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Employment Issues for the Sandwich Generation – Childcare and Eldercare

By Chris White

Introduction

On March 27, 2013, Dr. Linda Duxbury of Carleton's Sprott School of Business and Dr. Christopher Higgins of Western's Ivey School of Business released a major study titled, "Balancing Work, Childcare and Eldercare: A View From the Trenches". The study, based on the participation of just over 25,000 employees, paints the picture of an increasingly difficult situation faced by many in today's workforce as a result of family obligations. And, as most of the participants were highly educated managers and professionals working for larger firms, one could infer that many employees with less education and fewer financial resources would face even greater hurdles in meeting such challenges.

In one of the conclusions to the study, the authors write:

> *Employees in the sandwich generation are getting worn down by the demands on their time and they lack the emotional resilience to separate the work-life domains. The fact that most think their employers do not acknowledge that this is an issue exacerbates the situation as many try to cope by meeting work and family responsibilities at their own expense (i.e. neglecting their own physical and mental health). These findings are a wake-up call for employers given that the proportion of Canada's workforce with multi-generational caregiving demands is likely to increase in the next decade as our population ages, people live longer and employees tend to have their children in their thirties. The fact that the employees in the sandwich group were evenly split between Generation X and baby boomers helps dispel the myth that older employees are the ones most likely to be caregivers. These findings reinforce the fact that employers have to address this issue if they want to remain competitive.*

It is important to note that the study by Drs. Duxbury and Higgins is written from the perspective of professors in business schools and, as such, is focussed on the business challenges this issue presents to employers. Implications for employers and recommendations are clearly set out and we suggest that this study is an important resource for every organization that is interested in recruiting and retaining the best employees possible as well as supporting those employees so that they can perform in the most efficient and effective way possible.

The study's Executive Summary and Conclusions and Implications represent particularly compelling reading. Whether your organization is motivated by compassion or profit (or a judicious mix of the two), this study provides a resource that should not be ignored.

While the study focuses on the business reasons for addressing this issue, the legal implications do not form part of the analysis. And yet, increasingly, employers are facing challenges from employees that are played out in the courts or before the various human rights tribunals. This paper will address some of the liabilities and costs that such challenges represent.

The Statutory Framework

There are three possible sources of law which might create employer obligations in the event that an employee is dealing with family-related issues which impact the ability of the employee to carry out all of the duties and responsibilities of his or her position. These are:

- contractual terms and conditions found in:
  - written employment agreements
  - collective agreements governing unionized workplaces
  - policy manuals or employee handbooks
  - past practices which can be demonstrated to be binding on the parties
- legislated rights and obligations (i.e. human rights statutes)
- common law (i.e. decisions of the courts which have implied terms and conditions into an employment relationship)

In Canada, the common law has not implied rights and obligations into the contractual relationship such that an employee's need for accommodation to manage a family-related issue would somehow override the employer's ability to operate the organization in the normal course.

In the area of contract there are, no doubt, organizations which have directly or indirectly introduced or negotiated terms and conditions into the employment relationship designed to accommodate employee obligations arising outside the workplace. In such cases, the interpretation and application of those contractual terms obviously depend on the specific language or practices that are in place.

But the reality is that the singlemost important source of law which organizations must consider in dealing with workers faced with family responsibilities are the human rights statutes which directly address this issue. As well, it should be noted, in the event of any conflict, that such statutes trump any contract and override the terms and conditions upon which the parties may have otherwise agreed.

For employers who are federally regulated, the *Canadian Human Right Act* provides:

Prohibited grounds of discrimination

- **3.** (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Employment

7. It is a discriminatory practice, directly or indirectly,

- (*a*) to refuse to employ or continue to employ any individual, or
- (*b*) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

Employment applications, advertisements

8. It is a discriminatory practice

- (*a*) to use or circulate any form of application for employment, or
- (*b*) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry

that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.

Employee organizations

9. (1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination

(*a*) to exclude an individual from full membership in the organization;

(*b*) to expel or suspend a member of the organization; or

(*c*) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.

