Labour Notes®

October 8, 2012
Number 1460

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FAMILY OBLIGATIONS: ACCOMMODATING EMPLOYEES' CHILDCARE AND ELDERCARE RESPONSIBILITIES

— By Kristin Taylor, partner. © Fraser Milner Casgrain LLP, www.fmc-law.com.

Discrimination based on an employee's family status has long been prohibited by human rights legislation in Canadian jurisdictions. "Family status" is universally defined as the status of being in a parent-child relationship applying to both childcare and eldercare. Despite the universality of this protection, there has been great uncertainty as to what it means. For many years, family status protection simply wasn't used by employees. Its scope was thought to be limited to protecting working parents and primarily working mothers against discrimination in hiring and promotion. However, the last decade has seen an increase in employees demanding accommodation based on their childcare and eldercare responsibilities and the development of a series of tests for employers to apply when assessing their obligations.

The first noteworthy test was developed by the British Columbia Court of Appeal in a decision known as *Campbell River*.[1] In this case, an employee challenged her employer's change to her hours of work that were designed to better meet the needs of the employer's clientele. She alleged that the change would interfere with her after-school care obligations to her special needs son. The British Columbia Court of Appeal was mindful of the inherent conflicts in every employee's family obligations. Accordingly, it established a test that required the employee to prove that his or her obligations amounted to something more than the usual parenting requirements. The Court decided that there are three elements an employee must prove to trigger the duty to accommodate on the part of the employer: (1) a change in a term or condition of employment *imposed by the employer*, which resulted in (2) a *serious interference* with (3) a *substantial parental duty or obligation* of the employee. In the case at hand, the employee's family circumstances met this test.

A number of decisions thereafter applied the *Campbell River* test and dismissed employee complaints where there was no suggestion that their childcare needs were beyond the ordinary demands involved in balancing appropriate childcare and employment obligations. A number of other decisions adapted the *Campbell River* test to eliminate the first element on the basis that changes that originate with the employee's family — not just changes imposed by the employer — might also require accommodation.

After this tinkering with the *Campbell River* test, the Canadian Human Rights Tribunal rejected it entirely.[2] In a series of decisions, the Tribunal found the *Campbell River* test to be too restrictive and unfair in imposing a higher threshold to demonstrate discrimination based on family status than is required to prove any other ground of discrimination. By rejecting the need for an employee to prove a *significant* interference with a *substantial* obligation, employers would have to accommodate all ordinary parenting or eldercare obligations. Given the limits to daycare and the school day relative to the workday, these cases had the potential to create havoc for employers.

More recently, in August 2012, the Human Rights Tribunal of Ontario ("HRTO") has weighed in with a new test that purports not to apply a higher standard to prove family status discrimination, but draws a distinction between childcare and eldercare *preferences* and *needs*. The case is *Devaney v. ZRV Holdings Limited*[3] and it involves an employee's responsibilities for the care of his elderly mother. The employee lived with his mother whose mobility was deteriorating, thereby placing more and more demands on him. He maintained that much of his job as an architect and project manager could be done remotely from home and outside regular business hours. However, his employer insisted that he needed to be at work from 8:30 a.m. to 5 p.m. every day. He did not show up for work for these hours and eventually his employment was terminated as a result.

The HRTO, after considering the various tests, adopted a new one as follows:

> . . . the applicant must establish that the respondents' attendance requirements had an adverse impact on the applicant because of absences that were required as a result of the applicant's responsibilities as his mother's primary caregiver. I say "required" because I agree with the respondents that if it is the caregiver's choice, rather than family responsibilities, that preclude the caregiver from meeting his or her employer's attendance requirements, a *prima facie* case of discrimination on the basis of family status is not established. . . . This approach is also consistent with the well-established principle that the Code requires the accommodation of Code-related needs, not preferences.[4]

The HRTO has drawn an important distinction between a choice and a requirement. Applied to the usual working hours versus childcare scenario, that should mean that an employee's choice to use a daycare that is only open until 6:00 p.m. can be challenged if working hours extend beyond that point. Presumably the employee would have to prove that no other childcare arrangement could be secured other than the one that conflicts with his or her working hours. This will allow employers to push back where genuine business requirements mean that working hours cannot be modified to address every employee's individual childcare preferences.

What does this mean for employers? It largely means continued uncertainty. The HRTO analysis certainly is preferable for employers to that put forward by the Canadian Human Rights Tribunal. Although the *Campbell River* decision of the BC Court of Appeal remains the highest level court decision, it does not appear to have had much influence on human rights tribunals beneath it. For employers facing requests for accommodation by employees with family obligations, the best advice is to fully consider those obligations. Questions should be asked to probe an employee's choice and preference as opposed to a hard and fast requirement that must be met. Questions should also be asked about the employee's efforts to make arrangements that would allow regular working hours to be performed. If the employee's request really amounts to a preference and there isn't a substantial parental obligation at issue, then there should not be a concern as to family status discrimination or a duty to accommodate.

Notes:

[1] *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, [2004] C.H.R.D. No. 33 [*Campbell River*].

[2] See *Johnstone and Canadian Human Rights Commission v. Canada Border Services*, [2010] CHRT No. 20; *Richards and Canadian Human Rights Commission v. Canadian National Railway*, [2010] C.H.R.D. No. 24; *Seeley and Canadian Human Rights Commission v. Canadian National Railway*, [2010] C.H.R.D. No. 23; and *Whyte and Canadian Human Rights Commission v. Canadian National Railway*, [2010] C.H.R.D. No. 22.

[3] 2012 HRTO 1590 (CanLII).

[4] *Ibid*. at para. 117.