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Family Status Accommodations:
A Review of the Legal Obligations for Employers and Employees in the Canadian Workplace

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Table of Contents

Introduction

The sons and daughters of "baby boomers" are sometimes called "the sandwich generation". This cohort has the unenviable task of both raising their own families while often also taking on financial and caregiving responsibilities in respect of their aging parents. As a result, it is becoming increasingly common for employers to be faced with scenarios which require its consideration of an employee's entitlement to accommodation under the ground of "family status". This enumerated ground under Ontario's *Human Rights Code* and under the *Canadian Human Rights Act* has resulted in recent decisions relating to the balance between work and family obligations and accommodation requirements. The Ontario *Employment Standards Act* also provides protection to families under its Personal Emergency Leave provisions.

This paper canvasses the existing legislation in respect of "family status" accommodation obligations and provides an overview of a number of recent cases that shed some light on how "family status" accommodation situations are playing out in Canadian workplaces.

The Law

Ontario's *Human Rights Code* (the "Code")

Every person has a right to equal treatment with respect to employment without discrimination because of family status.

Decisions regarding hiring, promotion, training, discipline or dismissal should not be directly or indirectly based on assumptions related to family status. Family status need only be one of the reasons for a decision or treatment in order for it to be considered discriminatory.

"**Family status**" is defined by the Code to mean the status of being in a parent and child relationship.

The ground of family status protects biological and non-biological parent and child relationships, such as families formed through adoption, step-parent relationships, foster families, and non-biological gay and lesbian parents. The definition of family status covers all those who are in a parent and child "type" of relationship.

Family status also includes care relationships between adult children and those who stand in parental relationship to them. For example, individuals providing eldercare for aging parents are protected from discrimination under the ground of family status. The protection extends to include anyone in a "parent type" of relationship with the caregiver.

The ground of family status has been interpreted to prohibit differential treatment between various forms of families (i.e. families formed through adoption or fostering).

The Supreme Court in one instance has also held that "family status" as defined by the Code is broad enough to encompass discrimination resulting from the particular identity of the complainant's spouse or family member.[i]

Canadian Human Rights Act (the "Act")

The Act prohibits discrimination on grounds which include family status.

The Act states that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on family status.

With respect to employment, the Act specifically prohibits discriminatory practices which, directly or indirectly, would result in a refusal to employ or continue to employ an individual on the basis of family status or differentiate adversely in relation to an employee on the grounds of the individual's family status.

The Act specifically states that it is discriminatory to use an application for employment form or publish an advertisement for employment that expresses or implies any limitation, specification or preference based on family status.

It is also considered discriminatory practice under the Act for employee organizations to exclude an individual from membership or limit an individual in a way that would deprive or limit the individual in respect of employment opportunities.

Employers must not have policies or practices that affect recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment that deprives an individual or class of individuals of any employment opportunities on the ground of family status.

Accommodation

In the context of family status, accommodation is usually associated with care giving needs. Often, accommodation of care giving needs is neither burdensome nor costly; rather, it is a matter of flexibility.

Inflexible, excessive, or unpredictable work hours may pose barriers to persons with caregiving responsibilities. Court and tribunal decisions have found that employers may be required to consider modifications to work hours and schedules in order to accommodate needs related to family status.

Inflexible schedules for work hours and breaks may pose barriers for employees attempting to meet their responsibilities both to their employers and to their loved ones. For example, given that few daycares operate prior to 8:00 a.m. or after 6:00 p.m., even the most dedicated employee with children may find it difficult to comply with a work schedule that requires them to start precisely at 8:00 a.m. Of course, there will be circumstances where the nature of the work demands specific start, finish and break times. Where such timetables are not a bona fide occupational requirement however, employers should consider designing schedules in a more flexible manner, and should at minimum provide adjustments to accommodate Code related needs.

Individuals who have multiple or very heavy caregiving responsibilities may find it impossible to work lengthy hours on a regular basis and may be unavailable for last-minute demands to stay late or work overtime. Where such hours are not a bona fide occupational requirement, employers should consider offering temporary or permanent reductions in work hours, or other alternative work arrangements. Where social supports for childcare, eldercare, or for persons with disabilities are limited, employees with significant caregiving responsibilities may require accommodations to shift scheduling.