Discriminatory policy or practice

10. It is a discriminatory practice for an employer, employee organization or employer organization

- (*a*) to establish or pursue a policy or practice, or
- (*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

For all employers who are provincially regulated in the province of Ontario, the *Human Rights Code* provides:

Employment

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Definitions re: Parts I and II

10. (1) In Part I and in this Part,

"family status" means the status of being in a parent and child relationship;

Additionally in Ontario, provincially regulated organizations which regularly employ more than fifty (50) workers are required to provide emergency personal leave in accordance with section 50 of the *Employment Standards Act, 2000* which provides:

Personal emergency leave

50. (1) An employee whose employer regularly employs 50 or more employees is entitled to a leave of absence without pay because of any of the following:

1. A personal illness, injury or medical emergency.
2. The death, illness, injury or medical emergency of an individual described in subsection (2).
3. An urgent matter that concerns an individual described in subsection (2).

Same

(2) Paragraphs 2 and 3 of subsection (1) apply with respect to the following individuals:

1. The employee's spouse.
2. A parent, step-parent or foster parent of the employee or the employee's spouse.
3. A child, step-child or foster child of the employee or the employee's spouse.
4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse.
5. The spouse of a child of the employee.
6. The employee's brother or sister.
7. A relative of the employee who is dependent on the employee for care or assistance.

Advising employer

(3) An employee who wishes to take leave under this section shall advise his or her employer that he or she will be doing so.

Same

(4) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

Limit

(5) An employee is entitled to take a total of 10 days' leave under this section in each calendar year.

Leave deemed to be taken in entire days

(6) If an employee takes any part of a day as leave under this section, the employer may deem the employee to have taken one day's leave on that day for the purposes of subsection (5).

Evidence

(7) An employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.

For provincially regulated employers in Ontario it should be remembered that in dealing with workers who have a family-related matter, they will have the rights under both pieces of legislation. In some cases, the *Employment Standards Act, 2000* will provide a greater right to employees than the *Human Rights Code* (e.g. the expanded definition of family members in

respect of whom a personal emergency leave may be taken). In other cases, the *Human Rights Code* may result in an employee having potentially greater rights than the *Employment Standards Act, 2000* (e.g. an employee may be able to successfully argue that they require emergency leave days in excess of ten (10) in a year in order to deal with a family-related matter).

In all cases, the *Human Rights Code* has primacy over the *Employment Standards Act, 2000* and an employer cannot argue that its obligations are limited to those in the latter.

Recent Caselaw

Two cases related to family care issues have recently garnered much public attention.

Devaney

The first of these is a decision of the Human Rights Tribunal of Ontario dated August 17, 2012 in *Devaney v. ZRV Holdings Limited and Zeidler Partnership Architects* ("*Devaney").* This decision arose from an Application filed by an architect, Francis Devaney, that his termination for excessive absenteeism constituted discrimination on the basis of family status as his attendance issues were the direct result of his role as primary caregiver to his elderly mother. The Decision in *Devaney* is lengthy and sets out an exhaustive review of the factual background but, in summary, Mr. Devaney commenced employment as an architect with the Employer in 1982 and was made a Principal in 2000. During the period between 2005 and 2008 he worked almost exclusively on one project, the Trump Hotel and Tower in Toronto. During that period he reported working significant amounts of overtime, including as many as 1000 hours in 2007. During most of his employment, Mr. Devaney reported primarily for one of the founding members of the organization, Eb Ziedler, apparently without issue. In 2007, however, Mr. Ziedler became ill and another senior partner, Alan Munn, assumed a leadership role in administrative matters within the organization.

At the same time as Mr. Devaney was carrying out his duties and responsibilities respecting the Trump project, his mother (with whom he resided), was dealing with a variety of medical ailments generally characterized as age-related. These ailments were appearing with increasing frequency, severely impacted her mobility and required various medical treatments, including a number of surgeries.

During the period in which Mr. Devaney had reported to Mr. Ziedler, his eldercare responsibilities had occasionally impacted his attendance, apparently without issue or comment. However, the change in leadership to Mr. Munn coincided with the increase to Mr. Devaney's eldercare responsibilities and it appears that late arrivals, early departures days on which he worked from home became the norm rather than the exception. It should be noted that Mr. Devaney appeared to have been able to work remotely through the Employer's computer system and was available at all times by phone or computer to his client at the Trump project on which he continued to be primarily engaged.

