



Family Status:

Accommodating Parental Obligations in the Workplace

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Family Status

What is “family status”?

- ◆ **BC, Manitoba, NWT, Yukon, PEI, CHRA:** not defined
- ◆ **Alberta, Nunavut:** being related to another person by blood, marriage or adoption
- ◆ **Saskatchewan:** status of being in a child / parent relationship and includes steps, adoptives, and standing in place of another [? Foster care ? grandparents ? siblings]
- ◆ **Ontario, NS:** status of being in parent / child relationship

Family Status

- ◆ **Quebec:** aged and handicapped persons have right to protection and security that must be provided by family or persons acting in their stead
- ◆ **NB:** family status not even prohibited ground
- ◆ **NL:** status of being in parent / child relationship and includes adoptions

CHRT Decisions: Broad Interpretation

Brown v. M.N.R. (Customs and Excise) (1993), 19 C.H.R.R. D/39 (C.H.R.T.)

- *Prima facie* case includes status of being a parent and includes duties/obligations as member of society, with complainant as parent incurring those obligations
- as consequence of duties & obligations, combined with employer rule, prevents full and equal participation in employment

Brown v. M.N.R.

- ◆ Recognized modern dilemma of dual-working parent families, and socio-economic need for two incomes
- ◆ Often female parent required to strike balance between family and work demands
- ◆ Purposive interpretation of leg'n requires employer to facilitate and accommodate balance
- ◆ Anything less renders “family status” meaningless as ground of discrimination

CHRT – 10 Years Later

Woiden v. Lynn (No. 2) (2002), 43 C.H.R.R. D/296
(C.H.R.T.)

- ◆ Modified definition from *Ontario (HRC) v. Mr. A.*: practices or attitudes that have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic relating to their family

BCCA: Narrow Definition

- Health Sciences Assn. of BC v. Campbell River and North Island Transition Society* (2004), 50 C.H.R.R. D/140, 2004 BCCA
- ◆ Disagrees with definitions in *Brown* and *Woiden* as conflating issues of *prima facie* discrimination and employment; feels overly broad definition of family status unworkable

Campbell River

- ◆ Family status not an open-ended concept which would have potential to cause disruption and great mischief in the workplace
- ◆ Not limited to status of parent *per se* as would not address serious negative impacts that some employer decisions might have on parental and family obligations of all / some of affected employees



Campbell River Narrow Test

- ◆ Whether particular conduct amounts to p.f. discrimination depends on circumstances of each case

Campbell River (Stringent Test)

- ◆ In usual case where no bad faith on part of employer and no governing position in applicable collective agreement or employment contract, p.f. case made out when a change in term / condition of employment imposed by employer results in serious interference with substantial parental or other family duty or obligation of employee

Campbell River (the kicker)

- ◆ In vast majority of situations in which there is conflict between work and family, it will be difficult to make out *prima facie* case

BCCA Position

- ◆ Unfortunate for parents / caregivers living in BC
- ◆ Can be distinguished elsewhere, or persuasive but not binding
- ◆ Subject of some insightful commentary

Cases Pro Broad Definition

Hoyt v. Canadian National Railway (No. 2), 2006 CHRT 33

- ◆ Pregnant railroad employee (sex and family status)
- ◆ Odd shifts required childcare evenings, nights, weekends etc.
- ◆ Family status defined as practices / attitudes which have effect of limiting conditions of employment or opportunities on basis of characteristic relating to family

Hoyt v. C.N.R.

- ◆ Disagrees with BCCA test because of broad, liberal, purposive interpretation rule
- ◆ Inappropriate to select one prohibited ground for a more restrictive definition
- ◆ Concerns identified by BCCA more appropriate for examination of accommodation measures under 3rd branch of *Meiorin*; apprehension of undue hardship not a proper reason to obviate the analysis

Hoyt v. C.N.R.

- ◆ Fact that employee treated the same way as other employees does not mean she was not adversely treated

Cases Pro Broad Definition

Johnstone v. Canada (Attorney General), 2007 FC 36

- ◆ Judicial review of CHRC decision to dismiss complaint (another customs inspector case involving rotating shifts which conflict with childcare arrangements)
- ◆ Prefers *Hoyt* to *Campbell River*; family status cases can raise issues which may not arise in other contexts; no compelling reason to relegate this type of discrimination to secondary status

Johnstone v. Canada

- ◆ Limiting family status to situations where employer makes change to employment condition unduly restrictive because operative change typically arises within the family and not within employment
- ◆ “Serious interference” higher threshold than clearly established for finding of discrimination (*O’Malley*); *CHRA* does not stipulate degree or level of discrimination to be suffered in order to engage protection of *Act*

Restrictive Decisions

British Columbia Public School Employers' Assn. v. B.C.T.F., 2006 CarswellBC 3403 (B.C.L.R.B.)

