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Canadian Employment Law Guide

February 2011
Number 129

ACCOMMODATION DOES NOT PREVENT CORPORATE REORGANIZATION

By: Jennifer Shepherd and Gulu Punia, associates with Fasken Martineau LLP. This article originally appeared in the Fasken Martineau bulletin THE HR SPACE.

It's a common question. You're restructuring and an absent employee is impacted. Can you fire the employee if he or she is on disability or other leave? A recent Federal Court of Canada decision, *Tutty v. MTS Allstream Inc.* [2011 FC 57], has confirmed that the answer is "yes".

The Facts

While employed with MTS, Charles Tutty suffered from a stress-related illness for which he took disability leave for a number of months. He was initially cleared to return to work on a gradual basis under the supervision of his treating physician and an independent Return to Work Coordinator, paid for by MTS. Eventually Mr. Tutty was cleared to return to work on a full-time basis at full salary – although his ability to work overtime hours or travel had yet to be assessed.

Before the assessment was completed, Mr. Tutty's position was eliminated through a corporate reorganization. MTS offered Mr. Tutty another position at the same salary, although with reduced responsibilities. But he declined the position. Not only did he not like what he called a demotion, he also assumed that the alternate position would require extensive overtime and travel – which he believed he was not able to do in light of his disability. When Mr. Tutty refused the alternate position, he was dismissed.

Inside

Human Rights Complaint

Mr. Tutty filed a complaint with the Canadian Human Rights Commission. He claimed that MTS failed to reasonably accommodate his disability. Further, he claimed he was fired because of his disability.

The Commission dismissed Mr. Tutty's complaint. In doing so, the Commission said that MTS had made reasonable efforts to accommodate Mr. Tutty's disability. Further, his termination did not appear to be linked to his health status.

Federal Court Appeal

Mr. Tutty appealed to the Federal Court of Canada. In agreeing with the Commission's decision, the Federal Court said:

- there was no question that MTS had accepted Mr. Tutty's disability at face value, even though Mr. Tutty's ability to work overtime and travel was a live issue at the time of his termination; and
- MTS met its duty to accommodate by implementing the gradual return to work plan and hiring the Return to Work Coordinator.

What the Decision Means

This decision is an example of a successful accommodation effort. It provides further clarification to employers about their duties to employees with disabilities in a corporate restructuring. As the Federal Court said, ''an employer's duty to accommodate does not . . . require that it hold a legitimate corporate reorganization in abeyance pending the resolution of an affected employee's disability''. Employers are entitled to carry on with their strategic planning as long as they make reasonable efforts to accommodate employees with disabilities.

The Federal Court also reaffirmed the principle stated in *Central School District No. 23 v. Renaud* [[1992] 2 S.C.R. 970] that accommodation is a ''two-way street''. Employees must be open to reasonable workplace adjustments, including accepting positions with different or reduced responsibility where necessary. Although a Federal Court case, these principles apply to provincial cases too.

The dismissal of a disabled employee is fraught with risk. However, if that employee is properly accommodated during his or her employment and the termination of employment is not based on disability, the dismissal can be carried out. Beware though – if any part of the reason for the dismissal is based on disability, the employee's complaint may succeed.

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CANADIAN EMPLOYMENT LAW GUIDE

Published bi-monthly by CCH Canadian Limited as the newsletter complement to the CANADIAN EMPLOYMENT LAW GUIDE. For subscription information, see your CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

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2010: THE YEAR IN REVIEW

By: Prepared by Naomi Horrox of Fraser Milner Casgrain LLP, Toronto office. This article first appeared in FOCUS ON CANADIAN EMPLOYMENT AND EQUALITY RIGHTS *Vol. 9, No. 12, December 2010. © CCH Canadian Limited.*

Believe it or not, it's that time of year again. For some, it's a time of religious or secular celebration; for others, it's simply a welcome couple of days off work to spend with friends and family. Regardless of how the holidays are spent, for most, it's time to reflect on the year that is drawing to a close and to make resolutions (or predictions!) for the year to come. In my reflection on employ-

ment and equality rights at the end of 2010, there are a number of interesting issues to consider at year-end and speculate about for the year to come.