Nevertheless, Mr. Munn became frustrated with Mr. Devaney's absence from the office and sought to deal with it directly. From Mr. Munn's perspective it was critical that Mr. Devaney carry his work out in the Employer's office in order to provide direction and leadership to the team that was working on the Trump project. Commencing with a letter in July 2007, Mr. Munn began formally communicating with Mr. Devaney about his attendance, culminating with an email in April 2008 which advised that, absent prior approval, a failure to attend at the Employer's premises for all scheduled office hours would result in Mr. Devaney's immediate

termination for just cause. Notwithstanding this communication, Mr. Devaney's pattern of absence continued as before without any termination of employment.

Eventually, in October 2008, Mr. Devaney's mother was hospitalized with a medical issue that resulted in her being placed on the "crisis list" for long-term care. She remained in the hospital until December 2008 when Mr. Devaney was advised that a placement had been found for his mother in January 2009. Mr. Devaney told Mr. Munn of this development prior to the holiday season in December of 2008. Notwithstanding this information, the Employer decided to terminate Mr. Devaney's employment in early January 2009 for just cause based on absenteeism. The Employer offered, on a gratuitous basis to provide a payment equal to 34 weeks' compensation together with eight (8) weeks' benefit continuation.

Mr. Devaney then asked for a second chance to continue his employment and was offered an opportunity to continue working for the Employer on a contract basis which would see him paid a *per diem* for each full day of attendance in the office. Mr. Devaney turned down the office on the basis that his caregiving responsibilities would not be accommodated in the future and that the loss of his status as a Principal negatively impacted his position with clients and within the architectural community.

It is worth noting that Mr. Devaney was offered, and accepted, a position as a consultant with the developer of the Trump project. He subsequently brought this Application.

In *Devaney,* the Human Rights Tribunal of Ontario ruled that the Employer breached both its procedural and substantive obligations under the *Human Rights Code*. Procedurally, the Employer failed to consider or investigate whether Mr. Devaney's requirements could be accommodated. Substantively, the Employer breached the *Code* in its insistence on applying a single standard respecting attendance and without accommodating Mr. Devaney which was possible in these circumstances without undue hardship to the Employer.

The Employer also argued there should be a higher standard of "serious interference" with an Applicant's family duties or obligations in order for the Employer to be found to have acted in a discriminatory manner. This argument is based on a statement in the 2004 decision of the British Columbia Court of Appeal in Campbell River which reads:

> *...Whether particular conduct does or does not amount to prima facie discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a prima facie case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a prima facie case. [emphasis added]*

Essentially, the Employer argued that in order for the *Human Rights Code* to be engaged, the Applicant needed to prove that:

> i) the Applicant's family situation was somehow outside the normal experience of individuals in today's society; and

ii) that the Employer's rule respecting attendance at work constituted "serious interference" with the Applicant's family situation.

We note it could also be argued pursuant to *Campbell River,* that it is necessary for a third element to be proved by an Applicant in order for the *Human Rights Code* to be engaged:

iii) that the Employer had changed its terms and conditions of employment so as to cause the "serious interference".

In rejecting the Employer's argument based on *Campbell River*, the Adjudicator of the Human Rights Tribunal of Ontario in *Devaney* ruled:

> ***[115] In my view, there is no basis for establishing a higher test or threshold for family staus discrimination, as opposed discrimination on other Code grounds, and the approach of the Canadian Human Rights Tribunal in Hoyt, supra, and the Federal Court in Johnstone, supra, is more in keeping with the principle that the Code ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it, than is the approach in Campbell River.***
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> ***[116] In Johnstone, supra, at paras. 29 to 31, the Federal Court indicated that, while family status cases can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status. The Court added that to limit family status protection to situations where the employer has changed a term or condition of employment is unduly restrictive and wrong in law. With respect to requiring that a complainant establish a "serious interference" with his or her protected interests, the Court endorsed the view that the fact that an applicant is adversely affected by a respondent's policy is sufficient to establish a prima facie case of discrimination, and that applying a higher standard to the ground of family status would be an error.***

In his assessment of damages the Adjudicator awarded Mr. Devaney $15,000 for injury to dignity, feelings and self-respect, noting that a number of his absences had not been related to his eldercare responsibilities and that he had not engaged in a clear discussion with the Employer respecting possible accommodations. Mr. Devaney received no award for pecuniary damages as he had fully mitigated any financial loss. The Adjudicator also ordered the Employer to develop appropriate policies and provide mandatory human rights training to staff.

