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Labour and Employment Law Newsletter



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The Taylor McCaffrey LLP Labour and Employment Law newsletter comments on legal issues and developments relevant to the workplace. In this issue we discuss Family Status Discrimination, and Special Accommodation Rights for Pregnant or Nursing Employees.

Contents:

- Family Status Discrimination
- Did You Know? Special Accommodation Rights for Pregnant or Nursing Employees

Family Status Discrimination

Most employers know they must not discriminate against employees on the basis of family status, however few understand what that really means. What is “family status discrimination”? How does an employee prove he/she has been discriminated against on the basis of family status? How far must an employer accommodate an employee?

This area of the law is quickly developing but unsettled, creating numerous potential pitfalls for employers. It is a necessary concern for all companies and organizations given the number of employees to whom it may apply.

What is it?

In Manitoba under The Human Rights Code (“The Code”) it is discriminatory and therefore illegal to treat a person or group differently, to their disadvantage, in employment on the basis of pregnancy or marital or family status, unless the discrimination is based on a bona fide (“in good faith”) and reasonable requirement or qualification for the employment. It is also discrimination under The Code to harass on the basis of, or fail to reasonably accommodate, a special need resulting from these grounds.

Discrimination on the basis of pregnancy or marital and/or family status is prohibited with respect to all areas of employment including hiring, wages (including fringe benefits), terms and conditions of employment, lay-offs, suspensions, dress codes, employee benefit plans, training, promotions and seniority.

Family status is something employers need to be mindful of early on – even *before* the employment relationship begins. When assessing whether a job applicant can do the job, potential employers must focus their questions on the skills and qualifications which are necessary for performing the essential duties of the job, (while keeping in mind their duty to reasonably accommodate the special needs of employees that are based on protected characteristics).

If, for example, an essential duty of a job is that the employee starts work at 6:00 a.m., employers can ask an applicant if he/she is available to begin work at that time – *but not if they have children*, or describe their childcare arrangements.

For insight on how the Manitoba Human Rights Commission will administer family status issues, website contains guidelines at the following link:

http://manitobahumanrights.ca/publications/guidelines/parents_and_pregnant_women.html

Clients often ask: How can it be discrimination when we didn't intend to violate the law? The answer: Intention is irrelevant.

Discrimination can occur even when employers make apparently neutral changes in the workplace. For example, shift and schedule changes sometimes create difficulties for employees who rely on childcare or have other family obligations. These changes may result in discrimination on the basis of family status, depending on the circumstances. Therefore, prudent employers must educate themselves about this area of possible exposure and liability.

What is a *prima facie* case?

Employees have the onus of bringing evidence to establish a *prima facie* case (which is legalese for raising issues that would be sufficient to prove an allegation, unless rebutted). If there is no *prima facie* case, it must be dismissed. Sufficient evidence may include proof of an absence of care alternatives or proof of the seriousness of their situation. Usually strong evidence is provided (as opposed to mere assumptions) in cases where accommodation is deemed necessary.

Unfortunately, the courts are divided on what constitutes a *prima facie* case. The Supreme Court of Canada ("SCC") has yet to consider the appropriate *prima facie* test for establishing family status discrimination. Therefore, the highest court's decision on the issue comes from the British Columbia Court of Appeal in *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society* (2004), 28 BCLR (4th) 292, 130 ACWS (3d) 747, 2004 BCCA 260 ("*Campbell River*").

In *Campbell River*, the Court indicated that employers will only in very limited circumstances have a duty to accommodate family obligations - specifically where a change in a term of condition of employment imposed by an employer results in *serious interference with a substantial parental or other family duty or obligation of the employee*.

This is a high bar to meet, but this approach has been the subject of frequent and harsh criticism by many other courts who have held a complainant must simply demonstrate that he/she was treated in an adverse manner because of his/her family status.

The question of which test will be applied has not been decided by Manitoba courts, therefore employers here can not take comfort in knowing employees must satisfy the tougher standard.

Duty to Accommodate

Where a *prima facie* case exists, the employer has a duty to accommodate short of undue hardship. How far an employer must go to accommodate such requests or what will constitute "undue hardship" will depend on the facts of each situation. What will constitute undue hardship for a particular employer is also a question of fact and depends on among other things, the employer's financial and material resources, whether the company can operate properly and whether the rights of other employees are infringed.

Some Examples of Accommodation for Family Status

Breast feeding

One of the most common issues employers face relating to family status is accommodating the needs of nursing employees. The Manitoba Human Rights Commission states:

Employees who are nursing have the right to reasonable accommodation of their related special needs, to the point of undue hardship. The employee may require adjustment or flexibility with respect to breaks and work schedules to allow for nursing or to allow her to express her milk. Reasonable accommodation may also mean making available a comfortable place for the employee to breastfeed her child or express her milk, and providing access to cooled storage for expressed milk.

Accommodation for Child care

Another typical area that employers regularly encounter is the request by employees for accommodation due to child care needs.

