An Employee's Last-Minute Childcare Obligations May Trigger the Duty to Accommodate

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The Human Rights Tribunal of Ontario recently provided further clarification regarding the scope of an employer's duty to accommodate an employee's childcare obligations. Previous decisions on this issue had typically focused on requests by employees for indefinite changes to some aspect of their employment, such as an assignment to a different shift or the option to work remotely. However, the Tribunal has confirmed that an employee may sometimes also have the right to receive accommodation for "sporadic or unexpected" childcare needs.

Facts of the Case

Mr. Miraka, the employee in *Miraka v. A.C.D. Wholesale Meats Ltd.*, 2016 HRTO 41 (CanLII), was a delivery truck driver for a wholesale meat distributor. He had been working in the position for approximately one month. At the conclusion of a Monday shift he received a call from his wife, who was the primary caregiver of their two young children. His wife indicated that she was unwell and was concerned that she would be unable to look after the children the next day. At the hearing Mr. Miraka testified that his wife occasionally had anxiety attacks that interfered with her ability to carry out her caregiving responsibilities. Mr. Miraka therefore obtained permission from the office manager to be absent from work the next day so he could supervise his children.

Although Mr. Miraka stayed home from work on Tuesday, his wife's condition did not substantially improve. As a result, he also stayed home from work on Wednesday. He did not call in to report his absence until near the end of what would have been his shift on Wednesday. He testified that he assumed that the office manager was aware that he was at home taking care of his children, and that nobody from the employer had called him to ask why he was not at work.

Mr. Miraka returned to work on Thursday after having been absent for two days. Shortly after he began his shift, he suffered a workplace injury and asked to leave early. The owner responded by terminating Mr. Miraka's employment. Mr. Miraka subsequently filed an application with the Tribunal alleging that his termination was related to his request for accommodation of his childcare obligations and therefore constituted discrimination on the basis of family status.

The Decision

The Tribunal found that Mr. Miraka had been discriminated against contrary to the *Human Rights Code*. In reaching this conclusion the Tribunal applied a modified version of the analysis from the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 (CanLII). That case set out the following test for family status discrimination:

1. The child is under the individual's care and supervision;
2. The childcare obligation at issue engages the individual's legal responsibility for that child as opposed to a personal choice;
3. The individual has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and no such alternative solution is reasonably accessible; and
4. The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.

The Tribunal concluded that Mr. Miraka had a *Code*-protected need to be absent from work and take care of his children on the Tuesday and Wednesday, and that requiring him to leave his children at home with his wife when she was incapable of caring for them would have constituted a significant interference with his parental obligations. Accordingly, the first, second and fourth parts of the *Johnstone* test were met.

The central issue in the case was whether Mr. Miraka had satisfied the third part of the *Johnstone* test by proving that he had made "reasonable efforts" to meet his childcare obligations through means that would not have interfered with his ability to attend at work. The employer argued that Mr. Miraka had not made any efforts to find an alternative solution, in that he had testified that there was no one for him to call to babysit his children and "everyone else was busy with their own lives".

The Tribunal rejected the employer's argument. In doing so, it distinguished between long-term accommodation needs, such as a permanent or semi-permanent change in an employee's hours of work, and short-term accommodation needs, such as the need to attend to an unexpectedly sick child. In the case of a "sporadic or unexpected need to miss work", the Tribunal found that different considerations applied. For example, the Tribunal expressed doubt that it was possible for Mr. Miraka to have a babysitter "on call" for those occasions when his wife fell ill, or that he should have made attempts to hire a stranger from "Craigslist" or "Kijiji" to

babysit his children on short notice before seeking accommodation from his employer. The Tribunal also noted that, since the *Johnstone* analysis applies to childcare obligations that engaged Mr. Miraka's legal obligations to his children, an "alternative solution" that compromised the safety and well-being of those children would not have been appropriate.

Finally, the Tribunal was critical of the fact that the employer gave Mr. Miraka permission to take the Tuesday off work to care for his children, but then relied on that absence when it terminated him after he missed a second shift for the same reason.

The Tribunal awarded Mr. Miraka $10,000 for injury to his dignity, feelings and self-respect. Mr. Miraka did not receive any damages for lost wages, as he was receiving WSIB benefits during the period following his termination and would not have been able to earn income in any event because of his workplace injury.

Conclusion

This case emphasizes the importance of treating the accommodation process as a collaborative effort in which both the employer and the employee have a duty to be reasonable. The Tribunal had no difficulty concluding that some childcare obligations require immediate action, making it difficult to canvass alternative options before requesting accommodation. At the same time, by terminating the employee immediately after a two day absence, the employer had little chance of establishing that it had conducted a sufficiently thorough examination of the employee's circumstances. It would have been more appropriate for the employer to obtain information from the employee about his childcare obligations following his return to work, and then to have used that information to work with the employee in planning for similar occurrences in the future.