Johnstone

In the *Devaney* decision, the reader will have noted a reference to a 2007 decision of the Federal Court named *Johnstone.* That decision originated with an Application to the Canadian Human Rights Commission in 2004 by a Ms. Fiona Johnstone which arose out of a request for a schedule on day shifts to accommodate her childcare responsibilities that was denied by her employer, the Canada Border Services Agency. Ms. Johnstone's Application has had a roller coaster ride involving multiple decisions. For example, the 2007 decision of the Federal Court

referenced in the *Devaney* decision was the first of series of court decisions dealing with an appeal of the initial decision of the Canadian Human Rights Commission to deny Ms. Johnstone's Application on the basis that the Employer's scheduling policy did not constitute a "serious interference" with her family status rights under the *Canadian Human Rights Act*.

Since 2007, Ms. Johnstone's case has made a number of additional stops before tribunals and the courts and it appears that the journey is not at an end.

Following the 2007 decision of the Federal Court, Ms. Johnstone's Application was eventually referred back to the Canadian Human Rights Tribunal on the basis that the "serious interference" test was improper. Ultimately, the CHRT issued a Decision on August 6, 2010 upholding Ms. Johnstone's Application. That decision was judicially reviewed by the Employer and it, in turn, was upheld by the Federal Court on January 31, 2013 in Johnstone #2. The Employer has commenced an appeal of the *Johnstone #2* to the Federal Court of Appeal.

Notwithstanding the lack of finality in this case, it is worth reviewing for two reasons. First, it represents another analysis and application of the legal principles at play in the family status cases. Second, the decision of the Federal Court in *Johnstone #2* received significant media attention and that, in turn, has resulted in an increased focus on issues arising from childcare obligations in workplaces across Canada.

What makes Ms. Johnstone's case different from that of Mr. Devaney is the lack of any unique circumstances involving her family members. Ms. Johnstone had two children, each of whom appears to have had no particular special needs as a result of physical, mental or behavioural challenges. The difficulty for Ms. Johnstone arose directly from the schedule in her workplace. The Canadian Border Services Agency ("CBSA") utilizes a work schedule which requires full-time employees to work rotating shifts with variable start times. Ms. Johnstone's husband was employed by CBSA under a similar scheduling regime. As a result, Ms. Johnstone testified that she was unable to make any suitable arrangements for childcare.

When Ms. Johnstone approached the Employer after giving birth to each of her children, she was advised that it was the policy of the CBSA that all full-time employees were required to work the variable schedule. It should be noted that the workplace was unionized and the schedule had been created in accordance with the Collective Agreement. The Employer did, however, have an unwritten policy to allow employees in Ms. Johnstone's position to work straight days on a part-time basis. That would eliminate her entitlement to participate in the benefit and pension plans.

CBSA also did allow full-time employees to work straight days as accommodation for religious or medical reasons on either a temporary or permanent basis depending on the circumstances. Ms. Johnstone proposed a number of alternatives which would allow her to work full-time or which would permit her to maintain her participation in the pension plan while working part-time but the CBSA was not prepared to accept those proposals.

In upholding the 2010 decision of the Canadian Human Rights Tribunal, the Court in *Johnstone #2* found that the Tribunal had met the standard of reasonableness in its determinations that:

i) there is no separate test of "serious interference" in family status cases;

ii) the Applicant is not required to demonstrate that the Employer had changed its rules (in other words, discrimination could be the product of the application of existing rules to an employee's own changed circumstances); and

iii) the Applicant's own situation did not have to involve unique circumstances (e.g. a child with special needs) in order for a prima facie case of discrimination to exist.

Until we hear from the Federal Court of Appeal in the Employer's appeal of *Johnstone #2,* it is not possible to determine whether this decision represents the final word for federally-regulated employers. In the meantime, it does set out the standard which is applicable to such federally-regulated employers and should be considered carefully in those cases which may involve employees with family care responsibilities.

But is it the final word for provincially-regulated employers in Ontario. Not necessarily, as may be seen below.

Ontario – A Different Story?

