

# employment and labour law

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Family Status

Evolving Trends  
and the Need for  
Novel  
Accommodations

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# Introduction

- Balancing need to do paid work with demands of unpaid family care-giving
- Family Status has received increased legal attention
- No single law in Canada that comprehensively addresses circumstances of working caregivers
  - e.g. human rights, employment and labour standards, tax laws, and income assistance legislation

# Introduction

How do employers accommodate employees' family obligations in the workplace?

- Human Rights
- Employment & Labour Standards
- Special Considerations

# Human Rights Legislation

- The ground of family status is included in human rights legislation in most provinces and is included in the *Canada Human Rights Act*
- Protection from discrimination on the basis of Family Status found in section 5(1) of the *Ontario Human Rights Code*:
  - “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, age, record of offences, marital status, family status or disability.”

# Definition of Family Status

Definitions of “family status” vary across Canada:

## 1. Narrow definition

- e.g. Ontario: “the status of being in a parent and child relationship”

## 2. Broader definition

- e.g. Alberta: “the status of being related to another person by blood, marriage or adoption”

## 3. No definition

- e.g. B.C.: no definition in legislation & no detailed analysis provided by SCC with regards to the definition and scope of family status

# Divergent Approaches to Accommodation in the Case Law

- There are conflicting approaches to the accommodation of family status in the case law:
  - Employees are required to demonstrate a change in employment which results in serious interference with a substantial family obligations (*Campbell River*)

OR

- Approach family status claims in the same manner as other grounds of discrimination (*Johnstone, Hoyt*)

# *Campbell River* (B.C. Approach)

Leading authority is the B.C. Court of Appeal's 2004 decision in *Campbell River*

- Employee was a mother of a school-aged child with severe behavioural problems
- Due to re-organization of workplace, employee's schedule was changed by employer to end at 6:00 p.m. instead of 3:00 p.m.
- Change prevented employee from providing after-school care for her son

# *Campbell River*

- A *prima facie* case of discrimination would only be 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
  - Sets a very high threshold for employees to meet before the decision-maker considers whether the employer has a defence to the claim
  - Court found the employer did discriminate against the employee

# Cases in B.C. since *Campbell River*

- The cases in B.C. since *Campbell River* have proven that meeting the test established is difficult

## *Evans v. University of British Columbia*

- 2008 decision of the B.C. Supreme Court:
  - Employee was a mother who was unable to find daycare for her son following her parental leave
- Nothing “extraordinary” about the employee’s situation because a person on maternity leave or parental leave knows of their responsibility to make suitable childcare arrangements
- *Prima facie* case of discrimination was not made out

# Alternate Perspective to *Campbell River*

There are Canadian decisions that reject the *Campbell River* approach:

- The Canadian Human Rights Tribunal decision in *Hoyt*
- The Federal Court of Appeal decision in *Johnstone*

These decisions criticize the *Campbell River* test as being **too restrictive** as compared to other prohibited grounds of discrimination and all protected grounds should be treated equally

# Ontario Approach

- *McDonald v. Mid-Huron Roofing* (HRTO)
  - Bad facts (Seriously ill wife, premature baby)
  - Bad evidence (Employer unrepresented)
  - Tribunal adopted a less strict approach (Federal-like)
  - Employer failed to fulfill procedural obligation of duty to accommodate through investigation, consideration and assessment of accommodation options
  - Award included all lost wages (\$3500) and \$20,000 General Damages

# Most Recent Decision - *Rawleigh*

## *Rawleigh v. Canada Safeway Ltd.*

- September 2009 decision of the Alberta Human Rights Tribunal:
  - long-serving employee whose wife suffered from night blindness
  - employer required employee to work night shifts in rotation with other employees. Employee had not previously rotated onto the night shift, but decision was inconclusive as to reason for previous exclusion from night shift

# Rawleigh

- Alberta Human Rights Tribunal acknowledged both approaches
- Found that the employer's behaviour passes even the *Campbell River* test
  - employee makes out *prima facie* case
  - employer unable to demonstrate it accommodated to the point of undue hardship
- *Rawleigh* broadens scope of application of Family Status Accommodation
- Employers have duty to accommodate employees who have family-care obligations beyond parent-child relationships

