

# The HR Space

Your weekly e-bulletin on labour and employment law issues

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Fasken Martineau DuMoulin LLP

## What Happens When Child Care and Work Conflict - More Guidance for Employers

Author: Ralph Nero and Ida Martin

As we reported [last week](#), decision makers across the country are struggling with the meaning of discrimination on the basis of family status. Last week we looked at a Human Rights Tribunal decision out of British Columbia. This week we look at a recent Ontario arbitration decision, *Re Power Stream Inc. and International Brotherhood of Electrical Workers, Local 636 (Bender et al.)*. Like the B.C. case, Arbitrator Jesin ruled that not all conflicts between family and work lead to a duty to accommodate on the part of the employer.

the children off at daycare and pick them up on the way home during his custody weeks. He could no longer fulfill these child care responsibilities under the 10 hour shift – and the children had to change schools and the custody arrangements had to be changed, to the detriment of both parents.

- Grievor 2 was married with 8 and 10 year old children. His wife travelled frequently for work, so he had to drop the children off in the morning.
- Grievor 3 was married with two children, and was unable to pick up the children from day care under the 10 hour schedule. His wife had to and, according to the grievor, her opportunity for advancement at work was hindered.
- Grievor 4 was a divorced father of three teenagers who had custody of 2 of the children. He claimed that the 10 hour schedule conflicted with his ability to watch their extra-curricular activities.

### The Facts

The employer in the Ontario case is an electricity distribution company. Under a previous collective agreement, employees had the option of working five, 8 hour shifts per week - or four, 10 hour shifts per week. The 10 hour shift commenced one hour earlier and ended one hour later than the 8 hour shift. While most employees chose the 10 hour shifts, the 4 grievors chose the 8 hour shifts. That schedule allowed them to more easily fulfill their family responsibilities:

- Grievor 1 was separated but had joint custody of 6 and 10 year old children. The 8 hour shift permitted him to drop

Understandably, the employer preferred a standard shift. That way, employees could attend a standard daily planning meeting

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together. And forepersons could be more easily assigned. While initially resistant to the idea of standard shifts, the Union eventually bargained for a standard 10 hour shift – 10 hours because most members preferred it.

## The Decision

To start out, Arbitrator Jesin indicated that not all employer actions that have a negative impact on a family or parental obligation are discriminatory:

...I do not think that every conflict between a work obligation and a parental obligation must be accommodated by the employer. More importantly, I do not think that every such conflict should give rise to a finding of discrimination such that an inquiry should be conducted over whether the employer should accommodate the conflict.

Instead, arbitrators are to consider a number of factors when determining whether employees have been discriminated on the basis of family status:

1. What are the relevant characteristics establishing the grievors' family status?
2. What are the adverse effects complained of and is it reasonable to expect that the Human Rights Code offers protection against the particular adverse effect of the Employer's action on each grievor?
3. What prompted the adverse effect on the grievor – a change in the Employer's rule or a change in the characteristics of the grievors' family status?
4. What efforts have the grievors made to self accommodate their conflict? Have they rejected options at self-accommodation that they should reasonably be expected to have made?
5. In light of the answers to all these questions taken together, is it reasonable to make a finding of discrimination necessitating an

inquiry into whether the Employer is able to accommodate the adverse effects of the discrimination?

On this basis, Arbitrator Jesin held that Grievors 2, 3 and 4 had not been discriminated against on the basis of family status. Rearranging of family responsibilities between spouses is what families do every day. Further, being unable to attend children's extra-curricular activities does not amount to discrimination.

The employer wasn't so lucky with Grievor 1. There, Arbitrator Jesin said that a change in a workplace rule which forces parents to alter a carefully constructed custody agreement to their detriment may be found to be discriminatory. In this instance, there should have first been an inquiry by the employer regarding the possibility of accommodation, prior to forcing the Grievor to make substantial family and legal changes.

## Where Does that Leave Employers?

On balance, this case is favourable to employers. Like the B.C. case last week, it reinforces that not every conflict between work and family obligations results in a duty to accommodate on the part of the employer. However, these "accommodation of family responsibility" cases are arising more frequently and we expect that trend to continue. As we said last week - proceed cautiously and pay attention to changes in workplace practices that impact unique or mandatory family obligations.

For more information on the subject of this bulletin, please contact the authors.

**Ralph Nero**

416 868 3356

[rnero@fasken.com](mailto:rnero@fasken.com)

**Ida Martin**

416 865 4481

[imartin@fasken.com](mailto:imartin@fasken.com)

*The HR Space weekly bulletins are edited by: [Dominique Launay](#), [Karen M. Sargeant](#), and [Brian Smeenk](#)*

## For More Information About Our Labour, Employment and Human Rights Group

### Vancouver

**Kevin P. O'Neill**  
604 631 3147  
koneill@fasken.com

**Charles G. Harrison**  
604 631 3132  
charrison@fasken.com

### Calgary

**Katie Clayton**  
403 261 5376  
kclayton@fasken.com

### Toronto

**Karen Sargeant**  
416 868 3475  
ksargeant@fasken.com

**Brian Smeenk**  
416 868 3438  
bsmeenk@fasken.com

### Ottawa

**Stephen B. Acker**  
613 236 3882  
sacker@fasken.com

### Montréal

**Dominique Monet**  
514 397 7425  
dmonet@fasken.com

**Dominique Launay**  
514 397 5240  
dlaunay@fasken.com

### Québec City

**Jasmin Marcotte**  
418 640 2030  
jmarcotte@fasken.com

### London

**Cerys Williams**  
+44 207 917 8599  
cwilliams@fasken.co.uk

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### Vancouver

604 631 3131  
vancouver@fasken.com

### Ottawa

613 236 3882  
ottawa@fasken.com

### London

+44 (0) 20 7929 2894  
london@fasken.co.uk

### Calgary

403 261 5350  
calgary@fasken.com

### Montréal

514 397 7400  
montreal@fasken.com

### Paris

+33 (0) 1 44 94 96 98  
paris@fasken.com

### Toronto

416 366 8381  
toronto@fasken.com

### Québec City

418 640 2000  
quebec@fasken.com

### Johannesburg

+27 (11) 685 0800  
johannesburg@fasken.com