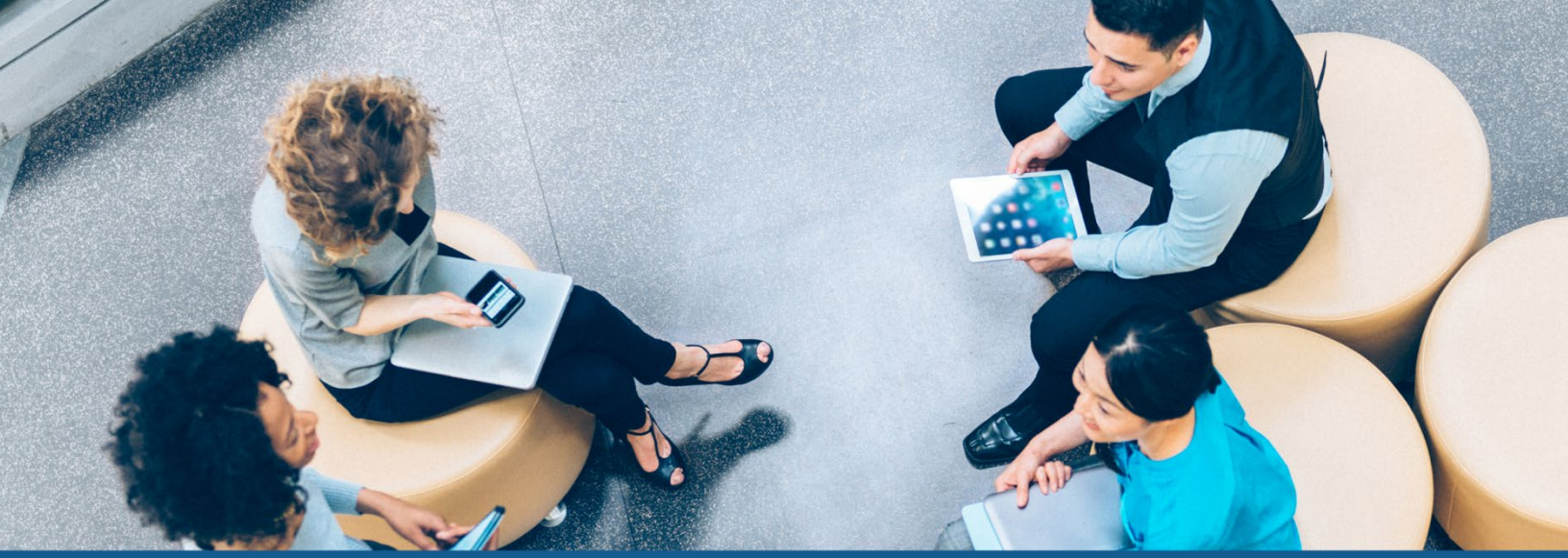

What's New in HR Law

Unilaterally Revoking Existing Accommodations is Risky Business

February 26, 2021

Bottom Line

In *Kovintharajah v. Paragon Linen and Laundry Services Inc.*, 2021 HRTO 98, Vice-Chair Best held that the employer violated the *Human Rights Code* (the "*Code*") by revoking an existing family status accommodation that allowed an employee to leave work before the normal end of the shift in order to meet their child care responsibilities.

Background

The accommodation was revoked by a new general manager who, without considering the applicant's personal circumstances, instituted and enforced a blanket rule forbidding all staff from leaving prior to the end of their shifts. After the applicant left their shift early subsequent to the implementation of the blanket rule, the general manager implemented progressive discipline, which eventually resulted in the termination of the applicant's employment. Following the applicant's termination, the head of the company, upon learning of the applicant's termination, asked the applicant to return to work. The general manager also contacted the applicant. The Tribunal found, however, that the applicant was not offered any specific shift,

Filion Wakely Thorup Angeletti LLP www.filion.on.ca

Toronto

Bay Adelaide Centre
333 Bay Street, Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel 416.408.3221 | fax 416.408.4814
toronto@filion.on.ca

London

620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel 519.433.7270 | fax 519.433.4453
london@filion.on.ca

Hamilton

1 King Street West, Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel 905.526.8904 | fax 905.577.0805
hamilton@filion.on.ca

such that no concrete offer to have the applicant return to work with accommodations was actually made. The Tribunal accepted that it was reasonable for the applicant to be scared to return to work only to have "the same thing … happen again".

Tribunal Comments on the Duty to Accommodate

With respect to the issue of post-termination offers of accommodation, the Tribunal noted that, though it is not clear that a post-termination offer can be considered an accommodation, "there may be circumstances where a post-termination offer is a relevant factor to consider". While the Tribunal did not elaborate on what such circumstances might be, it arguably left the door open to respondents being able to argue that a proper post-termination offer to return to work with accommodation may be a relevant factor for the Tribunal to consider, though the Tribunal did not clarify whether such factor may be relevant with respect to liability or remedy.

The Tribunal also offered helpful guidance in respect of the duty to accommodate in circumstances involving family status claims. In distinguishing the instant case from earlier decisions on family status where the Tribunal found that the applicant (as opposed to the respondent) failed to cooperate in the accommodation inquiry, the Tribunal remarked that, in this case, the respondent unilaterally revoked an accommodation that had been in place for over a year, and expected the applicant to make significant changes to their child care arrangements in a matter of days. The Tribunal noted that, though further exploration of alternatives may have been appropriate for both sides, the respondent had not "engaged in a dialogue" and, by failing to participate in the process, the respondent failed to meet its procedural and substantive duty to accommodate the applicant's family status needs.

Remedies

In awarding the applicant compensation for injury to dignity, feelings and self-respect, as well as lost wages, the Tribunal rejected the respondent's request that the order for lost wages should account for any Employment Insurance benefits received by the applicant. As noted above, the Tribunal also refused to accept that the employer's offer to return the applicant to the workplace had any mitigating effect in the circumstances. The Tribunal awarded the applicant nearly $30,000 in lost wages, which represented 13 months' pay (up to the time when the applicant found new employment), and $20,000 in general damages as a result of its finding that the applicant's termination was discriminatory.

Check the Box

The accommodation process is one that, if properly facilitated, is fluid and evolving. Once an accommodation has been put in place, there is nothing to say that it cannot be revised or even eliminated altogether. However, this decision serves as a cautionary tale for employers who may be looking to alter previously approved accommodations. Implementing any changes without first engaging in a review of existing arrangements, along with the employee's individual needs and possible alternatives, can have costly consequences. Both employers and employees should

endeavour to communicate openly and in a timely manner about workplace accommodation issues, whether related to family status or any other *Code*-based need.

Need more information?

For more information about employers' human rights obligations and the duty to accommodate, please contact Giovanna Di Sauro or your regular lawyer at the firm.

Filion Wakely Thorup Angeletti LLP
management labour and employment law

Proud member of L&E GLOBAL
an alliance of employers' counsel worldwide

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca