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THE TIES THAT BIND: AN EMPLOYER'S GUIDE TO ACCOMMODATING FAMILY OBLIGATIONS IN THE WORKPLACE

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Under both Alberta's *Human Rights Act*, and the Canadian *Human Rights Act*, employees cannot be discriminated against on the basis of "family status" or "marital status". Briefly, "family" has been construed broadly by the legislation, and includes any relationship arising out of blood, marriage or adoption, such that siblings, in-laws, and extended family are all captured by the definition of "family." Marital status in both acts includes common-law relationships.

Despite a number of recent decisions that consider family status discrimination, the law remains unclear on the legal test to be applied when evaluating such claims. Consequently, employers are often concerned and confused about their obligations as they grapple with the issue of when they must accommodate employees whose job requirements and family obligations conflict.

Human rights tribunals and labour arbitrators have adopted different standards when determining the threshold issue of whether there is a *prima facie* case of discrimination. This divergence has significant implications because without a *prima facie* case, an employer's duty to accommodate is not triggered.

The approach espoused by labour arbitrators, commonly referred to as the "Campbell River" approach (named after the British Columbia Court of Appeal decision in which it was first articulated[1]), requires that a term or condition of employment result in a serious interference with a substantial parental or other family duty or obligation in order that it be found to be *prima facie* discriminatory.

On the other hand, many human rights decisions, including the recent CN Rail decisions[2], have rejected this approach and instead held that a *prima facie* case for discrimination on the basis of family status can be established solely on the basis that an employee cannot satisfy a condition of her employment because doing so would conflict with a family obligation. The crucial difference between the two approaches is that the Campbell River approach characterizes the nature or extent of the interference that is required in order to establish a *prima facie* case, thereby preventing claims of discrimination in every instance where there is a conflict between family obligations and workplace requirements.

Despite these different approaches, some general principles have emerged that employers can rely on for helpful guidance in navigating this challenging issue:

1. Interference with a parent's subjective preferences is not enough to ground a finding of discrimination

    - An employee who refused to return to work after her maternity leave because she was unable to make appropriate daycare arrangements was not discriminated against since she insisted that daycare be provided through a regulated daycare facility and did not consider other childcare options
    - Not being able to attend some of a child's extra-curricular activities is not discrimination

2. Parents must actively take steps to juggle the competing obligations of workplace demands and family obligations and explore and exhaust all available solutions and alternatives ("self-accommodation")

    - Requiring an employee to work one evening shift per week upon return from maternity leave was not discrimination as childcare alternatives were readily available
    - Requiring that a that a female correctional officer work 30 nightshifts per year was not discriminatory as part of parental responsibility involved actively exploring alternatives for occasional night-time childcare, and no evidence was presented that these were not available
    - When parents are sharing custody and subject to custody agreements with strict terms, "self-accommodation" may be more difficult

3. Employers must be fair and forthright in determining whether accommodation sought would result in undue hardship and must be open to and consider alternatives proposed by employees

    - Only those accommodation measures that impose excessive or inordinate demands upon employer's resources will meet the threshold of undue hardship
    - A subjective concern that accommodation will result in a floodgate of similar requests is not undue hardship
    - Employees should demonstrate a lack of reasonable alternatives that would enable them to meet their family obligations and, as a result, that they need accommodation

4. Accommodation is more likely to be required where a child is ill or has medical or behavioural issues that require parental care

    - A woman whose son had a major psychiatric disorder, and who needed his mother's care after school, was discriminated against when her employer imposed a scheduling change that required her to work until 6:00 pm.
    - A woman who was denied a six-month extension of maternity leave to breast-feed an ill baby who required feedings every three hours should have been accommodated

Accommodation as the result of family status can be complex and require employers to balance competing interests. As the legal parameters of family status discrimination continue to evolve and be defined by courts and tribunals, employers may wish to seek specific legal advice on issues they are facing in this growing and challenging area.

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[1] *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 460.

[2] See *Seeley v. Canadian National Railway*, 2010 CHRT 24. Note that CNR is seeking judicial review of the Canadian Human Rights Tribunal's decision. ▲

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