrimination claim on the basis of family status relating to childcare obligations under Ontario's *Human Rights Code* (the "*Code*").
Significantly, in *Bray v. Canadian College of Massage and Hydrotherapy*, another recent decision, the Court awarded damages for discrimination on the basis of sex and family status, when an employer failed to reinstate an employee to her former position following her maternity leave. This decision is another important reminder to employers of both the importance of abiding by the requirement to fully reinstate employment following maternity or parental leave, and the liability risks under the Code for failing to do so.

The Facts

Ms. Bray was employed by the College as an Instructor for nine years, working approximately 25 hours per week. Ms. Bray took a one-year maternity leave following the birth of her first child, which ended in October 2013, one month into the September term. When the College went about preparing the September term schedule, it neglected to include Ms. Bray.

When Ms. Bray contacted the College to discuss her return to work, she was advised she would be reinstated as a Teaching Assistant, with less hours, less responsibilities, and a lower rate of pay than her former position. When Ms. Bray reminded the College of its obligation to reinstate her to her former position, she was told to "see how this term goes and see if you find it ok with even being in 4 classes and having to be a mother at the same time. It will be a big adjustment".

Ms. Bray reacted by filing a complaint with the Ministry of Labour ("Ministry"). When Ms. Bray's maternity leave

ended, she returned to work as a Teaching Assistant. Ms. Bray worked for the first semester in a "very strange" and "odd" environment, as the Ministry had informed the College of Ms. Bray's complaint. Then, at the commencement of the second semester, Ms. Bray was advised that "[a]t this time we simply do not require your services for the upcoming term".

Ms. Bray then withdrew her complaint with the Ministry and commenced a constructive dismissal action against the College in which she also alleged that she was discriminated against on the basis of her status as a new mother, and that her termination was a reprisal for filing a complaint with the Ministry. The Court agreed.

The Findings

With respect to Ms. Bray's constructive dismissal claim, the Court affirmed the well-established principle that an employer has no inherent right to lay off an employee, even temporarily. While such a right can be created by the terms of an employment agreement, this right was not included in Ms. Bray's employment contract. The Court found that by demoting Ms. Bray following her maternity leave and removing her from the schedule, the College had constructively dismissed Ms. Bray. As a result, Ms. Bray was awarded 8 months pay in lieu of reasonable notice.

With respect to the *Code*, Ms. Bray alleged that the reduction in her hours, pay, and responsibilities amounted to discrimination in employment on the basis of sex and family status. Referring to the Ontario Court of Appeal decision in *Peel Law Association v Pieters*, the Court confirmed that in order to establish a breach of the *Code*, Ms. Bray was required to prove: (i) that she is a member of a group protected by the *Code*,(ii) that she was subject to adverse treatment, and (iii) that the protected characteristic was a factor in the adverse treatment.

First, the Court found that as a woman and new mother, Ms. Bray was a member of a group protected by the *Code*. Second, the Court found that Ms. Bray was subject to adverse treatment when her responsibilities, hours, and income were reduced following her maternity leave and when she was laid off. Third, the Court found that the employer's statement that working and "having to be a mother at the same time...will be a big adjustment" coupled with the resulting demotion clearly and plainly established that Ms. Bray's sex and family status were factors in the College's adverse treatment. Consequently, the Court awarded Ms. Bray $20,000 in damages for injury to feelings, dignity and self-respect.

Lessons for Employers

The Court's decisions in *Partridge* and *Bray* confirm that post-*Johnstone*, a refusal to reinstate an employee following a pregnancy or parental leave can amount to a breach of the family status protections of the *Code*, whether or not the claim for discrimination on the basis of family status relates to childcare obligations.

To ensure compliance with both the *Employment Standards Act*, 2000 (the "ESA") and the *Code*, employers

should be aware of their reinstatement obligations under section 53 of the ESA and the consequences of reprisal under section 74 of the ESA. Employers should also refrain from making unilateral decisions about the needs of a parent returning to work from a maternity or parental leave.

by 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.