

CASE IN POINT: ACCOMMODATION

Family status: What should be accommodated?

Workplace rules may apply equally to all employees but could discriminate against those with pressing family obligations

BACKGROUND

Identifying discrimination based on family status

FAMILY DEMOGRAPHICS are changing across Canada. According to Statistics Canada, single-parent families have doubled in the last four decades, representing nearly 16 per cent of families in 2006. Along with more two-working-parent families, an aging population, a growing need for elder care and an increasing awareness of caring for the disabled, this can contribute to increased stress on employees and employers alike to find the right balance between work and home.

There are a multitude of considerations under the framework of family status accommodation. As with so many human rights issues, there are often no simple answers and each case must be considered on its own merits.

What is clear is an employer must be aware of these issues so if a family status question does arise it is identified promptly and addressed thoroughly. The British Columbia Court of Appeal in *Campbell River & North Island Transition Society v. H.S.A.B.C.* developed a three-step test to determine whether an employer is at risk of discriminating against employees.

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Human rights legislation across Canada prohibits certain types of workplace discrimination, but day-to-day compliance in ever-changing workplaces can present difficulties for employers. Family status is one type of protected ground for which there has been little judicial guidance.

What is family status?

Under the British Columbia *Human Rights Code*, family status is defined as “the status of being in a parent and child relationship.” Because human rights legislation is broadly construed, adopted children, stepchildren and foster children qualify, as will an individual who has assumed the role and

obligations of a parent. Whether this definition will automatically be applied to grandparents and grandchildren and other extended relationships is doubtful.

What constitutes unlawful discrimination?

An employer might have a workplace rule that work begins for everyone at 8:30 a.m. sharp. On the surface, this does not appear to discriminate because the rule applies to everyone.

However, even though not intended, such a rule can adversely affect individual employees with family commitments. For example, a parent may be unable to organize a daycare schedule with her work schedule. The question is whether the employer is required to relax the schedule as part of its duty to

accommodate.

The duty to accommodate has been expressly stipulated under the code with regard to accommodation of disabled employees, but there is no explicit reference to a duty to accommodate an employee on account of family status. While this might suggest there is no duty, the Supreme Court of Canada has made it clear that whether mentioned in human rights legislation or not, a duty to accommodate can arise in the context of most prohibited grounds of discrimination.

The three-step test

In *Campbell River & North Island Transition Society v. H.S.A.B.C.*, the British Columbia Court of Appeal came up with a three-step test to determine whether a workplace rule might run afoul of human rights legislation. Employers should consider whether:

- the rule is rationally connected to the performance of the job;
- the employer adopted the particular standard in a good-faith belief it was necessary to the fulfilment of a legitimate work-related purpose; and
- it is impossible to accommodate an individual employee adversely affected by the rule, without imposing undue hardship upon the employer.

The first two steps are often not the main point of contention, but the third is frequently controversial.

When is the need for accommodation triggered?

In *Campbell River*, the court found the

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Only pressing family demands trigger accommodation

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duty to accommodate is triggered if a workplace rule “results in serious interference with a substantial parental or other family duty or obligation of the employee.” The court recognized family demands create many potential requests for accommodation, but only the more pressing demands will trigger a legal right to accommodation.

From this analysis, a parent’s desire to leave work early to attend a child’s soccer practice is not sufficient. However, a parent’s need to accompany a severely handicapped child to school will likely meet the test.

Generally, when an obligation is one which only the parent can fulfil, and one which can only be satisfied by revision of a workplace rule, a duty to accommodate will likely be triggered.

If an employer is asked to accommodate an employee on the basis of family status, it would be advisable to show an open mind as failure to do so has been the ignition switch for many human rights complaints. It should collect all available information, including allowing the employee an opportunity to state her case as to why her particular circumstances constitute a substantial obligation and in what manner the workplace rule seriously interferes with the fulfilment of that obligation.

Accommodation and undue hardship

The search for accommodation is one in which the employee has a duty to participate. An employee must be open to all options which would alleviate the disadvantage. As well, an employer is justified in limiting accommodation to the minimum of what is required to meet the employee’s need.

The duty to accommodate is not a duty to provide “perks” to an employee. In *Campbell River*, the court considered medical evidence that the child had a

Change in work hours interfered with mother’s ability to care for special needs son

A BRITISH COLUMBIA health-care worker was discriminated against because of her duty of care to her disabled child, the B.C. Court of Appeal ruled in *Campbell River & North Island Transition Society v. H.S.A.B.C.*, a 2004 decision.

Shelley Howard worked as a youth support worker for the Campbell River & North Island Transition Society, a Campbell River, B.C.-based non-profit society that deals with family violence. She had four children, one of whom had a behavioural disability that required special parental attention.

Howard was considered a “very good employee” from when she started in 1993 until 2001, when the society changed her shift from day to evening. She was concerned the new shift would interfere with her ability to care for her son’s special needs, which included caring for him after school. The society refused to reinstate her to her old shift and she went on medical leave due to stress.

The arbitrator and Court of Appeal found the society interfered with Howard’s ability to carry out her “substantial parental obligation” when it changed her hours of work and therefore discriminated against her based on her family status as a parent of a special needs child.

“major psychiatric disorder and the parent’s attendance to his needs during after-school hours was an extraordinarily important medical adjunct to the son’s well-being.” On the basis of this evidence, the court was prepared to find the ability of the parent to be at home during after-school hours was a “substantial parental obligation” for which the employer should offer accommodation.

As a rule, employers are held to a very stringent level of hardship before undue hardship will be found. If it becomes the issue over which the employee’s request is ultimately decided, the employer will have a high onus to meet in order to demonstrate accommodation will result in undue hardship.

There are several circumstances where family status may have to be accommodated. If an employer has strict rules for scheduling or changing shifts, these may have to be revisited in the search for accommodation. An attendance management program must be administered in a way which does not punish an employee for an absence that is a result of family obligations.

If family status or another protected ground for discrimination comes into play, an employer may be required to accommodate an employee beyond the minimum standards provided under the relevant *Employment Standards Act*, such as if an employer fails to consider an employee with caregiving responsibilities for promotion. ■

For more information see:

■ *Campbell River & North Island Transition Society v. H.S.A.B.C.*, 2004 CarswellBC 1012 (B.C. C.A.).



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