- ◆ Teacher returned in January after 1-year maternity leave; wanted to change to part-time job share for balance of school year; request denied
- ◆ Applied ***Campbell River*** test; given grievor's commonplace circumstances, a finding of p.f. discrimination would have to be made in virtually every instance a full-time employee sought to go part-time based on family needs (floodgates)

Restrictive Decisions

C.S.U. v. C.U.P.E., 2006 CarswellNS 583 (N.S. Arb.Bd.)

- ◆ At issue was whether employee entitled to resist geographic relocation when applying for a promotion on the basis that he had family obligations (joint custody of teenaged children, partner with shared custody of child)
- ◆ Multi-jurisdictional issue (employee in NL, job position in NS, head office in ON)

C.S.U. v. C.U.P.E.

- ◆ If requirement to relocate to NS is *prima facie* discrimination, outcome depends on whether family commitments precluded grievor from moving to NS such that employer required to accommodate to point of undue hardship
- ◆ No discrimination on basis of marital or family status contrary to legislation or collective agreement
- ◆ No discrimination on basis of place of residence

C.S.U. v. C.U.P.E.

- ◆ Arbitrator found it was grievor's choice, not family / marital responsibilities, which precluded him from moving to NS
- ◆ Employer could have accommodated without undue hardship, but that was irrelevant because no *prima facie* case of discrimination made out
- ◆ Test for accommodation not whether it would be undue hardship to have to accommodate every employee with family commitments

C.S.U. v. C.U.P.E.

- ◆ Not all adverse impacts based on marital / family status can be considered discriminatory; pure logic of adverse effect discrimination must be tempered by reason
- ◆ Serious need to limit breadth of concept of discrimination on basis of family status in employment context (!?!)
- ◆ No bad faith by employer here; grievor requested change in employment (promotion)

Restrictive Decisions

Palik v. Lloydminster Public School Div. No. 99
(2006), CHRR Doc. 06-630 (Sask. H.R.T.)

- ◆ Complainant was teacher's aide and mother of 14-year old insulin-dependent diabetic
- ◆ Mother wanted to accompany son to hockey tournament to care for son / ensure his insulin & food levels appropriate
- ◆ Told could take one day off, not two. Took two; got fired.

Palik v. Lloydminster

- ◆ Applied *Campbell River* test (without reference to employer-imposed changes)
- ◆ Parental obligation can be viewed on a continuum, depending on needs / maturity of child and demands of obligations
- ◆ Obligation should be based on objective assessment of child's needs; test based on a reasonable person's assessment of whether participation in hockey tournament necessary for son's well-being, and whether mother's involvement necessary

Palik v. Lloydminster

- ◆ Son's participation in hockey (voluntary activity) not necessary or essential for his well-being as a diabetic; could have selected another activity which did not conflict with mother's work schedule or her perceived need to attend the tournament in case of health concerns (!?!)
- ◆ Son able to monitor own insulin / food daily from 8:00 to 5:00 pm; no indication son's needs at tournament could not be met by another adult

Palik v. Llodymminster

- ◆ Mother's attendance at tournament not objectively essential to son's well-being; therefore, not a substantive parental obligation
- ◆ Introduces concept of evaluating the necessity of the parental obligation (necessary vs. discretionary, non-necessary adjuncts)
- ◆ Is obligation objectively essential to child's well-being?

Restrictive Decisions

Rennie v. Peaches and Cream Skin Care Ltd. (2006),
CHRR Doc. 06-828 (Alta. H.R.P.)

- ◆ Esthetician returned from maternity leave and was asked to work evening shift(s)
- ◆ Unable to secure evening childcare
- ◆ Esthetician refused to work evenings; terminated 4 weeks after her return
- ◆ Esthetician outstanding / virtually irreplaceable

Rennie v. Peaches & Cream

- ◆ *Prima facie* case of discrimination made out; employee terminated because of family status / obligations
- ◆ Complaint dismissed because employer made out *bona fide* occupational requirement
- ◆ Undue hardship for employer; employer accommodated esthetician by allowing her to work 1 evening / week (instead of 2)

Rennie v. Peaches and Cream

- ◆ Cites SCC decision in *Central Alberta Dairy Pool*; says employer successfully made out a BFOR, therefore exempt from duty to accommodate (!?!)
- ◆ Undue hardship analysis problematic; tribunal appeared to look at situation while employee on maternity leave and post-termination to find it was impossible to secure cost-effective replacement for her
- ◆ Accommodation arguments not convincing in light of fact that employee only returned for 26 days

Conclusions

- ◆ Cases all over the map
- ◆ Need to establish *prima facie* case of discrimination before engaging in accommodation analysis
- ◆ High threshold to meet; seems to require more than ordinary childcare (elder care) requirements; seems to require special circumstances

Conclusions

- ◆ No cases yet considering elder care / care for other family members (disabled siblings or parents)
- ◆ Cases overwhelmingly in favour of employer rather than employee