Where employees have significant caregiving responsibilities, their ability to undertake regular or extensive travel may be limited. This is not the case for all employees with family responsibilities and therefore employers should not make the assumption that a person with caregiving responsibilities will not be interested in work that involves travel. When travel is not a bona fide occupational requirement of the position, employees should not be denied opportunities because their caregiving responsibilities prevent them from undertaking regular or extensive travel. Even where travel is an essential duty of the job, employers may be able to accommodate family-status related needs of employees by, for example, recognizing related dependent-care expenses or providing other appropriate supports or accommodations.

The Legal Test for Accommodation

Human Rights legislation prohibits discrimination that results from requirements, qualifications, or factors that may appear neutral but which have an adverse effect on persons

identified by family status. When faced with a request for accommodation, an employer must demonstrate that the requirement, qualification or factor is reasonable and bona fide by showing that the needs of the group to which the complainant belongs cannot be accommodated without undue hardship.

The Supreme Court of Canada has set out a framework for examining whether the duty to accommodate has been met. If prima facie discrimination is found to exist, the employer must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed,
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal, and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

The rule or standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. This ensures that each person is assessed according to his or her own personal abilities instead of being judged against presumed group characteristics. An employer must demonstrate that accommodation has been provided up to the point of undue hardship.

Accommodation Process

The procedure to assess accommodation is as important as the substantive content of the accommodation.

Some of the factors considered by the Tribunals when assessing allegations of discrimination on the basis of family status include:

- whether the employer investigated alternative approaches that do not have a discriminatory effect;
- the reasons why viable alternatives were not implemented;
- the ability to have differing standards that reflect group or individual differences and capabilities;
- whether the employer can meet their legitimate objectives in a less discriminatory manner;

- whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies; and
- whether parties who are obliged to assist in the search for accommodation have fulfilled their roles.

In most cases, accommodation needs related to family status will be connected to caregiving responsibilities. Human rights tribunals have found that the ground of family status must be interpreted to include the caregiving needs associated with the parent-child relationship.

Not every circumstance related to family status and caregiving will give rise to a duty to accommodate. The duty to accommodate only arises where a prima facie case of discrimination has been shown. Where rules, requirements, standards or factors have the effect of disadvantaging persons who have significant caregiving responsibilities related to their family status, either by imposing burdens that are not placed on others or withholding or limiting access to opportunity, benefits or advantages available to others, a duty to accommodate caregiving needs related to family status may arise. In most circumstances where there is a significant conflict between an important caregiving responsibility and an institutional rule, requirement, standard or factor, a duty to accommodate will arise.

Where an accommodation need related to family status has been identified, the organization must identify and implement the most appropriate accommodation, short of undue hardship. The determination of what is and is not an appropriate accommodation is a separate determination from an undue hardship analysis. An accommodation will be considered appropriate if it will result in equal opportunity to attain the same level of performance or to enjoy the same level of benefits and privileges experienced by others, or if it is proposed or adopted for the purpose of achieving opportunity and meets the individual's needs related to family status.

Accommodations must acknowledge the practical realities of caregiving. An accommodation that is not in accordance with good caregiving practices, or that would place an undue burden on the family, will not be considered appropriate.

Accommodation is a multi-party process. The person seeking accommodation has a responsibility to inform his or her employer that he or she has caregiving needs related to a parent-child relationship, and that there is a conflict between those needs and the organization's rules, requirements, standards, processes or procedures.

The employee may be expected to make reasonable efforts to first avail themselves of outside resources available to them prior to making accommodation requests to an employer. However, such resources should:

- most appropriately meet the accommodation needs of the individual,
- be consistent with good caregiving practices, and
- not place an undue burden on the family.

An employee is in the best position to identify and evaluate such outside resources.

The employer should accept requests in good faith, unless there are objective reasons not to do so. Where necessary, organizations may request documentation of the validity of the accommodation-seeker's needs, such as medical documentation related to a family member's disability, or illness. However, an Employer should not seek details of private family arrangements, unless there are objective reasons to believe that the accommodation seeker is not acting in good faith. Information related to accommodation requests should be kept confidential, and be shared only with those who need it.

Undue Hardship

Employers are not required to implement accommodations that would amount to undue hardship. The Code prescribes three considerations in assessing whether an accommodation would cause undue hardship. No other considerations, other than those that can be brought into these three, can properly be considered. These are:

1. cost
2. outside sources of funding, if any; and
3. health and safety requirements, if any.