# Limits of Case Law

Case law has so far created only a limited set of circumstances in which an employee may successfully bring a claim of discrimination:

1. Change to employment rather than change in family circumstances
2. Interference must be serious rather than just a slight trespass on human rights

# Remedies Available Under Human Rights

Human rights tribunals have broad powers to order remedies to both prevent and correct discriminatory behaviour, including:

- reinstatement
- lost wages
- injury to dignity, feelings and self-respect
- mental distress
- loss of benefits
- legal expenses
- non-monetary awards such as cease & desist orders

# Employment and Labour Standards

- Employment and Labour standards legislation provides another area of legal recognition to the circumstances of family care-givers:
  - Pregnancy leave
  - Parental leave
  - Family Medical leave (Compassionate Care leave)
  - Personal Emergency leave
  - Declared Emergencies

# Ontario Statutory Leaves

- **Pregnancy Leave**
  - Up to 17 weeks unpaid leave
  - Employee must be employed for 13 weeks before leave begins
- **Parental Leave**
  - Up to 35 weeks unpaid leave for birth mother
  - Up to 37 weeks unpaid leave for others
  - Employee must be employed for 13 weeks before leave begins

# Ontario Leaves

- Family Medical Leave
  - Up to 8 weeks unpaid leave to care for critically ill family member, foster parent of spouse or “a person who considers the employee to be like a family member”
  - Ill person must be certified to be at significant risk of death within 26 weeks
  - Employee may take multiple leaves if the ill person does not die during the 26 weeks
  - Employer may require evidence of entitlement to the leave

# Ontario Leaves

- Personal Emergency Leave
  - Employer must regularly employ 50 or more employees
  - Up to 10 days unpaid leave each calendar year
  - Various reasons including personal illness, illness, injury or death of a family member or an “urgent matter” related to a family member
  - Employer may require evidence of entitlement to leave

# Ontario Leaves

- Declared Emergencies
  - Absence due to an emergency declared under *Emergency Management and Civil Protection Act*, and an order that applies to employee or need to support someone to whom an order applies
  - “Danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise”
  - Indefinite unpaid leave
  - Employer may require evidence of entitlement to leave

# Leaves Remedies

- The remedies that can be awarded to employees for a breach of their statutory rights include:
  - ✓ reinstatement
  - ✓ payment for lost wages
  - ✓ payments for pain and suffering
  - ✓ payment for loss of benefits
  - ✓ payments for expenses such as job searches
- Employers may also receive an administrative penalty (fine) for breach of the legislation

# Special Considerations

Termination of an employee who is pregnant, on a pregnancy leave or parental leave, or who has just returned from leave will be subject to scrutiny.

Timing will raise suspicion that legislation has been violated and burden will be on employer to demonstrate it has not breached its reinstatement obligations.

# Special Considerations

Options for employers to demonstrate it has not breached legislation:

- Employee's pre-leave position continues to exist, but employee refused position
- Employee was offered a substantially similar position because position changed during leave, but employee refused
- Employer demonstrates its business or operations were suspended or discontinued during employee's leave
- Employee's position was eliminated during a restructuring or downsizing and no comparable position exists. BUT, if employee's duties continue to exist, so will the position
- Employee seeks to modify terms of employment (i.e. part time) and employer refuses

# Special Considerations

## Desire to keep replacement employee:

- Employer is permitted to offer returning employee a comparable position, but will be subject to scrutiny
- Employer can offer replacement employee comparable position (presumes employer's operations can sustain two positions i.e. company growth)

# Special Considerations

## Employee misconduct:

- Employers need to have clear documentary evidence of the offending behaviour and evidence of warnings
- Should address employee's behaviour before leave, not wait and hope behaviour changes while on leave

# Concluding Remarks

- Demand on employees to balance need to do paid work with obligation to provide family-care
- Employers must consider employee's family-care obligations and must:
  - consider duty to accommodate based on family status
  - provide employees with family-care leaves as per legislation

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