A good illustration is found in the case of *Hoyt v CNR*, [2006] CHRD No. 33 ("*Hoyt*") which involved a CN railway yard conductor with a two year old child who became pregnant and required modifications to her terms and conditions of employment. The employer made three

accommodation proposals, which the employee and union rejected as either unsafe or in conflict with her childcare obligations. The third offer was a position driving a crew van which required working on Saturday and therefore conflicted with her childcare obligations. Eventually, CN granted her leave without pay for the absences she requested.

In the Tribunal's view, Ms Hoyt had established a *prima facie* case of discrimination by proving that she was a parent performing the duties and responsibilities of parenthood. She had made an attempt, in a very short period of time, to find a reasonable and safe childcare solution for her daughter, and was then obliged to request accommodation for only three days.

CN did not convince the Tribunal that its decision was based on a *bona fide* occupational requirement. The Tribunal concluded that CN failed to establish that it would have suffered undue hardship, had it authorized the employee to work on Monday or Sunday instead of Saturday, for the first three weeks of her reassignment. During those weeks, the employer would have had to require the services of another employee to work on Saturday, or transport the workers by taxi, as CN did when one of its crew vans was not available.

CN offered no actual proof regarding the cost of such a temporary solution, and the Tribunal noted that a Monday to Friday work schedule had previously been authorized to accommodate a driver whose physiotherapy sessions were scheduled on Saturdays. A mere apprehension that undue hardship would result is not a proper reason to avoid accommodation.

In the end the CHRT ordered CN to consult with the Canadian Human Rights Commission, take steps to ensure that it understood its duty to accommodate pregnant employees, compensate Ms Hoyt for lost wages, pay \$15,000 for pain and suffering and \$10,000 for reckless and willful discrimination, and reimburse her for her legal expenses.

Conclusion

The majority of employers will at some time encounter employees who seek a preferential shift schedule, an extra-contractual leave to attend to family obligations

preferential holiday schedules (Christmas, spring break, summer) to better meet their parental obligations to their school aged children; and employees with attendance-related problems allegedly due to family obligations. The facts of each situation will need to be carefully assessed. In doing so, employers should keep these points in mind:

Not all family commitments are sufficient to equate to "family status." Consider whether the situation is commonplace or preference-based, or mandatory or essential, where a duty to accommodate is more likely.

The concept of family status applies beyond an employee parent-with-child relationship and may include a much broader range of familial relationships, such as a child-parent relationship involving an employee who needs to care for an aging parent.

It is likely that the duty to accommodate can be triggered through a change in an employee's personal circumstances, such as the birth of a child or a family illness but may also be caused by a change to working conditions i.e. scheduling change; modification to a policy and so forth.

Even if the employee can establish a *prima facie case* of discrimination, an employer should consider whether it can establish that the decision made was based on a BFOR and that accommodation would impose undue hardship.

A *belief* that undue hardship would result is not a proper reason to avoid reasonable accommodation, without compelling objective information to support that belief.

Given the complex, divergent and evolving case law on this topic, it would be prudent to seek advice regarding its obligations and rights when encountering issues relating to employees and family status, prior to deciding on family-related accommodation issues.

Did You Know? Special Accommodation Rights for Pregnant or Nursing Employees

In 2006, Manitoba's Workplace Safety and Health Regulation was amended to include specific safety and accommodation requirements for employees that are pregnant or nursing.

The Regulation requires that when an employee notifies that she is pregnant or nursing, the Employer must:

- (a) inform the worker of any known or foreseeable risk that conditions at the workplace pose or may pose to the safety or health of the worker or to her unborn or nursing child; and
- (b) so far as is reasonably practicable,
 - (i) take steps to minimize the exposure of the worker to the condition that creates the risk, or
 - (ii) if alternate work is available that involves no risk or less risk and the worker is reasonably capable of performing that work, assign the worker temporarily to that alternative work without loss of pay or benefits.

The Regulation places the onus on the Employer to "inform the worker of any known or foreseeable risk" upon receiving notification of pregnancy or nursing. How does an Employer meet this onus? In certain workplaces, the hazards may be obvious (handling chemicals, exposure to infectious diseases, certain physical or inherently dangerous work). Other risks may not be so obvious (particularly if the

employee may have other medical factors that increase the risks). The regulation does not refer to "unknown" risks, so it appears that the Regulation does not include an obligation to inquire about other possible medical issues that may increase a particular employee's risk. However, an Employer who learns of additional factors affecting an individual employee should take them into account when informing the employee of risk.

We expect that common sense would prevail in most situations. However, in situations where the risks are not fully known, or there is some dispute, we recommend getting advice about an assessment of the workplace and/or an employee's condition. This may take the form of information from an employee's physician, independent physician and/or an expert assessment of the workplace.

The end result may be that a pregnant or nursing employee requires placement in alternate duties, *at the same rate of pay*. This is different than the standard typically used for accommodations involving alternate duties for extended periods. In most situations, if the work assigned is squarely within a lower rated position, then the work may attract a lower rate. Note that a review as to whether alternate work is actually available will be subject to the duty to attempt reasonable accommodation to the point of undue hardship. Therefore, any such review should be carefully conducted, with records kept of the medical limitations and the job functions considered.

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