HUNTER-LIBERATORE-LAW

Accommodating Disability and Family Status Based Remote Work Requests

A recent trend facing employers trying to return employees to the office is requests for accommodation to stay remote. There is very little case law from the pandemic era to consider yet. However, there is some older case law that demonstrates the analysis that adjudicators will apply. In this article we explore the most common grounds for requesting remote work as an accommodation - disability and family status - and look at some of the existing related case law.

a) Disability Based Discrimination

Before the pandemic, requests for workplace accommodations due to disability, such as working remotely or commuting, were unusual but not unheard of. Employees may argue that a requirement to attend the office has an adverse impact on them as disabled individuals. Requests for accommodation often arise from an assertion of an unsuitable work environment caused by an employee's sensitivity or neurotypical uniqueness. Another typical request is that the employee's disability prevents them from commuting long distances.

b) Family Status Based Discrimination

In Ontario, the *Code* defines "family status" as "the status of being in a parent and child relationship (including relationships through fostering and adoption) and encompasses a wide and diverse range of "parent type" relationships, focusing largely on whether there is a relationship of care.

The Human Rights Tribunal of Ontario (HRTO)'s leading case on family status claims is *Misetich v. Value Village* where the Tribunal established discrimination based on family status requires the complainant to show that the employer's adverse treatment, standard, or policy results in a real disadvantage to either the parent/child relationship, the complainant's caregiving responsibilities, or the complainant's work. Where an accommodation request is based on family status but does not engage issues of caregiving, a *prima facie* case may not be established.

An employer is entitled to make inquiries about the extent of the employee's caregiving-related needs, and about the other supports that are available to

the employee and whether the employee made basic efforts to explore every possible option, such as a babysitter or after-school care.

c) The Duty to Accommodate

The duty to accommodate has both procedural and substantive obligations. An employer may request only the information reasonably necessary to determine the nature of the accommodation required. The employer's substantive duty is to reasonably accommodate an employee's disability-related needs – the standard does not require perfect accommodation, and it does not require the employer to go beyond the point of undue hardship.

d) Existing Case Law

A review of recent jurisprudence involving requests for alternative work arrangements, hybrid work arrangements, or work from home requests suggests that adjudicators take an individualized approach to each case and assess the reasonableness of the accommodation options explored. It is not sufficient for employee seeking accommodation to assert that they have childcare or eldercare responsibilities, or that they have a disability, and expect employers to grant them the work location or schedule of their choosing.

In *OPSEU (Martin) v. Ontario (Transportation)*, the grievor asked to work from home due to the COVID-19 pandemic, arguing that her husband had a medical condition and needed to be protected from exposure. The Grievance Settlement Board found that Martin was not entitled to accommodation based on marital status, a ground closely connected with family status, because absent a caregiving or caretaking relationship, the desire to provide a family member with optimal disease protection did not engage the duty to accommodate under the *Code*:

> .... It is understandable that anyone would want to take optimum precautions, including even not going to work, in order to reduce the risk of infecting members of the household including a spouse. That subjective desire, however genuine, would not provide the required protected characteristic, just as the mere fact of having children at home would not. In the case of children, it is the need and the obligation to care for young children that provides that characteristic. ... It is the obligation to care that flows from the family status that provides that protection. In this case, it was a desire or preference on the part of the grievor to provide the best possible protection to her spouse (at para 27)

In *Toronto v. CUPE (JT)*, the employee requested a change in work hours in order to meet her children when they were dropped off by the school bus. She asserted that she had difficulties in securing afterschool care because it was too expensive. The children attended private school where after school care was available. However, the employee did not enroll her children in after school care and instead paid for them to be bussed home.

Regarding an employee's obligation to explore childcare options, when possible, the arbitrator stated the following:

> ...It is my view, however, the contextual consideration of other available supports, consistent with the *Misetich* approach, suggests that with respect to after-school care, a relevant consideration is whether the individual seeking the accommodation had in good faith explored traditional options for child-care, such as babysitting... (at para 70)

The employer in that case inquired into the employee's limitations, looking at whether after school childcare was in fact unaffordable. The employee provided detailed information including information regarding her expenses and the family's debt load. Based on the information provided, the arbitrator found that the difficulty in securing after school care was the result of the caregivers' choices and was, in that case, insufficient to trigger an entitlement to accommodation.

In *Mazzariol v. LDCSB*, the applicant was a teacher with neurological symptoms that led to dizziness, nausea, and a sensitivity to noise and light. Following a sick leave, the applicant, who was unable to work in a bright, loud school environment, commute beyond very short distances, or come into work at all when she was symptomatic, asked to return to work by teaching e-learning courses from home. The Board refused the request, instead finding an appropriate workspace in a nearby school for the applicant to teach the online classes.

The Tribunal found that while the applicant was required to try proposed accommodations, even where she was skeptical about them, she was not required to try accommodations that clearly violated her "established restrictions." The Applicant should have come into her accommodated workspace when she was not symptomatic, and the school board should have let her work from home when she was experiencing symptoms. Its refusal to do so was found to be a breach of the *Code*.