Family Status Accommodation

Until recently, proving discrimination based on family status – the status of being in a parent and child relationship – had been a very difficult case for an employee to make. The employee would have to prove that the employer changed a term or condition of employment, and the change resulted in a serious interference with a substantial parental or other family duty or obligation of the employee. This summer, the Canadian Human Rights Tribunal critiqued that standard and used the typical discrimination analysis to approach the allegation. This change resulted in a finding that an employer had a duty to provide an employee with a regular work pattern in order to meet her child care obligations. With this decision in mind, employers should proceed with caution in responding to requests for accommodation based on family status as the case law in this area continues to evolve over the next few years.

Foreign-Trained Workers

According to results of surveys from Statistics Canada this year, foreign-trained workers continue to experience unemployment rates higher than persons born in Canada. Not surprisingly, the decisions from the Human Rights Tribunal this year have confirmed that some employers and regulatory bodies continue to insist on standards that are uncompromisingly stringent and that, as a result, adversely impact on foreign-trained workers in Canada. For example, a foreign-trained worker who did not furnish original documents because he was a refugee without access to those documents, was denied employment. The message from the tribunal in the decision against the employer was, however, clear: the standards imposed in the application process must be reasonable and necessary, and employers will be required to accommodate applicants adversely impacted by such requirements, based on prohibited grounds, up to the point of undue hardship.

The good news with respect to job prospects for foreign-trained workers is the apparent continued push towards recognizing and promoting the value of diversity in the workplace. Many large employers are founding diversity committees and taking proactive steps to assess how their workplaces are recruiting employees. Employers were assisted in analyzing the demographic of an employer's current workplace this year by the Ontario Human Rights Commission, which launched a new guide that offers information and advice to employers on collecting human rights–based data. The guide includes best practice examples of how data collection can improve internal work environments and promote higher productivity.

Harassment

On June 15, 2010, Ontario joined Quebec and Saskatchewan as a province offering protection to employees from harassment that is not related to a prohibited ground of discrimination under human rights legislation. Workplace harassment under Ontario's amended *Occupational Health and Safety Act* is defined as engaging in a course of vexatious comment or conduct against a worker in a workplace that is known, or ought reasonably to be known, to be unwelcome. Along with an expanded definition came expanded obligations on employers to prepare and post anti-harassment policies, and to investigate all claims of harassment in the same way as an employer would be required to do for harassment based on a prohibited ground of discrimination.

One of the most high-profile decisions of the year was the claim by an Ontario employee against her manager and employer for negligent and intentional infliction of mental distress in the context of a performance review. Despite the manager's appalling treatment of the employee, and the expanded protection for workplace harassment under occupational health and safety legislation, the Ontario Court of Appeal found that an employer does not owe a duty of care to an employee to prevent negligent infliction of mental distress. As the decision in this case is at odds to some extent with a British Columbia Court of Appeal case dealing with similar issues, this is another area in which the law will likely continue to develop in the next few years.

Leaves of Absence

On June 17, 2010, Manitoba became the second Canadian jurisdiction to provide employees with unpaid, job-protected leave to donate an organ, following similar legislation that came into force in Ontario on June 26, 2009. A Manitoba employee who has been employed with an employer for 30 days is entitled to up to 13 weeks of unpaid leave if he or she undergoes a surgical procedure that involves the removal of an organ or tissue for the purpose of it being transplanted into another individual. As well, Quebec has just passed legislation on December 10, 2010 that allows an employee with three months of uninterrupted service to take an unpaid leave of absence of not more than 26 weeks over a period of 12 months, in order to become a living organ or tissue donor. The legislation comes into force effective February 28, 2011.

Prince Edward Island's employment standards legislation also underwent significant changes effective October 1, 2010. Highlights include increased vacation entitlement after eight years of service, paid sick leave after ten years of service, one day of paid bereavement leave, and enhanced maternity, paternity, and adoption leaves.