The onus of proving that an accommodation would cause undue hardship lies on the employer. The evidence required to demonstrate undue hardship must be real, direct, objective, and in the case of costs, quantifiable. It is necessary to obtain supporting evidence rather than assuming that the cost or risk is "too high" based on impressionistic views or stereotypes. In most cases, accommodations for needs related to family status will require increased flexibility of policies, rules and requirements rather than expenditures.

Recent Decisions

Canada (Attorney General) v. Johnstone[ii]

Ms. Johnstone brought a complaint under the *Canadian Human Rights Act* alleging that her employer, the Canadian Border Services Agency ("CBSA"), engaged in a discriminatory employment practice with respect to family status, specifically, in relation to her parental childcare obligations.

Ms. Johnstone had been working full-time as a border services officer on rotating shifts. After having children she requested full-time employment working three 13 hour fixed day shifts that would allow her to arrange for childcare. Ms. Johnstone wanted to maintain her full-time employment status in order to access opportunities for training and advancement, pension, and other benefits available for full-time employees.

Ms. Johnstone's husband also worked at Pearson on a rotating shift. Their shifts overlapped approximately 60% of the time. Ms. Johnstone and her husband moved from Toronto (six kilometres from the airport) to Cookstown (near Barrie). Her family members could provide childcare three days a week for fluctuating hours, including overnight. They were not able to arrange childcare to allow Ms. Johnstone to return to full-time rotating shift work.

Ms. Johnstone's request for accommodation was denied. Ms. Johnstone was told that it was CBSA policy, albeit unwritten, that in order to get fixed shifts, the maximum hours of work allowed was 34 hours a week. CBSA had a policy which limited fixed day shifts to part-time employment. Part-time employees were not eligible for pension or benefit entitlements that were available to full time CBSA employees.

Ms. Johnstone asked if she could maintain her full-time status and characterize the hours not worked as a leave without pay which would allow her income to be pensionable. This request was denied. She asked if she could top up the difference to keep the equivalent of full-time pension benefits but this was also denied.

Canadian Human Rights Commission ("CHRC")
The CHRC dismissed Ms. Johnstone's complaint stating that CBSA had accommodated Ms. Johnstone's request for a fixed schedule and it concluded that the effect of the CBSA policy was not discriminatory.

Ms. Johnstone applied for judicial review of the Commission's decision. The Federal Court allowed Ms. Johnstone's application and returned the matter back to the Commission for redetermination.

The Canadian Human Rights Tribunal

The Tribunal accepted Ms. Johnstone's evidence that she could not work the rotating shift schedule because daycare was not available for the unpredictable and fluctuating hours it required her to work and a live-in nanny was not a financially feasible option.

The Tribunal found that family status in the *Act* includes parental childcare responsibilities.

The Tribunal concluded that Ms. Johnstone was successful in making out a *prima facie* case of discrimination contrary to the *Act*. It found that the CBSA had engaged in a discriminatory and arbitrary practice in the course of employment that adversely differentiated Ms. Johnstone on the prohibited ground of family status.

The Tribunal noted that although the CBSA departed from its unwritten policy to accommodate employees seeking accommodation for medical and religious reasons, it refused to do so in Ms. Johnstone's case. It also found that there were no viable health and safety concerns related to Ms. Johnstone's ability to perform the 13-hour shifts she requested.

The Tribunal found that CBSA chose to rely on its unwritten blanket policy and made no attempt to accommodate Ms. Johnstone or inquire into her individual circumstances. The Tribunal concluded that the CBSA had not established a *bona fide* occupational requirement defence nor had it established a sufficient undue hardship rationale to discharge the onus to show hardship.

The Tribunal made a finding of discrimination on the ground of family status. The Attorney General applied for judicial review of the Tribunal's decision.

The Federal Court

On judicial review, the Federal Court found that the Tribunal's conclusion that family status includes childcare obligations is reasonable. It held that childcare obligations arising in claims of discrimination based on family status must be one of substance and the complainant has an obligation to try to reconcile family obligations with work obligations.

The Court further held that when an employment rule or condition interferes with an employee's ability to meet a substantial parental obligation in any realistic way, the case for *prima facie* discrimination based on family status is made out. In the circumstances of this case it was satisfied that the Tribunal's findings of *prima facie* discrimination based on family status were supported by evidence and were within the range of reasonable outcomes.

The Court ordered the CBSA to pay full-time wages and benefits less the hours worked by Ms. Johnstone. The Court also upheld the Tribunal's award of $20,000 for special compensation, as a consequence of its finding that the CBSA engaged in discriminatory practice wilfully and recklessly. This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate.