In *Wilson v. Royal Lepage West Realty Group*, the applicant experienced multiple seizures and was permitted to work from home at his discretion. In this case however, the Applicant asked to take all his office furniture home with him stating that he needed the furniture because his home office chair was "not comfortable".

The Tribunal found that even if the applicant had been entitled to work from home as an accommodation, "there was no evidence to demonstrate that he needed the furniture that was at the respondent's office to do so" (at para 25). Where other employees did not have a right to take furniture when they worked from home, and where the applicant's disability did not relate to his ability to sit and work at a desk, he was not entitled to be accommodated with a new home office setup. In short, the accommodation sought bore no nexus to the applicant's actual disability-related needs and the employer's substantive obligation to accommodate only extended to the actual limitations experienced by the employee.

In *Pepper v. Lamb,* the plaintiff performed clerical work at the defendant's business, which involved the selling and shipping of office supplies. The parties had initially had a romantic relationship which had ended, though the plaintiff continued to work for the defendant. The plaintiff had formerly done some of her work remotely, but, owing to some concern about potential financial improprieties, the defendant later made a business decision to have her work on site.

Following an altercation in 2016, the plaintiff was placed on a one-week psychiatric hold. After she returned to work the plaintiff asked to work remotely, stating that she was frightened of the defendant. The defendant, realizing that the bulk of the plaintiff's work, including the packing and shipping of merchandise, could not be performed remotely, offered to let the plaintiff work on site from the defendant's home office and the defendant would not be present in the building during her working hours. The plaintiff found this accommodation insufficient and sued for constructive dismissal. At trial, the court found that the defendant had offered a reasonable accommodation and thereby discharged his duty to accommodate the plaintiff:

> I cannot accept Ms. Pepper's evidence that she did not accept the accommodation because she was "fearful" of the Defendant. That explanation is non-sensical. The proposal was such that the defendant would not be present when Ms. Pepper worked. She wanted to work

> entirely from home and that was unacceptable to the defendant. Indeed, it is unclear how working (entirely) from home could be accommodated. Product was stored at, and shipped from the business location. There was dedicated office equipment and supplies located there (at para 51).

Lastly, in the case of *Lesa Bowen v. Moore Packaging Corporation*, the complainant's job required her to drive between 50-60 hours per week between Barrie and Toronto, meeting with clients and delivering product to them. The complainant alleged that due to arthritis in her neck, she could not drive more than 2.5 hours each week. The employer proposed multiple accommodation plans. First, it proposed the complainant work remotely from a public area in the office while the employer would pay for the complainant to take the GO train and Ubers to commute where necessary. The complainant rejected this plan.

The second proposal would require the complainant to work from a semi-private office on the employer's premises, where the employer would provide her with a heating pad, humidifier, TENS machine, and an ergonomic chair. The employer asked for the complainant to make suggestions for how she would continue servicing her customers. The complainant rejected this proposal and declined to make any suggestions.

The employer's last proposal was that the complainant work from home wherever possible and meet in-office once weekly. The employer would pay the complainant $140 monthly for a car allowance and would pay for her GO train and Uber expenses. The complainant again declined the proposal and then claimed that the employer's refusal to allow her to work from home amounted to a reprisal. The complainant threatened to contact the employer's largest customers and relay negative information about the company. The employer terminated the complainant for cause, alleging extortion.

In its assessment, the Board found that the employer had offered reasonable accommodations, while the complainant had repeatedly failed to meet her duty to participate in the accommodation process:

> …Accommodation is a bilateral, multi-party process that engages both of the workplace parties. Moore engaged with Ms. Bowen's criticisms by repeatedly amending the accommodation plan to meet her concerns …
>
> There is no evidence that Ms. Bowen ever attempted to comply with the various proposed accommodation plans despite the protracted attempts

> by Moore to finalize a plan and its various attempts to accede to her criticisms… Beyond her complaints about the accommodation plans proposed by Moore, Ms. Bowen did not make any constructive suggestions of her own… (at paras 149 and 151)

e) Takeaways

These cases described in this article mostly pre-date the pandemic. They are helpful, however, in offering insight into the nature of the assessment that is required for adjudicating disputes in relation to work from home/commuting accommodation requests. As the cases above illustrate, adjudicators are likely to take an individualized approach to each case and assess the reasonableness of the accommodation options explored.

The assessment is likely to involve an examination of the flexibility and creativity offered by employers in finding reasonable accommodations, and likewise an assessment of an accommodation seeker's willingness to participate in this collaborative process. For employers and employees alike, it will be important to navigate these requests flexibly, and to think about the importance of collaboration, listening, and creativity. Whether or not remote work is the found to be a reasonable accommodation in the circumstances, employers have an ongoing duty to collaborate with employees to develop an accommodation plan that fosters dignity and full participation in the workplace.