Sexual Harassment and Sex Discrimination

Unfortunately, sexual harassment and discrimination complaints abounded in 2010. There were, of course, the usual distressing scenarios – crude language, practical jokes, customers repeatedly asking employees for dates, supervisors hitting on subordinates, pornography-watching at work, and, fortunately, slightly less common, genitalia being exposed to co-workers. While these cases attracted no, or negligible amounts of, media attention, the media was thrown into a tizzy when several professional American women alleged unfair treatment and remuneration by a high-profile investment firm, and two Canadian women filed a claim and a human rights application alleging a failure to promote women who were as well-qualified as their male colleagues in a law faculty and firm, respectively. We will have to wait for next year, and perhaps even into 2012, for these cases to wend their way through the courts and tribunals.

As always, we look forward seeing what the new year has in store from an employment and human rights perspective. We will certainly keep you posted as the cases above progress and as new trends emerge in 2011.

Q & A

What is discrimination based on marital status?

The definition of "marital status" varies to some extent across Canada by jurisdiction. Only Alberta, Saskatchewan, Ontario, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador expressly define "marital status" in their applicable human rights legislation. In all of these provinces, the definition of marital status includes being married, single, widowed, separated, divorced, or living with a person in a conjugal relationship outside marriage. Nova Scotia, Prince Edward Island, and Saskatchewan also add the status of being engaged to be married to their respective definitions. While other tribunals across Canada may reach differing results, the Ontario Human Rights Tribunal recently found that a mere "dating" relationship was not sufficient to bring the applicant within the threshold of protection for the ground of marital status; in Ontario, the applicant would need to establish that he or she was in a conjugal relationship with the person outside of marriage. In some jurisdictions, marital status may encompass discrimination relating to the identity and/or characteristics of one's spouse or spousal equivalent. This is not the case in Saskatchewan, however, where the province's definition of marital status expressly eliminates this possibility. Regardless of these differences, in all jurisdictions, marital status has been interpreted as including both opposite- and same-sex relationships.

Discrimination based on marital status in employment involves a distinction that imposes differential burdens, obligations, or disadvantages upon a person because of his or her perceived or actual marital status. Such discrimination may take a number of different forms, but often involves an employer making an assumption about an applicant or employee's suitability for work based on his or her relationship status. For example, an employer may prefer to hire a married man over an unmarried man in the belief that the married man may be more sedentary and less likely to move on to alternative employment in the short term. Other employers may prefer to hire single people in the belief that such individuals will have few outside responsibilities and thus may be more dedicated to their work. Relying on such assumptions in making employment-related decisions constitutes discrimination on the basis of marital status. In order to justify such discrimination, an employer would have to prove that the applicant or employee's marital status was a *bona fide* occupational requirement in relation to the position.

Inflating Titles To Keep Workers Happy Is Risky Business

While tough economic times continue, companies everywhere are creating innovative solutions to keep their loyal staff happy. As the company pocketbooks don't have the spare cash for generous raises, many employers are turning to title promotions with slight raises as a way to show their appreciation. And while there's nothing wrong with advancing a competent person, employment law experts warn companies to maintain integrity when giving promotions and be aware of potential legal risks associated with "job title inflation".

"If you're inflating job titles, you're breaking down traditional boundaries in the duties category. While employers may have good intentions, if you start inflating titles, the titles themselves don't reflect the duties of the position and required expertise," explained John K. Skousen, a partner in the Irvine, California office of Fisher & Phillips LLP. "It also can become confusing, disorganizing and difficult when striving to maintain job classifications and proper salaries when the economy bounces back including dealing with inaccurate job descriptions with misleading duties requirements, which can converge to cause difficulty separating exempt and non-exempt employees."

Skousen suggests considering the following issues before implementing title changes in today's economy:

1. **Steer clear of negligently promoting.** To give someone a responsibility he/she is not capable of doing – or a title that suggests something he/she is not really doing – is very risky. This may occur inadvertently when "promoting" by consolidating two or more positions into one job, leaving an employee unable to perform certain new functions in the glorified job. Employers are largely liable for their employees' actions and if they haven't trained them properly, or are negligently promoted, the company is responsible for that action. Skousen advises employers to avoid the temptation to change titles if it misstates what the person actually does.

