

EMPLOYMENT LAW: FAQs 2016

Presented by: Jane Sirdevan
November 10, 2016



FAQ #1 -The Duty to Accommodate

"An employee has been away for the last 6 weeks. The original doctor's note indicated that she would be able to return in 4 to 6 weeks. I just received a second doctor's note that indicates she will be away for a further 4 to 6 weeks. The other employees in the office can't continue to fill this role and I need to re-hire for this position ASAP and on a full time basis. I am going to let this employee know that while I wish her well, I have no choice but to conclude the employment relationship. I can do this – right?"



2

The Duty to Accommodate

- The Code provides that every person has a right to equal treatment with respect to employment without discrimination or harassment because of race, ancestry, place or origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability



3

The Duty to Accommodate

- All employers have a legal duty to accommodate the Code-related needs of their employees, unless it would cause undue hardship
- The duty to accommodate has both a procedural component (i.e. considering what steps could be taken) and a substantive component (reasonableness of accommodation given or reasons for not providing an accommodation)



4

The Duty to Accommodate

- The Code prescribes only 3 considerations when assessing “undue hardship”: cost, outside sources of funding and health and safety requirements
- “undue hardship”, by definition, does not include inconvenience, employee morale, customer or third party preferences, etc.
- Employer’s evidence of undue hardship must be objective, real direct and quantifiable



5

The Duty to Accommodate

- The purpose of the duty to accommodate is not to completely alter the essence of the contract of employment – i.e. the employee’s duty to perform work in exchange for remuneration
- Consider the application of this “purpose” to chronic absenteeism (where due to a code related need), employee refusal to work evenings or weekends, inability to perform usual duties of employee’s position



6

FAQ #2 – Discrimination re Family Status

All office staff are required to work from 9 a.m. to 5 p.m. One of my employees just returned from a parental leave and has advised me that he needs to leave at 4:30 to pick up his daughter from day care. He has offered to start at 8:30 or to reduce his lunch hour to 30 minutes. At least 80% of my staff have the same family responsibilities and they all manage to work normal office hours. I don't have to make an exception for this employee – do I?



Discrimination re Family Status

- Family Status is defined as “the status of being in a parent and child relationship”
- “parent and child relationship” is interpreted very broadly to include similar relationships of care, responsibility and commitment
- Most “family status” cases turn on whether there has been discrimination on the basis of family status (as opposed to accommodation of family status needs)



Discrimination re Family Status

- Until very recently, employee needed to demonstrate the following :
 - i. Child is under employee’s care and supervision;
 - ii. Childcare obligation at issue engages the employee’s legal responsibility (as opposed to personal choice)
 - iii. Employee has made reasonable efforts to meet the obligation through reasonable alternative solutions;



Discrimination re Family Status

- iv. the workplace requirement interferes in a manner that is more than trivial or insubstantial with the childcare obligation
- If the employee proves that there is discrimination, the onus shifts to the employer to demonstrate that the accommodation requested would cause undue hardship



10

Discrimination re Family Status

- Recent ORHT decision (*Misetich v. Value Village*) suggests that there is a new test:
 - i. Employee needs only establish a negative impact on a family need that results in a real disadvantage;
 - ii. The determination of whether there is a “real disadvantage” will depend on all of the circumstances of the case.



11

Discrimination re Family Status

- Consider impact of the “new test” on the scope of employment issues that may give rise to a claim of discrimination on the basis of family status



12

FAQ #3 – Vacation Pay

Is there a difference between vacation pay and paid vacation?



13

Vacation Pay

- Pursuant to the ESA, employees must receive vacation pay of a minimum of 4% of their annual “wages”;
- “Wages” include:
 - Regular earnings, including commissions
 - Bonuses and gifts that are non-discretionary or are related to hours of work, production or efficiency;
 - Overtime pay, public holiday pay;
 - Termination pay



14

Vacation Pay

- You cannot contract out of the ESA
- You can provide a greater benefit to an employee than the employment standard



15

Vacation Pay

- Most employers provide employees with “paid vacation” in satisfaction of their vacation pay entitlement
- Most employers provide employees with “paid vacation” in excess of the statutory minimum
- Many employers do not calculate “vacation pay” to include anything other than the employee’s usual base salary



16

FAQ #4 - Overtime

My employees usually work 9 a.m. to 5 p.m. During “busy periods” many employees work an extra 5 to 10 hours per week (at home or in the office). My employees are paid a generous base salary that takes into account their level of responsibility and my Company policy is that no one is eligible for overtime. A few employees have submitted “time sheets” and expect to be compensated for the additional hours. I don’t have to pay them anything extra - do I?



17

Overtime

- ESA prescribes that employer is obligated to pay employees “time and a half” for every hour worked over 44 hours per week
- You cannot contract out of the ESA – but you can provide greater benefits than the minimum standard
- Consider usual “hours of work” as they apply to your Company’s employees (by contract or course of conduct)



18

Overtime

- Employers are obligated to keep accurate records of work hours
- ESA provides that work is deemed to be performed where work is:
 - i. permitted or suffered to be done by the employer, or
 - ii. in fact performed by an employee although a term of the contract of employment expressly forbids or limits hours or work or requires the employer to authorize hours or work in advance



19

Overtime

- Most employees are subject to overtime provisions of the ESA
- Some employees are exempt from overtime obligations.
Examples (that actually come up from time to time) include:
 - A person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis



20

Overtime

- An information technology professional – defined as an employee who is primarily engaged in the investigation, analysis, design, development, implementation, operation or management of information systems based on computer and related technologies through the objective application of specialized knowledge and professional judgment
- A duly qualified practitioner of architecture, law, professional engineering or public accounting



21

Overtime

- Most employees do not complain about unpaid overtime until the employment relationship is concluded
- There are limitation periods (which will limit the number of years an employee can claim) but depending on size of work force, this can be a significant risk
- Consider your policies re "Overtime"



22



Questions?



23

Contact Us

Jane Sirdevan, Partner

 416.865.6672

 info@grllp.com

 jsirdevan@grllp.com

 @grllp



24