Devaney v. ZRV Holdings Limited[iii]

Devaney had more than 25 years of service as an architect at ZRV Holdings Limited ("ZRV"). Devaney brought a claim under Ontario's *Human Rights Code* alleging discrimination on the basis of family status in employment.

Devaney was a senior employee with a great deal of responsibility in his position. He was the principal-in-charge on the Trump project. The expectations on Devaney increased exponentially during this project and required more of his time. He was expected to communicate with a client in different time zones which required that he be available at all hours of the day. Devaney worked more than 1000 hours of overtime in 2007. In 2008 his overtime hours decreased to 410 hours due to his mother's declining health.

Devaney's team on the Trump project was aware of his responsibilities as a care giver to his mother and knew that she suffered from medical problems. Devaney kept in touch with the office when he worked from home and he informed persons on his team when he was attending at appointments with his mother. Devaney's time sheets reflected his absences from work to attend at medical appointments with his mother and identified other variations in his hours due to care giving responsibilities.

Devaney moved to Burlington in 1996 to care for this mother. She was 73 years old, and as a result of osteoarthritis and osteoporosis she was unable to perform regular activities of daily living. She had broken an ankle and wrist before Devaney moved in to her home to care for her.

After a period of hospitalization in late 2008 Devaney's mother was admitted to a long-term care facility. Prior to the Christmas break Devaney advised work that his mother was accepted to a long-term care facility. Devaney continued to provide care to his mother after she was admitted. During this period he maintained greater than full-time hours by working remotely.

Devaney was referred to ZRV's office manual, which formed part of the terms of his employment. The manual stated that all employees are expected to be in the office or available at a project meeting during core work hours or when a project meeting is scheduled.

In July of 2007 and again in April 2008 Devaney received letters from ZRV indicating that, while it recognized that his absences from the office and varied work schedule were due to personal and family problems, it was no longer prepared to tolerate his absences or varied work schedule. ZRV took the position that the only time that Devaney should receive credit for work he performed was the time he spent at the office.

After repeatedly insisting that Devaney attend at the office during core business hours, ZRV terminated Devaney's employment for just cause. ZRV stated that Devaney's employment was terminated because he failed to attend at the office as requested and as he said that he would.

Devaney responded to the termination by stating that his mother's situation was desperate and he needed his income to pay for her care. He asked to be given another chance. Devaney told ZRV that the situation would improve because his mother was moving into a long-term care facility. ZRV offered to employ him on a contract basis. Under this arrangement, he would only be paid for the full days he attended at the office. It stated that this arrangement would be evaluated after 3 months and it would be terminated if it was not working out. ZRV was of the view that offering Devaney a contract position was a form of accommodation.

Devaney refused this offer and accepted a consulting position offered to him by the CEO of the developer on the Trump project. The consulting position did not provide Devaney with benefits.

ZRV argued that Devaney made a choice to provide care to his mother rather than hiring someone to provide that care or having her admitted to a long-care facility earlier than he did.

Devaney argued that his eldercare obligations were not a matter of choice or personal preference. He stated that he was the primary caregiver to his mother who suffered increasingly debilitating illnesses. He argued that he was not requesting accommodation that would permit him to work from home permanently or even a majority of the time.

The Tribunal stated that the applicant must demonstrate a prima facie case of discrimination. In order to make out a prima facie case of discrimination on the basis of family status, Devaney had to establish that ZRV's attendance requirements had an adverse impact on him because the absences were required as a result of his responsibilities as his mother's primary caregiver. The Tribunal stated that if it is the caregiver's choice rather than family responsibilities, that preclude the caregiver from meeting his employer's attendance requirements, a prima facie case of discrimination on the basis of family status is not established.

On this basis, the Tribunal did not accept that Devaney was unable to obtain assistance to provide care for his mother. It found that only a couple dozen absences from the office could be attributed to taking his mother to medical appointments or providing care for her when she was ill or injured. The Tribunal did not accept that Devaney's remaining absences were required as a result of his caregiver responsibilities.

The Tribunal found that in late 2008 Devaney's responsibilities in relation to his mother required that he be away from the office on quite a few occasions. It accepted that he was required at home when his mother was injured and to attend meetings pertaining to her health care. These responsibilities interfered with Devaney's ability to comply with ZRV's attendance requirements. The Tribunal concluded that these absences were included in the absenteeism referenced in the letters that ZRV characterized as unacceptable and to be no longer tolerated.