2. **Avoid the temptation to give overworked staff title changes.** In a recession, people get more responsibility and jobs are combined. Instead of two employees working 40 hours per week, companies may have one person in that role working 60-hour weeks. Risks include increased turnover due to injuries or job turnover. Skousen advises employers to be smart and evaluate the risks of spreading out more work and responsibility to fewer employees just to "save money".

3. **Don't play the name game.** Many companies started calling staff "associates" several years ago, and it's lost much of its value today. Similarly, "consultants" are no longer sophisticated business consultants making $200,000 per year giving sound advice to companies. Now everyone's a "consultant" instead of a "salesman" or other appropriate title. Ensure the reputation of your team's qualifications are maintained, and that management titles remain respected.

4. **Ensure exempt and non-exempt accuracy.** Employers giving supervisory title changes may also assume they can shift a non-exempt employee to exempt status. However, if the actual job duties or responsibilities do not change much, there may be legal ramifications for misclassification and a potential lawsuit against the employer for unpaid overtime.

5. **Remember past lessons learned.** Inflating job titles is nothing new. In fact, similar practices took place in the '80s during that recession as employers attempted to compensate overworked and loyal employees during a tough economy. In addition, Skousen compares job title inflation to grade inflation in education, "If everyone has an 'A', how do you discern between the best and the average?"

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PROGRESS OF LEGISLATION

Prince Edward Island

New Legislation for Sunday Shopping

Prince Edward Island has passed two Bills which will affect employers who operate a retail business on Sundays.

Bill 100, *An Act to Amend the Retail Business Holidays Act*, will allow P.E.I. retailers to operate on Sundays all year-round. The Bill will remove the provision which currently prohibits retailers from operating on Sundays that fall between Christmas and Victoria Day. As a result, retail businesses will be permitted to open from 12 p.m. on Sundays throughout the entire year. Retailers, however, will still be prohibited from operating on designated holidays, including Boxing Day.

Bill 100 received first reading on November 23, 2010, second reading on November 25, third reading on November 30, and Royal Assent on December 9. It came into force on December 24, 2010.

Bill 34, *An Act to Amend the Employment Standards Act*, allows an employee to refuse to work on a Sunday, as long as the employee provides his or her employer with at least seven days' notice. An employer is prohibited from dismissing, disciplining, or otherwise penalizing an employee who refuses to work on a Sunday.

Bill 34 received first reading on November 30, 2010, second reading on December 8, and third reading and Royal Assent on December 9. It came into force on December 15, 2010.

Quebec

Organ Donation Act In Force February 28

Bill 125, *An Act to facilitate organ and tissue donation*, S.Q. 2010, c. 38, has received Royal Assent and will come into force on February 28, 2011. The Bill will amend the *Act respecting labour standards* to provide living organ or tissue donors with the same leave as is currently provided to those who require time off due to sickness or accident.

A worker who donates an organ or tissue will be entitled to an unpaid leave of absence of up to 26 weeks to undergo the donation and recovery. An employer will be prohibited from dismissing, suspending, or transferring an employee who takes a leave for organ or tissue donation. Upon expiry of the leave, the employee must be reinstated to his or her former position, with the same benefits and wages.

The Bill also contains provisions to create an organ donor consent registry, which aims to increase the number of organ donors in the province and reduce wait times for transplants.

Bill 125 received first reading on November 11, 2010, second reading on November 25, third reading on December 8, and Royal Assent on December 10.

Minimum Wage Increase Announced

Effective May 1, 2011, Quebec's minimum wage rate will increase as follows:

- the general rate will increase from $9.50 per hour to $9.65 per hour;
- the rate for employees who receive tips will increase from $8.25 per to $8.35 per hour;
- the rate for employees of certain sectors of the apparel industry will increase from $9.50 per hour to $9.65 per hour; and
- the rate for agricultural workers who harvest strawberries or raspberries will increase to $0.75 per kilogram, for strawberries, and $2.84 per kilogram, for raspberries.

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