Member's Quarterly

Spring 2021 Edition

Feature

Personal Preference or Legitimate Need? Childcare and Family Status Accommodation

Only activities that engage a parent's legal responsibilities are protected

Kyle MacIsaac
LL.B
Partner
Mathews Dinsdale Clark LLP

Caroline Spindler
J.D.
Associate,
Mathews Dinsdale Clark LLP

Employers have an obligation under human rights legislation not to discriminate on the basis of protected grounds and an accompanying duty to accommodate employees to the point of undue hardship. The accommodation process is a cooperative one with all workplace parties (employer, employee and union, if applicable) taking an active role. Despite the cooperative approach, the accommodation process is often complex, particularly when it comes to determining an appropriate accommodation. Unlike accommodation in relation to disability, which may be resolved through comprehensive medical documentation outlining an appropriate accommodation, accommodation in relation to family status is generally far less clear, which begs the question: is the requested accommodation a personal preference or is there a legitimate need?

The protected ground of family status engages the relationship between parent and child in the context of both child care and elder care and encompasses legal responsibilities that arise from that relationship as opposed to desired responsibilities. For example, the need to provide childcare to a 2-year-old child versus the desire to take the 2-year-old child to dance class. The "want" versus "need" debate in the context of a parent–child relationship, which is especially relevant with our "new normal" since the onset of COVID-19, arose in *Wing v Niagara Falls Hydro Holding Corporation*, 2014 HRTO 1472. The Applicant was a municipal councillor of a municipality that was the sole shareholder of the Respondent corporation. The Respondent was governed by a Board of Directors made up of municipal councillors and the mayor, who received an honorarium for being Board members. In the years leading up to the Applicant's Application, the Board met three times per year on an *ad hoc* basis, with meetings generally held between 3:30pm and 4:30pm. At that time, the Applicant did not have issues with attending the meetings. In 2012, the Applicant missed all three Board meetings for various reasons: one due to tax filings; one due to a conflict of interest with the subject matter being dealt with at the meeting; and the other because the Applicant had to pick up her young child from school and take her to swimming lessons because her spouse was working. At the third meeting that the Applicant missed, a motion was passed that in the coming year, there would be six Board meetings held at 3:30pm and if any Board member missed two consecutive meetings, they would be removed from the Board. When the Applicant became aware of this, she contacted the President of the Respondent to express her concerns over the timing of the meetings and the fact that she would not be able to attend meetings at that time because

Emma Bauso — Pexels

© IPM Management Training and Development Corporation 1984–2021. All Rights Reserved.

Member's Quarterly Spring 2021 Edition

Feature continued

she would have to pick up her daughter from school and may also have to bring her with to the meeting. The President advised that timing of the meetings was a matter for the Board, suggesting that a discussion be had with the Chair, and that the Applicant make childcare arrangements or arrange to attend the Board meetings by phone. The Applicant rejected the President's suggestions and advised that her preferred accommodation would be to have the meeting time changed to 4:30pm. The meeting time was not changed prior to the first meeting in 2013 but ultimately was changed to 4:00pm. The Applicant filed the Application alleging that the Respondent discriminated against her in employment on the basis of family status.

At the hearing, the Respondent argued that there was no discrimination in employment on the basis of family status because the Respondent was not the Applicant's employer as she was employed by the municipality, which was the sole shareholder of the Respondent corporation. The Adjudicator agreed with the Respondent and dismissed the complaint on this basis but went on to consider whether the Respondent had discriminated against the Applicant on the basis of family status. The Adjudicator confirmed that only activities that engage a parent's legal responsibilities are protected under the ground of family status.

> The accommodation process is a cooperative one with all workplace parties (employer, employee and union, if applicable) taking an active role.

Evidence at the hearing revealed that the Applicant chose to enrol her child in the same school her older child had attended, which was 20 minutes outside of the community, and that the child was not enrolled in an afterschool program because the Applicant's older child had not been. The Applicant's rationale for this was that she sought to provide her younger child with a similar experience as her older child. The Adjudicator commented that the Applicant chose to pick up her child after school rather than send her child to an afterschool program, which was a personal choice rather than a legal responsibility and that there was no evidence that the Applicant considered, or made reasonable efforts to find alternative solutions. The Adjudicator concluded that the Applicant failed to establish that the meeting time had adverse effects on her on the basis of being a parent and therefore failed to establish a *prima facie* case of discrimination on the basis of family status.

The notion of a legal responsibilities over personal preference with respect to family status accommodation has been confirmed in subsequent cases including *McClean v Dare Foods Limited*, 2019 HRTO 1544. When presented with accommodation requests based on family status and childcare, employers are entitled to make reasonable inquiries in order to determine whether or not there is a legitimate need for the request and should work cooperatively with the employee throughout the accommodation process.

Kyle MacIsaac is a Partner with Mathews, Dinsdale Clark LLP and can be reached via email at kmacisaac@mathewsdinsdale.com.

Caroline Spindler is an Associate with Mathews, Dinsdale Clark LLP and can be reached at cspindler@mathewsdinsdale.com.

© IPM Management Training and Development Corporation 1984–2021. All Rights Reserved.