

Member's Quarterly

Spring 2016 Edition

Feature

Family Status Protection: Employers Beware!

The "Sandwich Generation" and Family Status Discrimination

The "sandwich generation" no longer means employees who brown bag their lunch; it means ones squeezed between raising children while at the same time caring for aging parents. As more families struggle to manage competing workplace demands and care-giving responsibilities, family status discrimination claims are on the rise.

"Family Status" is a protected ground under federal and provincial human rights legislation. However, the legislation with respect to this protection varies between jurisdictions. While not every jurisdiction defines "Family status", most authorities set forth a fairly broad interpretation of the term as protecting the absolute status of being or not being in a family relationship; the relative status of who one's family members are; the particular circumstances or characteristics of one's family; and, the duties and obligations that may arise within the family (see: *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20 (CanLII) at para 41). Generally speaking "family status" protects childcare obligations, elder care obligations and the formation of a family.

Due to the aging population and rising costs of personal care, elder care obligations are becoming more and more prevalent in our society. Tribunals have recognized the reciprocal eldercare responsibilities of a child towards their parent should also be recognized in the same fashion as childcare responsibilities of parents towards their children (Hicks, supra.)

The issue of family status discrimination, and the continuing effect on the sandwich generation, has been considered at various tribunals, including recently at the Ontario Human Rights Tribunal and a Nova Scotia Board Human Rights Board of Inquiry.

In *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590 (CanLII), the Applicant was an architect who was terminated. The Applicant alleged that the respondent employer terminated his employment when it unilaterally changed the terms of his contract by imposing a rigid work schedule, thereby precluding him from caring for his ailing mother. The Respondent took the position that termination was for cause due to the Applicant's failure to attend the office as required.

The issue before the Tribunal was whether the Respondents' requirement that the applicant attend the office during certain hours was discriminatory against applicant on the basis of family status. After careful consideration Tribunal concluded that:

- i) the Applicant's employment was terminated based on absences, a significant portion of which were required due to his family circumstances;
- ii) the Applicant's family care requirements were a significant factor in the Respondents ultimately terminating his employment; and
- iii) the Respondents were aware that the applicant had eldercare responsibilities.

As a result, Tribunal concluded that the Applicant established a *prima facie* case of discrimination on the basis of family status. Furthermore, the Tribunal determined that the Respondent failed in their duty to accommodate both procedurally and substantially and section 5(1) and 9 of the Code had been violated.



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Issues of family status discrimination, and specifically, the formation of the family status protection, was very recently considered by a Nova Scotia Human Rights Board of Inquiry in *Adekayode v Halifax Regional Municipality and the International Association of Fire Fighters, Local 268*. Here, Mr. Adekayode was not entitled to any financial "top-up" of employment insurance benefits as a biological father, a right that was provided to adoptive parents under his collective agreement.

Adekayode took the position that this distinction was discriminatory, and amongst other things, violated his "family status" protections under the *Nova Scotia Human Rights Act*. The Respondents argued, amongst other things, that as this right (or lack thereof) was something freely negotiated in the context of collective bargaining, it was not discriminatory. The Tribunal disagreed, and determined the family status protection under the legislation makes no distinction between how the ground comes into existence. The Tribunal concluded that whether the relationship between a child and his or her parents is initiated biologically, or by placement, "family status" really comprehends the whole essential social relationship of obligation and dependence between those acting as parents with respect to care.

This decision has been appealed to the Nova Scotia Court of Appeal, and a decision is expected sometime in 2016 – so stay tuned!

As is always the case in human rights jurisprudence, a determination of whether discrimination has occurred is fact specific and will depend entirely on the particular circumstances of each case. However, given the trending demographics in Canada, it is likely that we will continue to see an increase in "family status" complaints both with respect to child and elder care issues.

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