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HUMAN RESOURCES DIRECTOR
WWW.HRMONLINE.CA
ISSUE 2.5 | $9.99

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HR'S BIGGEST LEGAL RISKS

Duty to accommodate: FAMILY STATUS IN THE SPOTLIGHT

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Requests from employees for accommodation on the grounds of family status are likely to escalate in coming years. **Kelsey Orth** outlines some common pitfalls and details what employers need to be aware of to remain compliant

Family status – what can we tell you that you don't already know? As an HR director you already know that:

1 Family status is a protected ground in all Provincial and Federal human rights legislation. However, what constitutes "family" and what interests are protected under the definition of "family status" is not necessarily the same in every jurisdiction; not to mention that even within particular jurisdictions that definition is not necessarily a static one.

2 There have, historically, been three different ways for the law to address family status claims:

a. **The Restrictive Approach –** The easiest approach for employers, discrimination is only found where some kind of employer-initiated change causes serious interference with a substantial parental or other family duty or obligation of the employee. With this approach, very few complaints make it over the threshold.

b. **The Liberal Approach –** The approach favoured by the federal adjudicative bodies. Discrimination is found where the mere situation at work and/or at home forces an employee to choose between his or her employment and his or her family obligations. This approach places a lesser burden on the complainant and is more congruent with requirements to prove discrimination on other prohibited grounds.

c. **The "Middle Ground" –** Arising largely from Ontario case law, arbitrators and the Human Rights Tribunal of Ontario have struck a balance between the Restrictive Approach once enunciated, and the Liberal Approach adopted in the Federal realm. Discrimination will be found where the context suggests that the employer should be doing more to accommodate.

3 The duty to accommodate requires an employer to accommodate a legitimate request for accommodation on the ground of "family status," up to the point where doing so would cause the employer undue hardship. This duty has two elements: procedural and substantive, requiring the employer to both make the right determination with respect to whether or not the employee can be accommodated (substantive), and to have arrived at that determination in the appropriate way (procedural).

WHERE ARE WE NOW?

Uncertainty has been created by different adjudicators (whether a provincial or federal Tribunal, Court or Arbitrator) using varying approaches as identified above, and no one approach has "won out" yet. As has been suggested, only a decision on an appeal to the Supreme Court of Canada would definitively answer the question for the country as a whole.

However, with recent case law from across the country, including notably the recent Federal Court of Appeal decision confirming the liberal approach originally applied by the Canadian Human Rights Tribunal in *Canada (Attorney General) v. Johnstone* 2014 FCA 110[1], along with a prominent arbitration decision from Ontario *(Re: Powerstream)* favouring

a contextual approach to dealing with family status claims, it seems fair to say that any HR director who applies the Restrictive Approach is likely subjecting his or her organization to significant exposure.

Instead, like all accommodation situations, it is important for the employer to take a reasonable approach in assessing the employee's request/need for accommodation against the bona fide requirements of the employee's position. In the case of family status, an examination of the following factors may be useful, based on the "Middle Ground" approach[2]:

1. What are the relevant characteristics establishing the individual's family status?
2. What are the adverse effects complained of and is it reasonable to expect that the Human Rights Code offers protection against the particular adverse effect of the employer's action on the individual?
3. What prompted the adverse effect on the employee? (e.g. change in a term of employment, or a change in the employee's personal circumstances?)
4. What efforts has the employee made to self-accommodate?
5. Did the employee reject options of self-accommodation?

As we learned from the decision of the Human Rights Tribunal of Ontario in *Devaney*[3], eldercare is another potential type of family status that may garner protection under human rights legislation. This was deemed to be the case in Ontario, where the definition of family status under the Human Rights Code is, specifically, "being in a parent and child relationship,"

Clearly, Canadian society today has a much broader appreciation for all the different types of families and family situations that exist than ever before; accordingly – and regardless of the intent when first introduced – adjudicators seem are more willing to interpret "family status" protection under human rights legislation as broadly as can be construed in any given case.

PRACTICAL APPLICATION

Between the combination of an expanding application of the term "family status" and the changes in expectations of today's workforce with respect to work-life balance, employers can only expect to get more requests for accommodation on the ground of family status. It is therefore important to ensure that your managers and supervisors are properly equipped to handle these requests.

No doubt the following is a common refrain for HR directors: it is imperative for employers develop a rigorous procedural component to their workplace accommodation policies. The procedural component should set out a specific process for employees to present accommodation needs and an equally-specific way for management to deal with the request. However, this does not mean that there is only one way to analyze or respond to the family status accommodation request: quite the opposite, in fact.

The increasing trend towards the contextual approach of interpreting family status described above also suggests that employers must engage in some type of fact-finding exercise upon receiving such requests in order to explore the employee's specific needs and then attempt to accommodate the employee.

Once you have the facts and understand the situation of the particular employee, it is then incumbent upon you to examine all reasonable options available to accommodate the employee. The most common types of accommodation for family status include:

- Flexible scheduling, including hours/days of work;
- Short term leaves of absence outside the available ESA leaves;
- Alternative work arrangements, such as working from home or reduced travel; and
- Providing on-site childcare.

The feasibility of any of these options depends largely on the size of the employer and the type of work performed. Regardless of the type of employment, however, you are obligated to seriously consider all options during the accommodation process. These options should then be balanced against employee-specific factors such as:

- Whether the employee is the primary-caregiver;
- Whether the employee has made efforts to self-accommodate; and
- Whether the employee is rejecting reasonable alternatives to care.

On that analysis, then, only if the accommodation causes an undue hardship will the employer be able to avoid accommodation obligations – but of course undue hardship can't be as difficult to pin down as "family status," can it? HRD

Sources:

[1] Canada (Attorney General) v. Johnstone 2014 FCA 110 [Johnstone].

[2] I.B.E.W., Local 636 v. Power Stream Inc. [2009] O.L.A.A. No. 447, 186 L.A.C. (4th) 180 [Re: Power Stream].

[3] Devaney v. ZRV Holdings Ltd. 2012 HRTO 1590, O.H.R.T.D. No. 1571 [Devaney]

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