The Tribunal found that Devaney's employment was terminated based on absences and a significant portion of the absences were required due to his family circumstances. It also found that ZRV was aware of Devaney's eldercare responsibilities.

The Tribunal found that ZRV failed to meet the procedural aspects of the duty to accommodate. ZRV knew that Devaney had eldercare responsibilities but did not ask about the severity of her illness or the extent of his responsibilities. Since Devaney did not make a request for accommodation, ZRV did not consider providing flexible work hours, allowing him to work from home certain days or providing him with an option to work reduced hours.

The Tribunal stated that when an employer is notified that an employee has needs related to the *Code*, the employer has a duty to make meaningful inquiries about the needs to determine whether a duty to accommodate exists.

The Tribunal was not satisfied that accommodating Devaney would have resulted in undue hardship.

The Tribunal found that ZRV subjected Devaney to discrimination on the basis of family status when it failed in both the procedural and substantive aspects of their duty to accommodate and terminated his employment. ZRV violated Devaney's right to equal treatment and freedom from discrimination on the basis of family status contrary to the Code.

Remedy

The Tribunal ordered ZRV to pay Devaney $15,000 for injury to dignity, feelings and self-respect. It also ordered ZRV to develop and implement a workplace human rights policy and conduct training pertaining to the duty to accommodate.

Personal Emergency Provision of the *Employment Standards Act*

In addition to family status being a protected ground under human rights legislation, Ontario's *Employment Standards Act*, 2000 ("*ESA*") provides for a personal emergency leave provision of which entitles employees, of an employer which regularly employs at least 50 employees, to a job-protected unpaid leave of absence of up to 10 days per calendar year.

The leave of absence may be for:

1. A personal illness, injury or medical emergency.
2. The death, illness, injury or medical emergency of an individual described in the list below.
3. An urgent matter that concerns an individual described in the list below.

    - The employee's spouse (married or common law and includes same sex spouse).
    - The parent, step-parent or foster parent of the employee or the employee's spouse.
    - The child, step-child or foster child of the employee or the employee's spouse.
    - The grandparent or step-grandparent of the employee or the employee's spouse.
    - The grandchild or step-grandchild of the employee or the employee's spouse.
    - The spouse of a child.
    - A sibling of the employee.
    - A relative of the employee who is dependent on the employee for care or assistance.

Illness, Injury or Medical Emergency

Employees are entitled to take personal emergency leave for an illness or injury which is caused by an employee even if it is caused by carelessness. The employee is also entitled to this leave for pre-planned and elective surgeries that are performed to address or prevent the manifestation of a medical condition (ie. laser eye surgery) due to an illness or injury. Employees are not entitled to a leave under this provision of the *ESA* for surgeries that are not related to an underlying illness or injury (ie. some cosmetic surgery procedures).

Urgent Matter

An urgent matter is an event that is unplanned or out of the employee's control, *and* raises the possibility of serious negative consequences, including emotional harm, if not responded to. The Ministry of Labour has listed the following as examples of an "urgent matter":

- The employee's childcare provider calls in sick.
- The basement of an elderly parent floods, and the parent is unable to handle the situation without the assistance of the employee.
- The employee has an appointment to meet with his or her child's counsellor to discuss behavioural problems at school. The appointment could not be scheduled outside the employee's working hours.

The following are examples of requests which are not considered an "urgent matter":

- An employee wants to leave work early to watch his daughter's holiday concert.
- An employee wants the day off in order to attend at her sister's wedding.

Employee's Responsibility:

- To advise his/her employer that he/she will be taking a leave under this section.
    - Notice of leave under this section may be given verbally.
    - If the employee is not able to give his/her employer advance notice of the leave of absence, he/she is required to advise the employer of the leave as soon as possible.
- Upon request by the employer, an employee is responsible for providing evidence, which is reasonable in the circumstances, to demonstrate that he/she is entitled to the leave. Consideration should be given to the following when determining the reasonableness of the request:
    - the duration of the leave;
    - whether there is a pattern of absences;
    - whether any evidence is available to support the absence;
    - the time it may take for an employee to obtain the evidence of the absence; and
    - the cost associated with obtaining the evidence.

An employer may discipline an employee for not providing it with proper notice of the leave of absence, as long as the discipline relates only to failure to provide notice and is not discipline for the absence.

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[i] *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66 (CanLII), 2002 SCC 66, at para. 46.
[ii] *Canada (Attorney General) v. Johnstone*, 2013 FC 113 (CanLII).
[iii] *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590 (CanLII).