

employment and labour law SEMINARS | 2010

Family Status:	Evolving Trends & the Need for Novel Accommodation
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- 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 employment insurance legislation

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Introduction

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

- Human Rights
- Employment & Labour Standards
- Special Considerations

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Human Rights Legislation

- The ground of family status is included in human rights legislation in most provinces and is included in the *Canadian Human Rights Act*
- Protection from discrimination on the basis of Family Status found in section 13(1) of the B.C. Human Rights Code:
 - A person must not:
 - Refuse to employ or refuse to continue to employ a person, or
 - Discriminate against a person regarding employment or any term or condition of employment because of race, colour, ancestry, place of origin, political belief, religion, marital status, **family status**, physical or mental disability, sex, sexual orientation or age of that person, or because that person has been convicted of a criminal or summary conviction that is unrelated to the employment or intended employment of that person.

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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

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Two Divergent Approaches to Accommodation in the Case Law

- There are conflicting approaches to the accommodation of family care-giving in the case law:
- Employees are required to demonstrate a serious interference with family obligations and a change to employment terms and conditions (B.C. approach)

OR

- Family status claims are treated the same as other grounds of discrimination (Federal/Ontario approach)

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B.C. Approach – the “Strict” 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-org. 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

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Campbell River

- The Court held that in the “usual case” a *prima facie* case of discrimination would only be made out when: A change in a term or condition of employment made by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee
- Sets a high threshold for employees to meet before the decision-maker considers whether the employer has a defence to the claim (e.g. BFOR)
- Court found the employer did discriminate against the employee

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Cases in B.C. since *Campbell River*

- The cases in B.C. since *Campbell River* have proven that meeting the test established is difficult
- The recognition of the potential scope of care-giving threatens to “normalize” family responsibilities

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

2008 decision of the B.C. Supreme Court in *Evans*:

- Employee was a mother who was unable to find daycare for her son following her parental leave
- She asked for an extension to her unpaid leave, which was denied by the employer.

Court found there was 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, therefore, employer did not have to mount a defence

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

2010 BC Human Rights Tribunal decision in *Brown*:

- Employee had an employment contract that explicitly stated employer's commitment to flexible working arrangements so employee could attend to her family-care obligations
- Employer unilaterally tried to cancel flexible working conditions

Prima facie case was established once employer broke promise of flexible working conditions and employee did not have to prove the changes resulted in a significant interference.

Employment contract was very specific and Tribunal noted it was not the “usual case”.

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Federal/Ontario Approach

Canadian decisions that reject the *Campbell River* approach as being too restrictive:

- Canadian Human Rights Tribunal decision in *Hoyt*
- Federal Court of Canada decision in *Johnstone*
- Ontario Human Rights Tribunal decision in *McDonald*

All protected grounds should be treated equally.

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Federal/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



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Outside the Scope of Parent-Child Obligations

- September 2009 decision of the Alberta Human Rights Tribunal in *Rawleigh*:
- 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.



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Rawleigh

- Alberta Human Rights Tribunal acknowledges both approaches, including the stringent *Campbell River* test, and finds that the employer's behaviour passes even the more stringent test
 - Employee makes out prima facie case
 - Employer unable to demonstrate it accommodated to the point of undue hardship
- *Rawleigh* demonstrates that employers have duty to accommodate employees who have family-care obligations outside of parent-child relationships



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Final Word in B.C.

In the "usual case" there is 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 employee's human rights



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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 (>\$35,000)
- Mental distress
- Loss of benefits
- Legal expenses
- Non-monetary awards such as cease & desist orders



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Employment and Labour Standards

Legislation provides another area of legal recognition to the circumstances of family care-givers.

However, unlike human rights legislation, it does not apply equally to all employees.

- e.g. In B.C., certain occupations are excluded from the *Employment Standards Act*



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B.C. Employment Standards

In addition to any leave entitlements provided for in employment contracts, leave provisions in legislation protect an employee's right to return to work and protect the employee's right to such things as vacation and seniority accrual.

Part 6 of the B.C. Employment Standards Act describes the different family-care leaves employees may take regardless of their length of service.



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Leaves

Pregnancy Leave:

- Pregnant employee entitled to 17 consecutive weeks of unpaid leave and is entitled to schedule
- May be eligible for an extension of up to 6 weeks for "reasons relating to the birth or the termination of the pregnancy"
- Leave must be taken by birth mother



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Leaves cont.

Parental Leave:

- Available for both birth or adoptive parents
- Entitled to up to 35 weeks' unpaid leave (therefore birth mothers can end up with 52 weeks' leave)



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Leaves cont.

Family Responsibility Leave

- Employees are entitled to up to 5 days' unpaid leave to meet responsibilities related to "care, health, or education of a child in the employee's immediate family"
- Employees are not strictly required to give notice of the leave, however are encouraged to provide as much reasonable notice as possible
- Employers do not have discretion to refuse leave



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Leaves cont.

Compassionate Care & Bereavement Leave

- Employees are entitled to up to 8 weeks' unpaid compassionate care leave to provide care or support for a member of the employee's immediate family
- Employees are entitled to up to 3 days' unpaid leave on the death of a family member



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Leaves Remedies

- The remedies that can be awarded to employees 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



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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.



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Special Considerations *cont.*

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



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Special Considerations *cont.*

Desire to keep replacement employee:

- Explore comparable positions and employee's desire to change terms of employment
- Offer replacement employee another position
- Keep both if operations can sustain two positions (i.e. company growth)



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Special Considerations *cont.*

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



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Special Considerations *cont.*

- Notice period for employee whose employment is terminated for reasons unrelated to pregnancy or related leave does not start until end of leave.



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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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Thank you



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