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“ORDINARY” FAMILY OBLIGATIONS DO NOT REQUIRE ACCOMMODATION: ARBITRATOR

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Most human rights legislation in Canada, including Ontario, prohibits discrimination or harassment in employment due to “family status” or a variation thereof. In Ontario’s human rights legislation, the Ontario *Human Rights Code*, “family status” is given a specific definition: “the status of being in a parent and child relationship”. However, does this mean that employers cannot make employment decisions that directly or indirectly have adverse consequences on employees with children? Neither courts nor administrative tribunals nor arbitrators have, until more recently, examined this issue to any great extent. While there are only a handful of cases that address this area of the law, the issue is receiving more attention in part because unions are filing grievances alleging that employers are obliged to accommodate employees who have childcare challenges or other family obligations, such as caring for an ailing parent.

A recent arbitration award from Nova Scotia is one of the latest decisions on the issue: *Canadian Staff Union v. Canadian Union of Public Employees* [2006] N.S.L.A.A. No. 15 (QL). In this case, the employer ceased to consider the grievor for a job when the grievor advised that he was unable, due to marital and family responsibilities, to relocate from St. John’s, Newfoundland & Labrador, to Halifax, where the job was located.

Note:

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The grievor lived in Newfoundland with his common-law partner and her son. On occasion, he also lived with his two sons from a previous marriage. Neither the ex-wife nor the common-law partner nor the sons were able or willing to move to Halifax. The grievor also assisted his aging mother, who also lived in St. John’s.

When the grievor, who had an exemplary work record and was the most qualified candidate for a vacancy in Halifax, indicated to the employer that he was unable to move to Halifax and wished to perform the job from St. John’s, the employer stated they would not proceed further with his application. The union filed a grievance alleging discrimination on the bases of family status, marital status and place of residence.

The union argued that the employer’s decision not to process the application was *prima facie* discrimination. The union further argued that the employer was required to accommodate the grievor to the point of undue hardship by, for example, permitting the grievor to perform the job from St. John’s, subject to some required travel throughout Atlantic Canada. In support of this argument, the union provided evidence that the job had been performed out of Ottawa for 39 years. In the alternative, the union argued that the requirement to report out of Halifax was arbitrary.

The employer argued that the requirement to report out of Halifax on a regular basis did not amount to discrimination. In the alternative, even if an employer’s decision which adversely affects an employee’s family obligations is discriminatory, the facts of this case do not support such a finding. In regards to accommodation, the employer asserted that the decision to base the position out of Halifax was due to legitimate business needs.

The arbitrator dismissed the grievance and ruled that the union had failed to prove a prima facie case of discrimination. When considering the issue of whether the employer's conduct was discriminatory, the arbitrator, adopting the reasoning in a British Columbia Court of Appeal, *Campbell River North Island Transition Society*, stated that for a finding of discrimination in this type of case there must be "a serious interference with a substantial parental or other family duty or obligation that takes the case beyond the vast majority of situations in which there is a conflict between a work requirement and a family obligation...". Note that in *Campbell River* the Court of Appeal concluded that the employer discriminated against the employee when it failed to accommodate an employee who was a single mother with four children, including a son with a psychiatric disorder who, according to medical experts, required hands-on intensive care from the mother.

The arbitrator in this case noted that the case before him was a "far cry from *Campbell River*". Instead, the conflicts and duties faced by the grievor were due to "everyday marital and family commitments [that] were not commitments upon which a finding of discrimination under either the collective agreement or any applicable human rights legislation can be based." He further noted that the grievor's "inability to relocate" to Halifax was not due to family or marital status, but rather was a personal choice. The arbitrator then stated that one option available to the grievor was to move to Halifax alone and commute periodically at his own expense.

This case could stand for the proposition that while family, childcare, and parental obligations are included in the definition of "family status", mere 'ordinary' family obligations borne by employees are not so elevated as to warrant human rights protection. To what extent this principal will apply to other 'ordinary' family and childcare obligations remains uncertain. For example, is an employer required to accommodate an employee who has difficulty, at the conclusion of a parental leave, arranging appropriate childcare? If a baby has colic, and a physician has indicated an extended maternity leave would be beneficial for the baby's growth and development, is the employer required to extend the maternity leave or offer part-time work? To what extent is the employee responsible for ensuring that their family obligations do not interfere with their basic work obligations? Finally, when do "ordinary" family and marital obligations, which do not require accommodation, become substantial or serious obligations, which may require accommodation as per *Campbell River*?

On May 1, 2007, the Ontario Human Rights Commission published a collection of policy and consultation documents, which are available on the Commission's web site at www.ohrc.on.ca, that discuss discrimination on the basis of family status as it relates to the provisions of the *Code*. While a review of the policy documents are beyond the scope of this Communiqué, the Commission is taking a broad approach to the interpretation of human rights protections on the basis of family status. For example, the Commission has presented a number of examples of potential discriminatory conduct due to family status including the following:

Example: When a woman returns to work after the birth of her first child, she notices that her career, which had seemed to be on a 'fast-track', now appears to have stalled. She is given smaller and less important projects to manage, and is passed over for several training opportunities. When she asks about a promotional opportunity, her manager tries to discourage her, stating that the job requires 'super-dedication' and 'killer hours'.

As a further example, the Commission also states that employers may be required to flexibly apply absenteeism, leaves of absence, hours of work and other workplace policies and practices to accommodate persons with childcare or eldercare responsibilities.

The conflict between an employee's family obligations and an employer's duty to accommodate and not discriminate requires a fine balance. As with all human rights cases, the analysis requires an examination of the unique facts and circumstances of each case. Given that this area of the law remains uncertain, it is advisable that employers are prepared to respond to employees who request accommodation due to significant childcare or eldercare responsibilities

or, alternatively, to employees whose attendance or performance may be affected, and possibly protected, by “family status” issues.

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