In Ontario, it may be argued that yet a different standard should be applied based on analysis found in a 2012 arbitration award by Arbitrator John Stout in Siemens Milltronics Process Instruments Inc. ("*Siemens*") In this decision, the Grievor was a single mother with two daughters, one of whom had severe disabilities. Her disabled daughter experienced medical problems on the day before the Christmas shutdown in 2011 which included three statutory holidays. As she was unable to make alternative childcare arrangements for her daughter the Grievor did not attend work and, as a result, was considered by the Employer to be disentitled to statutory holiday pay for the three days.

The grievance was filed on the basis that the Employer's actions constituted discrimination on the basis of family status. During the hearing, the Employer testified that:

> *...the Company does not accept as satisfactory the absence of an employee to care for a child or any other person in their family. [The Company representative] indicated that accepting such reasons would be precedent setting and open up the Company to many other cases. [She] estimates that between forty to fifty (40-50%) percent of employees have young children who get sick. [She] also points out that other employees have relatives that they may have to provide care for on an ongoing basis.*

In this decision the Union argued that a number of decisions, including *Johnstone,* "...stand for the proposition that any employer action that has a negative impact on a parental obligation would be prima facie discriminatory." In rejecting that approach, the Arbitrator relied on a 2010 decision of the Ontario Court of Appeal, Tranchemontagne.

With respect to *Tranchemontagne*, the Arbitrator wrote:

> *[61] The Court of Appeal in Tranchemontagne makes it clear that it is not enough to impugn an employer's conduct on the basis that what was done had a negative*

> *impact on an employee in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact that triggers the possibility of a remedy. Therefore, the Union is required to establish more than differential treatment causing a negative impact. The Union must establish a link between the protected ground and the adverse treatment. A component of that analysis includes whether the treatment is in fact stereotypical or arbitrary, and whether it affronts concepts of human dignity. In other words, did the protected ground or characteristic truly play a role in creating the disadvantage? [emphasis added]*

With respect to *Johnstone*, the Arbitrator also argued that a more nuanced reading was appropriate, writing "I read [*Johnstone*] as meaning that a contextual approach is required examining all the circumstances in determining if the employer's conduct is prima facie discriminatory." In summing up his analysis, the Arbitrator went on to state:

> *[64] In my view, accepting the proposition that any employer action, which has a negative impact on a family or parental obligation, is prima facie discriminatory is untenable. On a basic level, attendance at work interferes with family obligations. However, it has been found that requiring work in exchange for compensation is a reasonable and bona fiderequirement, see ONA v. Orillia Soldiers Memorial Hospital 1999 CanLII 3687 (ON CA), (1999) 42 O.R. (3d) 692 (C.A.) cited in Complex Services Inc. and Ontario Public Service Employees Union, Local 278, supra.*
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> *[65] More than a negative impact is required to make out a case of prima facie discrimination. According to Tranchemontagne, the negative impact must be examined in context, including the situation of the complainant, the reasons for the employer's conduct and whether the impact of the employer's conduct is to perpetuate prejudice or stereotyping.*

In denying the grievance, the Arbitrator found that the Employer had not acted in an arbitrary or bad faith fashion. While the Employer's application of its rules had a negative consequence for the employee they were in furtherance of legitimate workplace goals applied to other employees and did not have the effect of perpetuating prejudice or stereotyping. The Company did not treat the employee differently because of her family status. Rather, it treated her as it did because of rules rooted in legitimate business interests. Not all differential treatment is discriminatory and must be considered in context.

Finally, it should be noted that if the Arbitrator's analysis in *Siemens* is accepted, the law in Ontario is not that found in the Federal Court decision in *Johnstone* or the B.C. Court of Appeal decision in *Campbell River*. Rather, it is a third way which we would argue is more nuanced and properly reflective of the competing interests in a viable employment relationship.

Conclusion

There is no doubt that employees belonging to the Sandwich Generation face difficult challenges that appear to be on the rise. And that, in turn, creates challenges for their employers. In most

cases these will be the business challenges identified in the study by Drs. Duxbury and Higgins. But for some employers, these will be manifested in legal challenges as employees seek solutions for their childcare and eldercare difficulties in the form of workplace accommodations.

In such cases, the way is far from clear. The law in this area continues to develop and there is no one decision which can be said to have pulled together the various strands into a cohesive whole. Employers will have to exercise both caution and common-sense in dealing with employee requests for accomodation of their family care responsibilities.