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Feature

Family Ties that Bind: Family Status Discrimination

Recent decisions on the employer's duty to accommodate

Colin Fetter
B.Comm, LL.B.
Partner, Brownlee LLP

Section 7 of the Alberta Human Rights Act prohibits employers from "discriminating against any person with regard to employment or any term or condition of employment, because of the… family status… of that person or of any other person". However, until the release of two recent decisions from the Federal Court of Appeal in May 2014, the law regarding family status was unclear. Namely, there was uncertainty surrounding the meaning of family status, the threshold required to establish discrimination on the basis of family status, and finally, the extent of an employer's duty to accommodate family status.

According to Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society ("Campbell River"), in order to establish family status discrimination, an employee must show that an employer imposed a change to a term or condition of employment that resulted in serious interference with a substantial parental duty of the employee. In contrast, in Brown v. Canada (Department of National Revenue, Customs and Excise) ("Brown"), a broader test for proving family status discrimination was applied, whereby an employee need only demonstrate that an employer's rule interferes with his or her parental duties. Over time, human rights tribunals considered and contrasted the Brown and Campbell River tests, yet, despite a seeming preference for the test as articulated in Brown, neither concretely emerged as the singular test.

As a result of the 2014 Federal Court of Appeal cases Canada (Attorney General) v. Johnstone ("Johnstone"), and Canadian National Railway Company v. Seeley ("Seeley"), some clarity has been brought to the threshold test for discrimination in respect to family status and the extent of an employer's corresponding duty to accommodate family status.

Ms. Johnstone worked at an international airport on such an unpredictable schedule that she was unable to arrange for adequate childcare. Ms. Seeley, employed by a national railway, was advised by her employer that she was being transferred to a new province, making it extremely difficult to find appropriate childcare arrangements. Essentially, both employers refused to accommodate Ms. Johnstone and Ms. Seeley's need to meet childcare obligations, asserting that they had no legal obligation to do so.

Hearing the facts of both cases, the Court confirmed that family status includes legitimate childcare obligations that a parent may hold. Thereafter, rather than applying the tests set out in Brown or Campbell River, the Court elected to create a new test for proving a prima facie case of family status discrimination in the context of childcare obligations:

(i) that a child is under his or her care and supervision;

(ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;

(iii) that he or she has made reasonable efforts to meet those childcare obligations through rea-

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sonable alternative solutions, and that no such alternative solution is reasonably accessible; and

(iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

After the above discrimination test is applied, the Court reiterated the longstanding position that the burden then shifts to the employer to demonstrate that the subject "policy or practice is a bona fide occupational requirement, and that those affected cannot be accommodated without undue hardship". Ultimately, in both Johnstone and Seeley, the Court concluded that each employee had made out a prima facie case of discrimination on the ground of family status resulting from their childcare obligations. Given that the employers in each case did not assert any bona fide occupation requirement or an undue hardship argument, the complaints were upheld.

In light of the new test, an employer's duty to accommodate family status necessitates a complete examination of the facts of each given case. In doing so, a prudent employer will engage the following checklist:

1. Remain genuinely attentive to the employee's concerns and needs, including the details of how the workplace is or will negatively impact the employee's family status;
2. Gather detailed information from its employee, including the:
   - specific needs of the child;
   - nature and extent of the employee's childcare obligations;
   - "reasonable efforts" the employee has made to find alternate childcare arrangements and why those alternate arrangements are not viable solutions; and
   - length of time for which accommodation is sought.
3. Remain open-minded and refrain from hastily denying requests for accommodation of family status;
4. Provide sufficient information so that the employee can seek out and truly consider alternate solutions to his or her family status interference with workplace obligations;
5. Thoroughly document and date the steps taken in the accommodation process in detail from start to finish; and
6. Remain active in the accommodation process after accommodation has been granted, which may include following up with the employee after a given period of time.

In closing, while employers should be aware and understand the essence of family status discrimination, practically speaking, most potential family status discrimination claims will never materialize, as they are often avoided by the reasonable exploration of alternative arrangements on behalf of the employee.

Colin Fetter is a Partner and Practice Group Leader in Employment and Labour Law with Brownlee LLP in Edmonton. He can be reached via email at cfetter@brownleelaw.com.