Federal Court Rules on Family Status Accommodations

Family status is a prohibited ground of discrimination across Canada. The behaviour which establishes discrimination on the basis of family status has been subject to two lines of cases. The first line obligates the employer to accommodate only in the situation where the parent/child requirement is extraordinary (i.e. child with a disability). Under the second line of cases, the employer's obligation to accommodate is triggered simply by virtue of the existence of a parent/child relationship; no extraordinary circumstance is necessary.

The recent January 2013 decision of the Federal Court of Canada, *Attorney General v. Johnstone* ("*Johnstone*"), appears to provide further support for the second line of cases, and as a result presents significant challenges for employers.

In *Johnstone*, the employer denied a female employee's request to work a revised full-time fixed shift schedule for the purposes of obtaining childcare. Instead, the employer approved a part-time schedule that allowed the employee to obtain childcare but rendered the employee ineligible for benefits. The Court ultimately concluded that the employer had discriminated on the basis of family status by denying the employee's initial request.

This decision has a number of important implications:

(i) As noted above, under the standard as set out in the first line of cases, only more onerous family obligations triggered an employer's duty to accommodate. Under *Johnstone*, however, a parent/child relationship may now trigger this duty *on its own*;

(ii) Under the second line of cases which appears to be supported by the recent *Johnstone* decision, family status is not restricted to the status of being a parent or a child, but it also includes the obligations that flow from this status (i.e. childcare and eldercare); *and*

(iii) Tribunals and courts are not likely to be sympathetic to employer arguments that accommodating the needs of one employee will lead to a deluge of accommodation requests; in other words, courts will not be sympathetic to the 'floodgates' defense.

Despite what the above means to employers on a go-forward basis, it must be noted that accommodation is still a two-way street. The primary duty continues to fall to employees in that they must demonstrate that they have done everything reasonably within their powers to reconcile their family and work obligations. Employers have the right to ask employees for evidence showing that they have considered every possible solution to their family care needs. This would include asking employees whether other family members can care for their children or parents, or whether the children can be placed in daycare. The burden shifts to employers to accommodate the employees' requests up to the point of undue hardship only when employees demonstrate they have considered all their options.

Please contact e2r Solutions® should you require assistance addressing employee requests based on family status, and when seeking the evidence that you are entitled to prior to considering employees' requests for accommodaton.